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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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In re: SEQUOIA ORANGE CO. INC., AMA Docket No. F&V 908-2. Decided January 15, 1986.

Decision by Donald A. Campbell, Judicial Officer.

REMAND ORDER

On January 7, 1986, Administrative Law Judge Victor W. Palmer certified to the Judicial Officer the question as to whether petitioner's counsel should not be permitted to participate in this proceeding because of his prior work and responsibilities as Assistant General Counsel in the Marketing Division, Office of the General Counsel, United States Department of Agriculture. Petitioner's counsel has this day withdrawn from the proceeding and, therefore, that issue is now moot. Accordingly, the case is remanded to the Administrative Law Judge for further proceedings.

In re: SEQUOIA ORANGE CO. INC., AMA Docket No. F&V 910-7. Decided February 13, 1986.

Gregory Cooper, for complainant.
James Moody, Capital Legal Foundation, Washington, D.C., for respondent.

Decision by William J. Weber, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

The marketing of lemons grown in central and southern California, and Arizona, is controlled by a marketing order.[1]

The purpose of a marketing agreement (or order) is to "establish and maintain such orderly marketing conditions as will establish and maintain parity prices for growers, while at the same time protecting the interests of consumers (7 USC § 602)." *In re Sequoia Orange Co., Inc., and Exeter Orange Co., Inc.*, 41 Agric. Dec. 1511, 1511-12 (1982).

The marketing order limits the quantity of lemons grown in the regulated area that may be "handled." [2]

The marketing order provides for a Committee (Lemon Administrative Committee) consisting of growers, handlers and a nonin-

[1] Lemons Grown in California and Arizona, 7 CFR 910; Agricultural Marketing Agreement Act of 1937, 7 USC 601.

[2] Simplistically, for purposes here, "handle" means to buy and/or ship regulated lemons for fresh market use in Canada or the United States. (7 CFR 910.6, 910.7)

Generally, lemons, grown in the regulated area, used by charitable institutions, relief agencies or processing manufacturers to make juice or some by-product are excluded from regulation (7 CFR 910.80).

dustry member to administer, implement, oversee, report and recommend to the Secretary on matters pertinent to the marketing of lemons from the regulated area (7 CFR 910.30, 910.31, 910.32, 910.33).

The Committee is a creature of, and for, the marketing order. It uses its collective expertise to carry out its duties and make recommendations to the Secretary. Its composition and structure is controlled by detailed provisions in the marketing order (7 CFR 910.20–910.33).

One of its functions is to annually compile a Marketing Policy covering pertinent information and recommendations for the following marketing year, including its recommendation concerning the quantity of lemons which the Committee deems advisable to be handled weekly during the following year (7 CFR 910.50, 910.51).

The Secretary may, based on that recommendation and the supporting data and rationale, and "from other available information," determine that limiting the quantity of lemons to be handled during any week will tend to carry out the declared policy of the Agricultural Marketing Agreement Act of 1937 (7 USC 601; "Act").

The Marketing Policy submitted by the Committee each year to the Secretary provides information concerning: (1) the supply, quality and sizes of lemons available in each district (within the marketing order), (2) estimates concerning the domestic, export, by-product and other uses of lemons, (3) a proposed schedule for weekly shipments to the fresh market in the United States and Canada, (4) the level and trend of consumer income, (5) estimates concerning competitive citrus commodities, and (6) any other pertinent information. Any revisions must cover similar updated information (7 CFR 910.50).

In making its decision to regulate lemons, the Committee must consider income trends, weather conditions, prices and other relevant factors. Changes may be recommended from time to time, as may be warranted (7 CFR 910.51).

Based upon this and any "other available information" (7 CFR 910.52), the Secretary may limit the quantity of lemons to be handled during any particular week(s).

The Petitioner is a handler regulated by this Lemon Marketing Order. Petitioner seeks an "order (a) declaring that the 1984–85 [Marketing] Policy and weekly prorate [base] are not in accordance with law, and (b) exempting [Petitioner] Sequoia from the obligations imposed by the [Marketing] Policy and weekly prorate." (Page 36 of the Petition).

In simplified terms, for purposes here, the weekly prorate base is the ratio between the lemons that a handler has (qualifying to be

"handled" by a handler that week) and the total of all such lemons all handlers have had that time.[3]

The handler is then authorized to handle the percentage of the total quantity of lemons fixed by the Secretary to be handled that week. Thus, the weekly prorate base is a key figure in the computation of the handlers' weekly allotments [4] for shipment of lemons for fresh use in the United States or Canada. *In re Sequoia Orange, supra*, at page 1513.

Petitioner challenges the 1984-85 Marketing Policy filed by the Lemon Adminstrative Committee and the weekly proration system from a variety of angles and levels:

- Inability to participate in the formulation of the Marketing Policy (as prepared by the Committee) and the establishment of weekly prorate allotments.[5]
- Arbitrary and capricious "rubber stamping" of the Marketing Policy by the Secretary, without independent scrutiny or consideration of alternatives or other evidence, etc., constitutes an abuse of discretion.
- Conflicts between the Marketing Policy and USDA guidelines.
- Failure of the Secretary to consider alternatives to the weekly proration system, to comply with requirements of the Regulatory Flexibility Act (5 USC § 601), Executive Order 12291 and the Secretary's Memorandum 1512-1 (issued June 11 1981 to implement Executive Order (12291).
- Because supply controls violate due process, equal protection and the requirement for just compensation for deprivation of property rights, all as protected by the Fifth Amendment.

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[3] The weekly prorate base is "the ratio expressed in percentage terms, between the average weekly pick for each applicant handler and the total of such average weekly picks for all applicant handlers (7 CFR § 910.53(d), .153(c)(2))." *In re Sequoia Orange, et al, supra*, at page 1513.

[4] This allotment may be temporarily increased in several specified manners. *In re Sequoia Orange, supra*, at page 1513-14.

[5] Essentially these are division titles paraphrased to make the apparent point to which the supporting material seems directed.

- Because the Market Policy and the weekly proration system are contrary to the historical purpose(s) of the Agricultural Marketing Agreement Act, and violate it in five respects, and frustrate the Congressional intent.
- Because the Market Policy impedes achievement of orderly marketing.
- Because the Market Policy and the weekly proration system cause disorderly marketing.
- Because the Market Policy fails to establish parity prices.
- Because the Market Policy and weekly proration system are inequitable and discriminate against Petitioner.
- Because the Market Policy creates/uses an illegal and unauthorized classified pricing scheme.
- Because the weekly proration system fails to achieve parity prices, depresses grower income, is wasteful, distorts the marketing season, implements an illegal classified pricing scheme, contributes to inequities in grower income, fuels chronic overproduction, suppresses commercial initiatives, destroys the balance between supply and demand, fails to achieve the objectives of and frustrates the Agricultural Marketing Agreement Act, the Secretary has a mandatory duty to terminate the use of the weekly proration system and set aside the Market Policy.
- Because the Market Policy and the weekly proration system take Petitioner's property without compensation and violate its substantive and procedural due process rights, and deny it equal protection, all as protected by the Fifth Amendment, the relief sought should be granted.

Each of these divisions is supported by a brief argument of a legal, economic, historical or philosophical character.

It is not feasible to require Respondent to answer these arguments as if they were pleadings of a factual nature or character.

Essentially, as illustrated by Petitioner's response to the Motion to Dismiss, Petitioner seems to be inviting counter-argument from Respondent.

An adversarial hearing is predicated on an ability to formulate a set of issues with certain dimensions and limits, so that rulings may properly be made on relevancy and materiality of proffered evidence.

With such broad ranging assertions which make up the Petition, there could not reasonably be effective control of the proceedings on questions of relevancy and materiality.

Somewhere, Petitioner could find and point to some word, phrase, sentence or paragraph, and argue with some merit that the evidence they wish to present, directly or indirectly, relates to an issue based on or related to that "allegation."

Blending generalized and vague contentions with a short generalized and conclusory argument, as done here, is a pandora's box.

Petitioner's Response to the Motion to Dismiss, is mainly directed to the merits of their position, rather than the pleadings that set forth their position.

A threshold issue here is the character of the Petition as a pleading, not the merit of Petitioner's position.

Respondent cannot be compelled to answer this Petition selectively admitting or denying "allegations." The risk is that Respondent would take a safe position, denying everything, and further frustrate formulation of an issue-structure on which to proceed.

Control of the proceedings cannot/should not be relinquished to Petitioner through the vague generalized contentions and arguments which constitute the Petition.

Further, "Petitioner cannot place upon others the responsibility to sort through [this 37 page] Petition to determine whether or not a set of allegations may be patched together . . ." *In re Sequoia Orange, supra*, at page 1518.

The Petitioner does not comply with 7 CFR 900.52(b) which requires a Petition to contain a:

> "(2) Reference to the specific terms or provisions of the order, or the interpretation or application thereof, which are complained of;
>
> (3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely . . . the manner in which petitioner claims to be affected by the terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law . . ."

In addition to the pleading difficulties, the Petition has other deficiencies of a legal character. Petitioner has distorted concepts of the law, procedure and facts, which cause confusion and ambiguity.

Respondent persuasively and ably covered them in the following extracts from its Memorandum of Points and Authorities in Support of Respondent's Motion to Dismiss:

"II. The Petition Fails To State A Sufficient Claim

In order to conform with the AMAA as required by the Rules of Practice (7 CFR 900.52(c)), it is endemic that a petition must state a claim upon which relief can be granted. Aside from the obvious facial infirmity of the petition, an analysis of the true nature of the petition and the relief sought reveals its substantive failure to state such a claim.

The petition claims to seek relief from the 1984–85 marketing policy (7 CFR 910.50) and the weekly prorate regulations issued pursuant to 7 CFR 910.52. The marketing policy, which was issued July 10, 1984 (see, Exhibit to petition), and the prorate regulations apply to a fiscal year which began on August 1, 1984, and will end on July 31, 1985 (7 CFR 910.10). Yet, petitioner did not file its overly long petition until the end of April 1985. The petitioner, and its attorney, should be extremely familiar with the Department's applicable rules of practice from their numerous other petitions. It is inconceivable that petitioner could have anticipated relief before the end of the fiscal year to which the complained of documents are applicable. If this were truly the case, the Administrative Law Judge might just as well dismiss the petition at this point for mootness.

The petition, however, is really not attacking this marketing policy document or these particular weekly prorate regulations. Indeed, throughout its 37 pages it fails to object to any facts and figures of these specific documents. Rather, the petition is a backdoor approach to attacking the Lemon Order provisions that authorize these documents. The objections would be just as applicable to next year's or last year's marketing policy and prorate regulations as they would be to this year's. The method of petitioner's attack is to allege that a conglomeration of statutes, orders, guidelines, etc. cause the Lemon Order provisions to be unlawful. As will be demonstrated below, each of these grounds is legally defective and, thus, the petition fails to state a claim upon which relief could

be granted under 7 U.S.C. 608c(15)(A) and the petition should be dismissed.

Before considering the specific allegations, one must differentiate between the marketing policy and the weekly prorate regulations. Under section 910.50 of the Lemon Order, near the beginning of the fiscal year the Lemon Administrative Committee (hereinafter LAC) meets and prepares a marketing policy containing various information specified in said section. If substantial modifications become advisable during the fiscal year, the LAC may meet and prepare a revised marketing policy. The marketing policy is derived from these LAC meetings and is submitted to the Secretary. The marketing policy is a document which contains a compilation of factual data concerning lemons and the collective expertise of the industry as to the current economic situation, the forecast for the coming year, the recommended actions to be taken during the year, and a general schedule as to when particular actions should be taken. Under the Lemon Order, the marketing policy imposes no restrictions, limitations or obligations on anybody. In the hands of the Secrtary, it is an evidentiary document of information and advice which can be weighed and considered along with all other available information and advice in reaching any determinations the Secretary might make. Since the marketing policy cannot affect or impose an obligation on petitioner under the Lemon Order it is not a proper subject of a petition under 7 U.S.C. 608c(15)(A) or section 900.52(b)(3) of the Rules of Practice and, thus, any allegations in the petition concerning the marketing policy must ultimately be unavailing of relief and should be dismissed.

The weekly prorate regulations, on the other hand, do impose obligations on the petitioner and all other handlers in the industry. During the year, the LAC investigates the supply and demand conditions on a weekly basis and considers certain specified factors (7 CFR 910.51). If the LAC believes handling restrictions are advisable for any week, it makes certain recommendations to the Secretary (7 CFR 910.51). Based on the LAC information and recommendations and all other available information, the Secretary determines whether a limitation is necessary and the amount of such limitation (7 CFR 910.52). It is this determination by the Secretary, effectuated through informal rulemaking in the Federal Register, that imposes legally enforceable obligations on the handlers. The subdivision of this industry-wide limitation to each particular handler is a ministerial act done by the LAC on the basis of formula contained in the Lemon Order, and subject to certain flexibility options which may be exercised by each handler (7 CFR 910.53-910.63). Therefore, the weekly prorate regulations promulgated in

the Federal Register by the Secretary are the proper subject of a 7 U.S.C. 608c(15)(A) proceeding. The grounds alleged by petitioner in this proceeding, however, fail to comply with the AMAA in that they fail to state a claim upon which the prorate regulations could be invalidated and the relief requested could be granted.

The remainder of this memorandum will discuss the infirmity of each of the particular grounds alleged by petitioner.

A. The Administrative Procedure Act

The AMAA specifically authorizes volume control provisions for marketing orders such as are incorporated in the lemon order. (7 U.S.C. § 608c(6)). A marketing order containing such provisions must be promulgated after notice and public hearing when the Secretary finds "upon the evidence introduced at such hearing" that the issuance of such an order will tend to effectuate the declared policy of the Act. (7 U.S.C. §§ 602, 608c(3), (4), (6)). The lemon order, containing a provision for the imposition of weekly controls on the quantity of lemons which may be handled, was promulgated in 1941 after notice and hearing. 6 Fed. Reg. 1833 (1941). The order including its weekly volume control provision has undergone numerous amendment proceedings since 1941, all of which were effectuated upon notice and hearing on the record as required by the Act. 7 U.S.C. § 608c(17); *See, e.g.*, 12 Fed. Reg. 6620 (1947), 12 Fed. Reg. 7904 (1947), 13 Fed. Reg. 766 (1948); 19 Fed. Reg. 5319 (1954), 19 Fed. Reg. 5969 (1954), 19 Fed. Reg. 7175 (1954); 20 Fed. Reg. 6191 (1955), 20 Fed. Reg. 7137 (1955), 20 Fed. Reg. 8451; 27 Fed. Reg. 4994 (1962), 27 Fed. Reg. 6629 (1962), 27 Fed. Reg. 8346 (1962); 35 Fed. Reg. 16,850 (1970), 36 Fed. Reg. 5609 (1971); 36 Fed. Reg. 9061 (1971).

Petitioner's repeated complaints about "the marketing policy" and "weekly prorate", when viewed as a whole, comprise a complaint about any use of volume controls on the lemon market by the government as authorized by the AMAA and the Lemon Order. However, to the extent that petitioner's allegations concerning the "marketing policy" and "weekly prorate" attack the procedural validity of the means used to implement the market volume control provisions of the lemon order, such allegations are without merit.

Petitioner's allegations that the LAC's annual marketing policy formulated pursuant to the lemon order, 7 CFR § 910.50, is in violation of the APA should be dismissed, because the LAC's marketing policy is not subject to APA rulemaking or review provisions. The APA provisions on publication in the Federal Register and on an opportunity for public comment only apply to rulemaking. (5 U.S.C. § 553). A rule is defined in pertinent part as "an agency statement

of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy . . . ." (5 U.S.C. § 551(4)). Certain rulemaking is specifically exempted from the notice and comment requirements of the APA. Among such exempt actions are "general statements of policy." (5 U.S.C. § 553(b)(A)).

The LAC's marketing policy is merely a collection of data and recommendations by an industry panel acting in this respect as an advisor to the agency, which latter body alone retains the power to impose any market volume controls under the lemon order. (7 CFR § 910.52). The LAC's marketing policy is not agency policy and has absolutely no effect on anyone without the crucial later event of agency action which is taken upon consideration of the LAC policy as well as other available information and advice from the LAC and other sources. The LAC's marketing policy statement does not impose market volume controls and has no direct impact whatsoever on the industry.

The merely advisory, non-binding nature of the LAC's marketing policy differentiates it from an agency statement implementing law with particular future effect as a rule is defined in the APA. However, even if the LAC's advisory marketing policy is seen as agency action within the meaning of the APA definition of a rule, the policy surely comes within the realm of a general statement of policy exempt from the notice and comment provision of the APA. (5 U.S.C. § 533(b)(A)). A general statement of policy is defined by the fact that it does not fix rights or impose obligations and does not have a substantial, direct impact on those regulated. *Aiken* v. *Obledo*, 442 F. Supp. 628, 653 (E.D. Ca. 1977). A general statement of policy does not establish a binding norm and is not finally determinative of the issues or rights to which it is addressed, because it leaves the agency still free to exercise informed discretion. *Guardian Federal S & L* v. *Federal S & L Ins. Corp.*, 589 F. 2d 658, 666 (D.C. Cir. 1978). The LAC marketing policy clearly fits this definition.

Moreover, the APA only subjects final agency action to judicial review. (5 U.S.C. § 704). Even if the LAC marketing policy is agency action, which is dubitable as discussed above, it is certainly not final agency action within the meaning of the APA. (5 U.S.C. § 704). Agency actions are not final and reviewable " 'unless and until they impose an obligation, deny a right, or fix some legal relationship' . . . . *Chicago & Southern Air Lines Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 112-113 . . . (1948); *Nevada Airlines Inc.* v. *Bond*, 622 F. 2d 1017, 1020 n. 5 (9th Cir. 1980)." *Air California* v. *United States Dept. of Transp.*, 654 F.2d 616, 621 (9th Cir. 1981). Where an agency pronouncement does not have the status of

law but requires some intervening action before the complaining party feels any effect, the action is not final for purposes of review. *Air California, supra*. As the United States Supreme Court noted in *FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980), a critical factor in determining whether an action is final is whether it has legal force, as, for instance, does a regulation with which parties are expected to comply immediately or risk penalties of law. In the present case the LAC's marketing policy has no force of law whatsoever, has no direct impact on the industry as it is merely an intermediate, informational and advisory step in the regulatory process, no one is expected to comply with it and it fixes no obligation on anyone. The policy is, therefore, not final agency action subject to judicial review under the APA.

With respect to the Secretary's actual exercise of his discretion and power to impose market volume controls under the lemon order, 7 CFR § 910.52, petitioner alleges that the weekly volume control regulations have been issued without public notice and comment procedures in contravention of the requirements of the APA. The weekly volume limitation regulations do not, in fact, provide for public comment on where the volume level is set for any week, because fluctuating weekly regulation does not allow time for a comment period or for thirty day advance publication before the effective date. This is in accordance with the APA's specific exceptions to the usual public comment and advance publication procedures. (5 U.S.C. § 553(b)(B), (d)). When volume controls are to be effected under the lemon order, the order itself requires that such controls be implemented on a weekly basis. (7 CFR § 910.52). The requirement of weekly volume regulations was included in the lemon order only after notice to the public, a hearing and other public participation procedures were afforded. 6 Fed. Reg. 1833 (1941). The lemon order has also been amended over ten times since it was promulgated, and each time the public was afforded a hearing and the opportunity to participte in the formal rulemaking process as required by the APA. Despite the fact that weekly volume regulation necessarily prevents public participation in where the level is set each week, the public has had the opportunity and is currently being afforded the opportunity to be heard on the issue of the lemon order's provision for volume regulation and its requirement of weekly regulations when volume controls are put into effect.

The lemon order requires that limits on the handling of lemons be evaluated and effected on a weekly basis, because the supply and demand conditions of the lemon market are variable. The long period during which lemons can be harvested throughout the year

subjects the supply to unpredictable variations due to weather and other variables which can only be monitored and accurately predicted a relatively short time in advance of the actual harvesting. *See, e.g.,* 35 Fed. Reg. 16,850; 16,853; 16,855; 16,856 (1970). Data on supply and demand are compiled and considered by the LAC at a public meeting prior to the particular week under consideration. The LAC's data and recommendations which are then sent to the Secretary are, thus, received by the Secretary shortly before the period during which any regulation would take effect. Public comment and 30 day advance publication under APA procedures are totally impracticable at that time and would be contrary to the economic interest of the public in an orderly, regulated flow of commodities to market. *See, e.g.,* 48 Fed. Reg. 19,356-57 (1983). Reacting to variable, constantly fluctuating market conditions in a timely manner to effect orderly marketing of lemons necessarily prevents the Secretary from giving the public advance notice and an opportunity to comment before the week during which any particular limit is to be in effect. The APA recognizes this type of situation in section 553 where it exempts from notice and comment requirements those actions where "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are *impracticable, unnecessary, or contrary to the public interest*". (5 U.S.C. § 553(b)(B)). The APA also allows less than thirty days advance publication of a rule before its effective date for good cause found and published with the rule. (5 U.S.C. § 553(d)(3)).

Weekly regulation implementing the existing market volume control provision of the lemon order serves a valid economic regulatory purpose. It is not merely an excuse to avoid public participation in the regulatory process. Weekly implementation of market volume controls is clearly a situation where advance notice, public comment and 30 day advance publication are totally impracticable and contrary to the public interest in the orderly marketing of lemons throughout its year long harvest season. This case is a valid use of the APA exemption quite unlike those situations in which courts have found use of the exemption to be improper. This is not a case where no reasons for claiming the exemption were published with the rule as in *Buschmann* v. *Schweiker,* 676 F. 2d 356, 357 (9th Cir. 1982), or *Kelly* v. *United States Department of Interior,* 339 F. Supp. 1095, 1101 (E.D. Ca. 1972). Nor is this a case where unexplained delay existed prior to the agency claiming that there was no time to follow APA notice and comment procedures as in *Kelly* v. *United States Department of Interior, supra.* Nor is this a case where a statutory deadline for regulation was used as an excuse for

avoiding public procedures when the agency could have met the deadline even providing for notice and comment as in *Western Oil & Gas* v. *United States E.P.A.*, 633 F.2d 803 (9th Cir. 1980).

Most importantly this case is not a case like most situations in which courts have narrowly construed section 553(b)(B) where notice and opportunity for comment is the only possible opportunity for public participation in the governmental process before the public is subject to a regulation. Unlike such cases the use of the section 553(b)(B) exemption here does not run counter to the purpose of the APA which is to give the public the chance to exercise a right to air their views to the government to insure better government decision making and greater governmental responsiveness to the needs of the public. *Buschmann* v. *Schweiker, supra* at 357; *Kelly* v. *United States Department of Interior, supra,* at 1102. In the present case the use of the section 553(b)(B) exemption for the weekly regulations implementing the volume control provisions of the lemon order has not eliminated the opportunity to the public to be heard in a meaningful exchange of views with the government on the subject of whether the lemon market should be subject to weekly volume controls. The formal rulemaking procedures used in initiating and amending the lemon order have assured the public of numerous opportunities to be heard on the issue over the years. In fact, such an opportunity is currently being afforded in the pending rulemaking proceeding. This fact is important in any evaluation of petitioner's claims that weekly regulations are improperly issued under the APA, because nowhere in the petition is it claimed that a particular weekly limit was incorrect or set at an inappropriate level and that petitioner was deprived of the opportunity to so inform the agency. Petitioner's real complaint is not where the level of the control is set but rather on the use of any controls at all. However, the use of the section 553(b)(B) exemption for weekly regulations has not deprived them of an opportunity to be heard on this issue. Therefore, the use of the section 553(b)(B) and (d) exemptions both fulfills the requirements for those exemptions for impracticability, the public interest and good cause as defined in the APA and also has not vitiated the spirit and purpose of the public participation provisions of the APA, because the public has participated in the formulation of order provisions for weekly regulation of the market volume of lemons.

Finally, it is important to recognize that Congress has already decided in the Act that the Secretary should control the market in lemons and other enumerated agricultural commodities by establishing and maintaining such orderly marketing conditions as will avoid unreasonable fluctuations in supplies and prices. (7 U.S.C.

§§ 601, 602(4)). Petitioner disagrees with this Congressional policy and advocate a free market economy. Petitioner is attempting to interfere in this legislative policy question of the advisability of a free market when Congress has long since decided that a free market is not advisable for certain segments of the agricultural economy. Petitioner's attempt to undercut this legislative policy decision is disguised as an attack on the use of the section 553(b)(B) and (d) exemptions of the APA. However, such weekly procedures are peripheral to petitioner's major complaint that the lemon order allows for market volume to be controlled at all. This disguised attempt at judicial legislation through a request for review of agency use of APA exemptions should be recognized and rejected. The United States Supreme Court has looked very unfavorably upon this type of picayune attack on substantive administrative decisions and had said that "[a]dministrative decisions should be set aside . . . only for substantial procedural . . . reasons . . ." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

In the present case the public has been given the opportunity to be heard and, indeed, is currently being heard on the issue of whether market volume controls for lemons are appropriate under existing market conditions to fulfill the purposes of the Act. The administrative decision to control the market was incorporated in the order only after public hearing and full public participation. Furthermore, full public participation is allowed at the weekly LAC meeting where the weekly volume recommendations to the Secretary are determined. Weekly implementation of this order provision is in accordance with the APA, because it would be impracticable and contrary to the economic interest of the public to achieve the necessary short term regulation of the market with the use of notice and comment and 30 day advance publication procedures. Therefore, the market volume control provisions of the lemon order have been properly implemented, and the petition fails to state a cause of action upon which relief can be granted.

B. USDA Guidelines

Petitioner alleges that the marketing policy and prorate regulations do not conform to the Guidelines For Fruit, Vegetable and Specialty Crop Marketing Orders of January 25, 1982 (attachment 1 to this Memorandum) and the Secretary's letter of May 10, 1983 (attachment 2 to this Memorandum). While respondent certainly denies these allegations, conformity or nonconformity to these documents does not give rise to a cause of action upon which relief can be granted in this proceeding.

The Guidelines and letter are clearly general policy documents outlining the direction the Secretary would like to follow in the future. Unlike the AMAA or the Lemon Order they are not in any sense a law with which informal rulemaking actions must conform. Under 7 U.S.C. 608c(15)(A) relief may be granted only if the Secretary's actions are found to be "not in accordance with law." Such a finding regarding the marketing policy and prorate regulations cannot be made, therefore, on the basis of adherence or non-adherence to the Guidelines or the letter of May 10, 1983.

C. The Regulatory Flexibility Act

Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (hereinafter RFA) provides that sections 603 and 604 of the RFA, which mandate initial and final regulatory flexibility analyses during certain rulemaking actions, shall not apply to any rule for which the agency certifies that it will not have a significant economic impact on a substantial number of small entities. (5 U.S.C. § 605(b)). Such certifications were made in the present case with respect to the imposition of weekly volume controls on the handling of lemons under the lemon order. Nevertheless, petitioner alleges that the certifications under section 605(b) were improper and that under sections 603 and 604 regulatory flexibility analyses should have been prepared. However, under the RFA when a section 605 certification is made it automatically bypasses sections 603 and 604 and obviates any need for any regulatory flexibility analyses to be prepared or published. (5 U.S.C. § 605(b)). Petitioner's allegations that such regulatory flexibility analyses were required must fail in light of the certifications which were duly made.

There is also no jurisdiction to review the Secretary's decision that section 605(b), rather than sections 603 and 604, of the RFA is applicable to the imposition of volume controls on the handling of lemons under the lemon order. On the matter of judicial review Congress declared unequivocally in the RFA that:

> (a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.
>
> (b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of

> the whole record of agency action in connection with the review.

5 U.S.C. § 611. Clearly, the plain language of the RFA indicates that the respondent's compliance or noncompliance with sections 603–605 is not a proper subject for review in this forum.

In addition to the plain meaning of section 611 of the RFA barring judicial review, there is ample evidence in the legislative history of the RFA which manifests a Congressional intent to foreclose completely any judicial review of matters related to agency compliance with the RFA. The following explanation appears in the section-by-section analysis of the bill which later became the RFA:

> Section 611(a) provides that there is no judicial review of any determination by an agency regarding the applicability of any provision of this subchapter except at provided in section 611(b). This means, for example, that the decision by an agency with respect to what proposed rules would have a significant economic impact on a substantial number of small entities pursuant to section 605(b) shall not be subject to judicial review. Thus, the decision regarding when the agency shall conduct a regulatory flexibility analysis remains in the sole discretion of the agency. Also not subject to judicial review are agency determinations regarding the agenda (section 602), the procedures for gathering comments (section 609), the periodic review of rules (section 610) and any other administrative determination under this act.
>
> Section 611(b) provides that a regulatory flexibility analysis is a management tool and administrative procedure to effect improved rulemaking. Neither the manner of conducting regulatory flexibility analyses nor the content of the analyses should be subject to judicial review either pursuant to this act or pursuant to section 706(2)(D) of title 5, United States Code, or pursuant to any other provision of law. But once a regulatory analysis has been prepared, its contents may, if relevant, be considered by the reviewing court along with other relevant material in determining the validity of the rule which is the subject of the analysis.
>
> The court will look to the statement of the basis and purpose published by the agency along with its final rule to determine whether the rule is valid. In making that deter-

> mination, the court may consider the contents of the regulatory flexibility analysis along with any other relevant material.

126 Cong. Rec. 21460–21461 (1980). Thus, in an instance such as this one where the agency has certified that no regulatory flexibility analysis is required, section 611 does not allow a court to review that decision.

Since the propriety of the agency's RFA certification is not reviewable, it cannot be the basis for a finding that the prorate regulations are "not in accordance with law." Hence, these allegations in the petition fail to state a claim upon which relief can be granted by this forum or any reviewing district court under section 8c(15) of the AMAA.

D. Executive Order 12,291

Executive Order 12,291 is a presidential directive to agency rulemakers to conduct cost-benefit, regulatory impact, and regulatory review analyses in the process of making rules likely to have significant impact on the economy as defined in the executive order. The goal of Executive Order 12,291 is "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations and insure well-reasoned regulations." Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app. Executive Order 12,291 does not apply to rulemaking under the hearing procedures of section 556 of the APA. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app. It does apply to other types of promulgation of "major rules", *i.e.* those with significant economic impact as defined by the executive order. *Id.* Petitioner contests the respondent's determination that Executive Order 12,291 did not apply to the imposition of volume controls on the handling of lemons under the lemon order. There is no jurisdiction to review this matter.

Executive Order No. 12,291, 46 Fed. Reg. 13,193, 13,198 (1981), *reprinted in* 5 U.S.C. § 601 app. provides the following with respect to judicial review: "This Order is intended only to improve the internal management of the Federal government, and it is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person." With such language in the executive order, it is evident that the President intended to preclude suits instituted to enforce agency compliance with Executive Order No. 12,291.

Executive Order No. 12,291 is, thus, an administrative document within the executive branch of government rather than a delegated legislative action by the President. Therefore, it does not have the force and effect of law. As the Court of Appeals for the District of Columbia Circuit has noted: "Congress has given the District Court many important functions to perform, but they do not include policing the faithful execution of Presidential policies by Presidential appointees." *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F. 2d 451, 457 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

Since failure to comply with Executive Order No. 12,291 cannot be the basis for a finding that the prorate regulations are "not in accordance with law", these allegations in the petition fail to state a claim upon which relief can be granted by this forum or any reviewing district court under section 8c(15) of the AMAA.

E. Secretary's Memorandum 1512-1

Secretary's Memorandum 1512-1 is merely this Department's internal administrative document for implementing Executive Order No. 12,291. Just as the President by his Executive Order did not create a law which could invalidate the marketing policy and prorate regulations, so too the Secretary's implementing memorandum did not have such an effect. Thus, these allegations also fail to state a cause of action upon which relief can be granted.

F. The Philosophical Issues

The petition in this proceeding contains a rambling discourse of approximately ten pages that appears to be more related to second rate philosophy than any intelligible legal argument. Basically words and phrases are extracted out of context from those portions of the AMAA that state its general purposes (7 U.S.C. 601 and 602). These in turn are followed by attacks generally aimed at any type of volume regulations and by assertions of one or two alleged facts that intrinsically "prove" that volume regulations are the sole cause that the general purpose has not been totally achieved.

In the AMAA Congress stated certain general purposes and goals and gave the Secretary authority to promulgate marketing orders with specified provisions. On numerous occasions, as was noted above, the Secretary conducted formal rulemaking hearings to gather the best evidence on whether a marketing order was required and which of the specified provisions should be in such an order. If the industry concurred with the Secretary's evaluation, the marketing order took effect. The provisions in 7 U.S.C. 608c(15)(A) were created so handlers could voice objections that the marketing order provisions did not conform to the evidence at the

rulemaking hearing, violated the specific authorities in the AMAA or violated some other statute, or that regulations or obligations under the marketing order were similarly violative.

In this portion of the petition, the attack is not on any specific prorate regulation or portion of the current marketing policy. Rather it is on the marketing order provisions that authorize these documents. These attacks are not based on allegations that the lemon order provisions aren't specifically authorized under 7 U.S.C. 608c(6) or (7), or that they violate some other statute. Petitioner doesn't even claim the marketing order provisions aren't based on the rulemaking records that created them. Rather these attacks are an infantile plaint that the marketing order hasn't fully achieved all the goals and purposes of Congress and made Sequoia's world a happy place. Such attacks have no bearing on whether the marketing order provisions are "in accordance with law" and, hence, are not a cause of action upon which relief can be granted in a proceeding under 7 U.S.C 608c(15)(A).

Such attacks are also misleading in that they fail to note that a formal rulemaking proceeding is in progress and that petitioner has fully participated at every step of the proceeding in presenting its economic and philosophic views as to the future of the lemon order.

G. Classified Pricing

The portion of the petition dealing with classified pricing contains the same fallacious reasoning evident in the immediately preceeding sections. Petitioner correctly states that the Lemon Order limits the quantity of lemons that may be handled for fresh use and does not limit the number of lemons that may be handled for by-product use. If lemon production is far in excess of all the needs of the market, one would logically expect such Lemon Order limitations would cause the marketplace to attach a higher price to lemons for fresh use than to lemons for byproduct use. Petitioner next asserts that such a price differential has occurred. Under the petition's twisted logic, the fact that this end has occurred (*i.e.:* a price differential) means that the Lemon Order has fixed prices and, hence, is illegal since the AMAA only allows price fixing for milk.

There are only three legitimate questions to be asked in a proceeding under 7 U.S.C. 608c(15). The first is whether the AMAA provides authority for a marketing order limiting the handling of lemons for fresh use. Under 7 U.S.C. 608c(2) and (6) such a marketing order is clearly authorized. The second question is whether the marketing order was promulgated in a procedurally correct

manner and was supported by substantial evidence in the formal rulemaking record. Petitioner does not even allege any deficiencies in this regard. The final question is whether the weekly limitation on the handling of fresh lemons is being accomplished in a procedurally correct manner and in accord with the relevant provision of the marketing order. Again, petitioner cannot make any legitimate objections. Hence, the Lemon Order limitation on the handling of fresh lemons is "in accordance with law" and the petitioner's challenge must fail.

Whether the limitation of the handling of fresh lemons promotes a societal goal and whether that goal could better be accomplished through free enterprise or through the use of some other AMAA authorized provisions are all questions that may be explored in a formal rulemaking hearing under 7 U.S.C. 608c(3), (4), and (17). However, the fact that such economic and philosophic questions may exist does not render the current lemon order and its provisions "not in accordance with law" and subject to relief in this forum. Hence, petitioner has again failed to state a cause of action upon which relief can be granted.

H. Termination

Petitioner correctly states that 7 U.S.C. 608c(16)(A) provides that the Secretary shall terminate an order (or a provision of an order) when he finds it does not effectuate the purposes of the AMAA. However, the Secretary has made no such finding and the petitioner has not even alleged that such a finding has been made. Hence, the Lemon Order is not susceptible to attack in this forum as "not in accordance with law."

It might be noted that the question of termination or continuance or modification of prorate is presently before the Secretary in the above-cited formal rulemaking proceeding. If prorate is continued or modified, then petitioner can file a petition under 7 U.S.C. 608c(15)(A) to challenge such a conclusion if petitioner does not believe it to be supported by substantial evidence in the rulemaking record.

I. Constitutional Issues

Petitioner claims that the use of market volume controls in the lemon order deprives it of liberty and property without due process of law, takes its property without just compensation, and denies it equal protection vis a vis other lemon handlers, all in alleged violation of the fifth amendment to the Constitution; and denies it freedom of association in violation of the first amendment to the Con-

stitution. Courts have long since held, however, that the AMAA and resultant marketing orders are constitutional.

1. The Use Of Market Volume Controls Through The Lemon Order Is Within The Constitutional Power Of Congress To Regulate Commerce.

Well over forty years ago the Supreme Court held that it is within the power of Congress under the commerce clause of the Constitution to prohibit absolutely all interstate commerce. *Mulford* v. *Smith*, 307 U.S. 38,48 (1939), *citing Currin* v. *Wallace*, 306 U.S. 1 (1939). Therefore, the Court held in *Mulford* v. *Smith* that Congress could limit the amount of a given commodity which may be transported in such commerce and that Congress' motive in exerting that power was irrelevant to its legitimacy. Consequently, the Court upheld the Secretary's issuance of a marketing quota on tobacco under the authority of the Agricultural Adjustment Act of 1938, a precursor of the Act under consideration herein, as both a legitimate exercise of the commerce power and a constitutional delegation of such power to the Secretary. *Mulford* v. *Smith*, *supra*.

In *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 569–76 (1939) and *H.P. Hood & Sons* v. *United States*, 307 U.S. 588, 594–95 (1939) the Supreme Court rejected arguments that the Agricultural Marketing Agreement Act of 1937, was an invalid exercise of Congress' power to regulate commerce and that the Act involved unconstitutional delegations of legislative power to the Secretary. The Court noted in *Rock Royal Co-op*, 307 U.S. at 569, that Congress' "power over commerce where it exists is complete and perfect." The Court also later found that by the Act Congress intended to exercise the full reach of that power, that the power to regulate interstate commerce implied every other power necessary to make such regulation effective, and reaffirmed the Act's constitutionality. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118–19, 123–25 (1942).

Even before the Supreme Court had reached its conclusions that the Act was constitutional, the Court of Appeals for the Ninth Circuit had so concluded. In *Edwards* v. *United States*, 91 F.2d 767, 780–83 (9th Cir. 1937), the court found that a marketing order which provided for weekly limitations on the quantity of California and Arizona oranges which could be shipped in commerce and which allowed an industry advisory committee to allot such limitation among handlers was a constitutional exercise of the commerce power. Accord, *Wallace* v. *Hudson-Duncan & Co.*, 98 F. 2d (9th Cir. 1938).

2. The Imposition Of Market Volume Controls Does Not Deprive Petitioner Of Liberty Or Property Without Due Process Within The Meaning Of The Fifth Amendment To The Constitution.

Petitioner alleges that it has been deprived of liberty and property without due process, because the imposition of controls on the number of lemons which may be marketed interferes with, *inter alia,* its right to contract freely and to receive the maximum possible compensation for the sale of lemons. These arguments have also been rejected by courts long ago. Interference with the liberty and property rights inherent in the ability to contract freely was rejected by the Supreme Court in *Rock Royal Co-op, supra* at 569, 572, as a basis for finding a milk marketing order in violation of the Constitution. The Court found that the provisions of the marketing order were nonetheless reasonably related to the power to regulate commerce which the Court had found "complete and perfect." *Id., see also, H.P. Hood & Sons* v. *United States, supra* at 594–95 (a milk marketing order provision requiring handler payments for milk to be channeled through a regulatory equalization fund did not violate the due process clause of the fifth amendment to the Constitution).

With respect to a marketing order for oranges which set up volume controls and handler allotments in a manner virtually identical to the lemon order at issue herein, the Court of Appeals for the Ninth Circuit in 1937 rejected contentions that such volume controls were contrary to the fifth amendment's provisions for liberty of contract. *Edwards* v. *United States, supra* at 783–85. That court later elaborated on its reasoning in another case in which it upheld the constitutionality of a walnut marketing order despite the fact that it might be said to have destroyed property rights or the liberty to contract or engage in business freely. *Wallace* v. *Hudson-Duncan & Co., supra* 991–93. In *Wallace* v. *Hudson-Duncan & Co.* the court found that the marketing order did not violate the fifth amendment, because the means adopted by the Secretary, i.e., the marketing order, were reasonably related to the declared object of the Act. *Id.* at 992. In judging that relationship the court noted that such a rational relationship would be presumed unless there were evidence to the contrary. *Id.* In *Whittenburg* v. *United States,* 100 F. 2d 520 (5th Cir. 1938), the Court of Appeals for the Fifth Circuit upheld the constitutionality of a grapefruit marketing order which limited the volume through weekly limits and handler allotments and prorations just as the lemon order does herein. In *Whittenburg* the Court noted that "collisions between private right [liberty of contract] and exertions of police power for the public good result generally in the prevalence of the public good." *Id.* at 523.

The court therein also pointed out that before any interference in property rights occurred through the imposition of volume controls under a marketing order, the Act required notice and a hearing for those to be affected and provided for judicial review of the Secretary's order promulgating a volume control regulation in a marketing order. *Id.* As proper hearing procedures had been accorded, the court found that liberty and property had not been taken without due process of law.

Petitioner in the present proceeding claims that the lemon order causes it to incur financial losses which it would not incur were such regulation absent, and that the lemon order does not meet the rational relationship test of constitutionality because it does not fulfill the purposes of the AMAA. Petitioner claims that it is respondent's burden to demonstrate the rational relationship. However, as the Court of Appeals for the Ninth Circuit noted in *Wallace* v. *Hudson-Duncan & Co., supra* at 992, it is petitioner's burden to overcome a presumption of a rational basis for the marketing order. The AMAA allows the Secretary to impose market volume controls for lemons when he finds from evidence introduced at the required hearing that such regulation will fulfill the purposes of the Act. 7 U.S.C. § 608c(3), (4), (6). That is precisely what happened here. 6 Fed. Reg. 1833 (1941). Judicial review of whether such regulation does tend to fulfill the purposes of the Act and as such is reasonably related to achieving legitimate goals is limited to a determination of whether the Secretary's decision that the regulation would promote the purposes of the Act was supported by substantial evidence introduced at the rulemaking hearing required by the Act prior to the issuance of a marketing order. 5 U.S.C. § 706(2)(E); *see Chiglades Farm Ltd.* v. *Butz,* 485 F. 2d 1125, 1129 (5th Cir. 1973). Petitioner has failed to allege that the regulation is not supported by substantial evidence introduced at the rulemaking hearing. Thus, it can not possibly overcome the presumption that the regulation is rationally related to the goals of the Act, and this forum must dismiss the allegations that the lemon order is unconstitutional because it does not effectuate the goals of the Act. As there is not even a single allegation that the Secretary did not follow procedures prescribed under the Act in enacting the lemon order or that the Secretary's initial decision that the lemon order's volume control provisions would effectuate the Act is not supported by substantial evidence, the petition fails to state a claim upon which relief can be granted. Furthermore, the issue of whether the volume control provisions are still effectuating the AMAA is being reviewed by the Secretary in the current rulemaking proceeding. That issue may only be reviewed, if the Secretary's decision is un-

favorable to petitioner, on the basis of evidence of record in that proceeding.

3. The Imposition Of Market Volume Controls Do Not Constitute A Taking Of Private Property Within The Meaning Of The Fifth Amendment To The Contitution.

Petitioner maintains that economic losses which it allegedly suffers as a result of the imposition of volume controls under the lemon order constitute the taking of private property in violation of the fifth amendment. This issue was considered by courts long ago and such contentions were rejected. In 1939 in *Mulford* v. *Smith, supra* at 49–51, the Supreme Court held that despite cash investments by tobacco growers in crops they could not market that year due to the imposition of tobacco allotments among farmers, the financial losses did not constitute a taking of such farmers' property in violation of the fifth amendment. The Court of Appeals for the Ninth Circuit held in 1938 that even if a marketing order materially reduced a person's property rights or destroyed a person's property in the exercise of the commerce power, there is no "taking" within the meaning of the fifth amendment, because there is no direct appropriation of property from such person by the government. *Wallace* v. *Hudson-Duncan & Co, supra* at 989–91, *citing Omnia Commercial Co.* v. *United States,* 261 U.S. 502 (1923). In pertinent dictum the court of appeals also noted that even if the economic losses were a "taking" it would be justified by a public purpose with compensatory benefits to farmers of higher prices for their products. 98 F. 2d at 991. A recent marketing order case dealing with the issue of whether a taking was presented by government price regulation under a marketing order followed the precedent and reasoning of *Wallace* v. *Hudson-Duncan & Co., supra. Prune Bargaining Ass'n* v. *Butz,* 444 F. Supp. 785, 793 (N.D.Ca 1975)

In light of the above decisions, petitioner's alleged economic losses from the operation of the lemon order do not constitute a taking of its property without just compensation within the meaning of the fifth amendment.

4. The Lemon Marketing Order Does Not Discriminate Against Any Group Of Handlers In Violation Of The Due Process Clause Of The Fifth Amendment To The Constitution.

Petitioner alleges that under the lemon marketing order, it is allowed to ship fewer lemons than handlers with growers in other geographic districts under the order and handlers with growers in entirely unregulated areas and that volume controls discriminate among handlers in different production districts on the basis of

sales opportunities, income, and prorate limitations. Petitioner alleges by implication that the lemon marketing order dictates different prices for handlers with growers in different geographic districts. Petitioner claims that these discriminations among some handlers violate its rights under the fifth amendment to the Constitution.

The fifth amendment's guarantee of due process includes the concept of equal justice under law. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976). Equal protection analysis under the fifth amendment is the same type as has been developed under the equal protection clause of the fourteenth amendment. *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976). This analysis only entails a limited judicial review of legislative classifications of persons for different treatment under the law to determine if such classifications are rationally related to a legitimate governmental objective. *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981). The rational relationship analysis has been used previously by the Supreme Court to uphold distinctions made between handlers under the Act. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 564–65 (1939).

The AMAA provides for the method incorporated in the lemon marketing order of limiting the quantity of a commodity handled and apportioning that quantity equitably among all handlers. 7 U.S.C. § 608c(6). Such commodity volume regulation as will further the interests of farmers and consumers and will provide for orderly marketing has been found to be a valid governmental goal within the power of Congress under the commerce clause of the Constitution. Under the lemon marketing order the equitable apportionment among all handlers of the total quantity of lemons which may be allowed to be handled during any week is achieved through the prorate base system. The differentiation in calculating the prorate base among different geographic areas is based on the differences among these areas in production and marketing conditions. 7 CFR § 910.53(e). The lemon marketing order also allows for exceptions to this geographic area classification of handlers for the purpose of calculating prorate base if a handler can show that the production or marketing conditions in his area differ substantially from general conditions otherwise prevailing in that district. 7 CFR § 910.53(g).

This prorate base system of apportionment among handlers as provided for in the Act was adopted and has been amended several times after notice, a public hearing, and subsequent formal rulemaking procedures. Recognition of geographic distinctions in production and marketing factors to achieve the equitable handler allotments provided for by the Act irrespective of geographic area

has been reflected in various agency decisions regarding such classifications. *See, e.g.,* 35 Fed. Reg. 16,850, 16,853 (1970). This system, including its geographic distinctions, can only be judged on the basis of the record evidence compiled during such rulemaking processes. Petitioner has not claimed that this apportionment system is not supported by substantial record evidence. Therefore, this forum must uphold the lemon order provisions which define this system. Furthermore, the issue of the delineation of geographic districts for apportionment purposes is currently before the Secretary in the pending rulemaking proceeding. Review of the Secretary's decision to see if it is supported by the evidence in the record now being made will only be appropriate after the rulemaking process is finished.

With respect to the claim that the order discriminates against handlers of lemons grown in California and Arizona as opposed to other handlers who are not subject to regulation, this classification stems directly from the AMAA. The Act requires that marketing orders be limited in their application to the smallest region practicable consistent with effectuating the purposes of the Act and that marketing orders applicable to the same commodity in different regions shall contain different terms necessary to reflect the differences in the production and marketing of that commodity in such different areas. 7 U.S.C. § 608c(11)(B), (C). Regional differences in commodity marketing are rationally related to regional differences in marketing regulation. While this regional approach to commodity regulations may seem unfair to petitioner as a handler competing with handlers in unregulated areas, this does not invalidate the classification under the fifth amendment.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause [and correspondingly the Federal Government does not violate the equal protection component of the Fifth Amendment] merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.' *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61,78. *Dandridge* v. *Williams* 397 U.S., at 485. . . . As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.

Schweiker v. *Wilson*, 450 U.S. 221, 234–35 (1981). Therefore, the petition also fails to state a cause of action in this regard.

5. The Establishment Of The LAC To Recommend Market Volume Controls To The Secretary Is Not An Unconstitutional Delegation Of Legislative Authority To Private Persons.

Petitioner alleges that USDA has deprived petitioner of its fifth amendment procedural due process rights by unconstitutionally delegating authority to limit the quantity of lemons which may be handled to the LAC. The LAC, however, which is established pursuant to the lemon marketing order and in accordance with the Act, does not have or exercise any authority to limit the quantity of lemons which may be handled. The AMAA provides that all marketing orders shall include terms:

> (C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:
>
> (i) To administer such order in accordance with its terms and provisions;
>
> (ii) To make rules and regulations to effectuate the terms and provisions of such order;
>
> (iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and
>
> (iv) To recommend to the Secretary of Agriculture amendments to such order.
>
> No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. . . . .

7 U.S.C. § 608c(7)(C). The lemon marketing order, which provides for the establishment of a thirteen member LAC, consisting of eight growers, four handlers and one nonindustry member, limits the duties of the LAC to those specified by the Act as set forth above. 7 CFR § 910.20, .30. Among the duties of the LAC are the duties to investigate the growing, shipping and marketing conditions with respect to lemons, to assemble data on such conditions, to furnish the Secretary such available information as he may request, to formulate an annual marketing policy which contains in-

formation on supply and demand conditions, any other pertinent factors bearing on the marketing of lemons and a schedule of estimated weekly shipments to be recommended to the Secretary during the fiscal year, and, finally, when its investigations of supply and demand make handling limitations advisable, to recommend to the Secretary the quantity of lemons which it deems advisable to be handled during a week. 7 CFR § 910.31(c), (d), .50, .51(a). In recommending weekly limitations the LAC must consider specified factors. 7 CFR § 910.51(b). Under the lemon marketing order the LAC may only investigate economic conditions and recommend market volume controls. Under the order only the Secretary has the power to limit the quantity of lemons which may be handled during a specific week. The Secretary may impose and determine the amount of such a limitation whenever any information, including LAC recommendations and reports, indicate to the Secretary that a limitation will tend to effectuate the Act. 7 CFR § 910.52. Once the Secretary fixes such a weekly limit, the LAC carries it into effect by following order provisions for determining handler allotments.

In the present case the LAC clearly acts in an administrative advisory capacity to assist the Secretary to carry out the terms of the order which the Secretary has enacted. While the LAC's expert recommendations made in accordance with the terms of the order assist the Secretary in carrying out his functions, only the Secretary has any power to impose limitations on the number of lemons which may be handled. The Secretary has not delegated his power to impose marketing volume controls, and the functions given to the LAC do not constitute a *de facto* delegation of such power. The Secretary alone exercises his discretion to impose controls, and the marketing order sets out the criterion for its exercise, i.e. whether weekly limits will "tend to effectuate the declared policy of the [A]ct." 7 CFR § 910.52. The fact that the LAC recommendations made pursuant to the order and in accordance with the Act may become the basis for action by the Secretary does not mean that the LAC is the one exercising the authority to impose volume controls.

Regulatory schemes such as this which incorporate industry committees to assist the government in carrying out regulations have long been upheld. In *Edwards* v. *United States, supra* at 767, the Court of Appeals for the Ninth Circuit found that the marketing order provisions of the precursor to the present Act did not delegate legislative authority to private individuals even though the orange marketing order contained provisions for a grower committee to administer the order. In *Mulford* v. *Smith, supra* at 44, the

United States Supreme court upheld the constitutionality of a tobacco allotment program which included provisions for apportionment of the tobacco quota among individual farms by local committees of farmers according to standards "prescribed in the Act, amplified by regulations and instructions issued by the Secretary."

The two cases which dealt directly with the issue of delegation to industry committees under the AMAA arose in the Fifth Circuit. In *Whittenburg* v. *United States*, 100 F.2d 520 (5th Cir. 1938), the court was faced with a challenge to the delegation of the authority to a growers committee and to a shippers committee under a citrus fruit marketing order which allowed such committees to investigate conditions and make recommendations to the Secretary on weekly shipping limits and allotments. The court upheld the constitutionality of the regulatory scheme on the ground that the committees who recommend regulations are not given any legislative power or any power to force the Secretary to regulate. *Id.* at 522. "Action taken is always that of the Secretary. These others gather and present information to give him a broader view of the situation. Their concurrence gives his action support and tends to assure its enforcement. But they have no actual power." *Id.* at 523.

The Court of Appeals for the Fifth Circuit recently affirmed the *Whittenburg* holding in a case involving a celery marketing order under which an industry committee was given authority to recommend handling limits on celery. *Chiglades Farm, Ltd.* v. *Butz*, 485 F.2d 1125 (5th Cir. 1973). The court noted that Congress had "approved the use of such producer-controlled committees on the theory that the most sound decisions will result from permitting those in the area with the greatest knowledge of the industry's needs to make recommendations to the Secretary. *See, e.g.*, Sen. Rep. No. 566, 87th Cong., 1st Sess. p. 39." *Id.* at 1134. The court relied upon the sole power to act resting with the Secretary as noted in *Whittenburg*, *Id.* The Court rejected plaintiffs' arguments that the committee vested control of the industry in a group of self-interested producers, thereby depriving plaintiffs of due process, and that despite the Secretary's ultimate authority he exercised no independent judgement. In rejecting such arguments the court relied on the effective checks on committee power contained in the order including, *inter alia*, the fact that the Secretary selected committee members, received all recommendations and actually acted to limit the handling of the commodity. *Id.*

The reasons which prompted the Court of Appeals for the Fifth Circuit to reject claims of unconstitutional delegation of authority to industry committees are equally applicable in the present case. Further, the principles upon which the court acted in those two

marketing order cases have been relied upon by other courts of appeals in deciding delegation issues in other contexts. The Court of Appeals for the Second and Third Circuits have found that a statute providing for self-regulation of over-the-counter securities dealers by a private dealers association is not an unconstitutional delegation of legislative power to a private institution, on the grounds that the Securities and Exchange Commission has the power to approve or disapprove the association's rules and to make an independent review of disciplinary actions taken by the association. *First Jersey Securities, Inc.* v. *Bergen,* 605 F. 2d 690, 697 (3rd Cir. 1979); *Todd & Co., Inc.* v. *Securities & Exchange Com'n,* 557 F. 2d 1008, 1012-13 (3rd Cir. 1977); *R. H. Johnson & Co.* v. *Securities & Exchange Com'n.,* 198 F. 2d 690, 695 (2d Cir. 1952) *cert. denied,* 344 U.S. 855 (1952).

In the present case although the LAC assists the Secretary in informing him of industry conditions and giving him their regulatory recommendations, the Secretary retains the power actually to regulate based upon committee recommendation or other available information. For the reasons discussed in the above cases such industry assistance does not rise to the level of an unconstitutional delegation of legislative authority which deprives petitioner of its procedural due process rights.

6. The Lemon Marketing Order Does Not Deprive Petitioner Of Its Rights Under The First Amendment To The Constitution.

Petitioner alleges that the imposition of market volume controls infringes upon its freedom of association under the first amendment in that it limits its association with customers of its own choosing by limiting the number of lemons it may sell and, thus, the number of customers to whom it may sell them, and it forces petitioner to associate with an economic idea repugnant to petitioner. Neither of petitioner's claims comes within the type of freedom of association protected by the first amendment.

The freedom of association protected by the first amendment is a penumbral right not explicitly set out in the amendment itself. "[T]he right of individuals to associate to further their personal beliefs . . . has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy* v. *James,* 408 U.S. 169, 181 (1972). This freedom to associate with others "stemmed from the [Supreme] Court's recognition [in *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958)] that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' " *Buckley* v. *Valeo,* 424 U.S. 1, 15 (1976). The orderly group activity of advancing common beliefs and

ideas is the freedom of association protected by the first amendment. *Elrod* v. *Burns*, 427, U.S. 347, 357 (1976). Most commonly this freedom protects association for political expression. *See, e.g., Buckley* v. *Valeo* and *Elrod* v. *Burns, supra.* However, it is immaterial what the group beliefs being advanced are, be they political, economic, religious or cultural. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 460 (1958). The key element, nevertheless, is that people associate in a group for the purpose of advancing their common beliefs of whatever ilk. *Id., see also, N.A.A.C.P.* v. *Button*, 371 U.S. 415, 430 (1963). Thus, the freedom of association which protects group activities and group membership has been found to prohibit the following: the conditioning of public employment on political party affiliation, *Elrod* v. *Burns, supra;* the nonrecognition of radical student political organizations by colleges, *Healy* v. *James, supra;* the requirement that teachers list all the organizations they have belonged to during the past five years as a condition of employment, *Shelton* v. *Tucker*, 364 U.S. 479 (1960); the requirement that an organization give the state a list of all its members as a condition of "doing business" in that state, *N.A.A.C.P.* v. *Alabama, supra;* the proscription of association for litigation purposes, *N.A.A.C.P.* v. *Button, supra;* and the refusal to license a qualified lawyer for belonging to a political organization or for refusing to answer questions about such an association, *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971).

Nowhere in the petition has petitioner alleged that it has been prevented or restrained from joining with other people to further its political or economic views or that it has been forced to join an organization which holds views repugnant to it. Associating with an unlimited number of customers to sell them lemons does not rise to the level of the cherished freedom to associate with others to advocate or express one's belief that is protected by our Constitution. Similarly, economic regulation of the number of lemons a handler may buy or sell can not reasonably be said to force petitioner to join with others in a group to espouse views which are opposed to petitioner's free market beliefs. As this critical element of group association for the purpose of expression is missing from this petition, petitioner's first amendment allegations must fail. These allegations are merely a strained attempt to characterize the mundane as the significant, by clothing petitioner's dissatisfaction with the lack of a free market for lemon handlers in borrowed, ill fitting, and totally inappropriate constitutional garb."

Thus, the Petition should be dismissed. 7 CFR 900.52(c).

ORDER

The Petition is dismissed. The Order Granting Motion to Dismiss became final February 13, 1986.

In re: ECHO SPRING DAIRY, INC., AMA Docket No. M124-2. Decided February 25, 1986.

Petitioner does not qualify as a "producer-handler".
The Judicial Officer affirmed Judge Palmer's order sustaining the determination by the Market Administrator of Order No. 124 that petitioner did not qualify as a "producer-handler" under the Order, and that petitioner is obligated to pay $432,973.06 to the Market Administrator because petitioner's operation of a leased dairy farm was not the personal enterprise and the personal risk of petitioner. Petitioner had a joint checking account with the lessor of the dairy farm under which petitioner was able to utilize the financial resources of the lessor and other entities participating in the joint bank account. The producer-handler exemption must be strictly construed. Petitioner has the burden of proving that the Market Administrator's determinations are "not in accordance with law." Great weight is given to the Market Administrator's interpretation of the order.

Michael J. Gentry, for petitioner.
Mary Kyle Hobbie, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an appeal to the Judicial Officer from an initial Decision and Order filed by Administrative Law Judge Victor W. Palmer (ALJ) on October 22, 1985, under the Agricultural Marketing Agreement Act of 1937, as amended.[1] Final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated to the Judicial Officer (7 CFR § 2.35).[2] The

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[1] In view of the different situations in the various milk marketing areas, there is a wide variation in the pricing provisions of the orders. For a general description of the milk marketing regulatory program under the Act, *see Lehigh Valley Coop.* v. *United States*, 370 U.S. 76, 78-81 (1962); *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 542-45 (1939); *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762, 764 (D.C. Cir. 1971). *See generally* Vetne, "Federal Marketing Order Programs," in 1 *Agricultural Law* ch. 2 (J. Davidson ed. 1981); Brooks, "The Pricing of Milk under Federal Marketing Orders," 26 Geo. Wash. L. Rev. 181 (1958).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Offi-

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case was referred to the Judicial Officer for decision on December 27, 1985.

The ALJ sustained the determination by the Market Administrator of Federal Milk Order No. 124 that petitioner did not qualify as a "producer-handler" under the Order from November 1983 through December 1984. As a result, petitioner is obligated to pay a total of $432,973.06 to the Market Administrator.

Based upon a careful consideration of the entire record in this case, the initial Decision and Order is adopted as the final Decision and Order (with a few trivial changes). Additional conclusions by the Judicial Officer follow the ALJ's decision.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This proceeding was initiated under section 15(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c(15)(A); "the Act"), by a petition filed by a milk handler regulated by Federal Milk Order No. 124 (7 CFR 1124 *et seq.*; "Order 124"). Petitioner, Echo Spring Dairy, Inc. (Echo Spring), alleges that Order 124's Market Administrator incorrectly determined that petitioner did not qualify as a "producer-handler" under Order 124 from November 1983 through December 1984. Petitioner seeks reversal of this adverse determination which disqualified Echo Spring from exemption from monetary assessments under the terms of Order 124, and the vacating of the resulting producer-settlement fund and administrative fund assessments levied by the Market Administrator.

An oral hearing was held before me in Portland, Oregon, on June 18, 1985, at which petitioner and respondent were represented by their attorneys, Michael J. Gentry and Mary Kyle Hobbie, respectively. Briefing was completed on September 3, 1985.

Upon consideration of the record evidence and the written and oral arguments by the parties, the attached order is being entered this day dismissing the petition, and denying the remedy therein requested.

FINDINGS OF FACT

1. Echo Spring is an Oregon corporation which, prior to July 1, 1983, operated as a fully regulated pool plant under Order 124, and was fully subject to the Order's terms, provisions, and assessments

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cer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

payable to the producer-settlement fund and the administrative fund.

2. On July 1, 1983, Echo Spring leased from Maddox Dairy, Ltd., the Maddox Dairy, located in Burrel, California.

3. On July 1, 1983, Maddox Dairy, Inc., became a 20% shareholder in Echo Spring, and one of its officers, Mr. Steve Maddox, was hired and paid by Echo Spring to run its new dairy division in Burrel, California.

4. Approximately half of the milk produced at the dairy farm in Burrel actually goes to Echo Spring's creamery in Eugene, Oregon. The rest is sold to Danish Cooperative Creamery in Fresno, California.

5. By letter of June 30, 1983, the Market Administrator gave tentative approval to a request by Echo Spring to thereafter be designated as a producer-handler pursuant to section 1124.12 of Order 124.

6. Since July 1, 1983, Echo Spring has been operated as a corporation having two separate divisions—its processing and distribution plant, located in Eugene, Oregon, known as the Creamery Division, and the dairy farm in Burrel, California, known as Maddox Dairy-Division of Echo Spring Dairy.

7. In November 1983, Maddox Dairy-Division of Echo Spring entered into a bank accounting system, a concentration account, in company with several of the Maddox entities. The account was based on a zero base accounting method whereby the money in eleven individual checking accounts was pooled in one common account and the balance of each individual account was zero at the end of each business day.

8. The books and records regarding the participation of Maddox Dairy-Division of Echo Spring in the concentration account were not maintained with Echo Spring's other books and records in Eugene, Oregon, but were maintained instead in the Maddox offices located in Riverdale, California. The accounting procedures for Maddox Dairy-Division of Echo Spring were handled by Mr. Rick Stacy who, although an independent accountant, spends 100% of his working hours on the accounts of Maddox entities and, as part of those duties, handled the accounting procedures of Maddox Dairy-Division of Echo Spring.

9. The parties have stipulated to:

a. the existence of the bank account numbers representing the concentration account at the Crocker National Bank in which Echo Spring began participation in November 1983;

b. the authenticity of the bank account records and statements of the concentration account, known as the Ru-Ann-Maddox account;

c. the authenticity of the bank account statements for Maddox Dairy-Division of Echo Spring, Inc.;

d. the authenticity of the documents identified as "Danish Creamery to Maddox, Ltd., producer or patron statements"; and

e. the authenticity and correctness of all of the mathematical calculations and figures representing the amounts claimed to be due by the Market Administrator (but not that the amounts are due).

10. As a result of the implementation of the concentration account, Echo Spring was able to deposit money in and draw money from the common account. In the months of November 1983 through December 1984, a total of 14 months, Echo Spring drew more money from the concentration account than it had deposited in the account in at least seven months.

11. Echo Spring maintained a close financial relationship with the Maddox entities through the concentration account which diluted the risk to Echo Spring in conducting business.

12. Order No. 124 requires monthly reports and accounting from producer-handlers.

13. The Market Administrator conducted an audit of the books and records of the Dairy Division in Riverdale in early July 1984. This was the first audit of the Riverdale location since the implementation of the concentration account.

14. As a result of that audit, the Market Administrator determined that Echo Spring was not a producer-handler as defined by section 12 of Order 124 (7 CFR 1124.12), in that Echo Spring had not offered proof satisfactory to the Market Administrator that the care and management of all dairy animals and other resources necessary to produce the entire volume of fluid milk was the personal enterprise of and at the personal risk of Echo Spring.

15. The Market Administrator met with officials of Echo Spring in August and September of 1984 and told them that, in his opinion, they had lost producer-handler status by their use of the concentration account.

16. By letter dated September 28, 1984, the Market Administrator sent Echo Spring his written determination that Echo Spring was not a producer-handler and stated the basis of his determination as follows:

> "The basis of this decision is that the leased dairy farm operation of Maddox Dairy, Ltd. located at Burrel, California

is not the personal enterprise and the personal risk of Echo Spring Dairy, Inc. Specifically, the monies of Echo Spring Dairy, Inc. are combined with monies of various business enterprises of Maddox Dairy, including two other dairy farms which are not controlled by Echo Spring Dairy, Inc. Money deposited in an account of Maddox Dairy-Division of Echo Spring is transferred to the Ru-Ann-Maddox Dairy Concentration Account in the Crocker National Bank where it is combined with income from several other Maddox Dairy enterprises, including Maddox Dairy-Division of Echo Spring. The control of the Ru-Ann-Maddox Concentration Account is by Maddox Dairy and not by Echo Spring Dairy, Inc. Therefore, the personal risk required by § 1124.12(b) is not being entirely borne by Echo Spring Dairy, Inc."

17. In response to my request, the Market Administrator, by letter of March 11, 1985, further explained the basis of his determination that Echo Spring Dairy was not a producer-handler pursuant to § 1124.12 of Federal Milk Order No. 124 for the period of November 1983 through December 1984. He stated, and I find on the basis of the substantial evidence of record, the following bases for his determination:

1. Echo Spring Dairy Inc.'s monies were being combined with monies from Ru-Ann Dairy, Maddox Dairy, Ltd. and Burrel Farms, Inc. in the Ru-Ann-Maddox Concentration Account #032-316336 in the Crocker National Bank, Fresno, California. The entities other than Echo Spring Dairy, Inc. which participated in the Concentration Account were not controlled by Echo Spring Dairy, Inc. The Concentration Account was a system in which funds from all the various bank accounts of Ru-Ann Dairy, Maddox Dairy, Ltd., Burrel Farms, Inc. and their subsidiaries as well as funds of Echo Spring Dairy, Inc. were deposited in a central account. When any of the above business enterprises needed funds to pay their obligations, the bank would transfer from the Concentration Account the amount of funds needed to cover the checks of the various individual accounts. Funds needed by Echo Spring Dairy, Inc. to pay obligations of their dairy farm operation were handled in this way. If the monies Echo Spring Dairy, Inc. deposited in the Concentration Account were not sufficient to cover their obligations, monies deposited by the other entities party to the Concentration Account were used to

pay the obligations of Echo Spring Dairy, Inc. The general ledger and the balance sheet of the Echo Spring dairy farm operation did not carry such deficiencies in deposits to the Ru-Ann-Maddox Concentration Account as a liability nor did the general ledger and balance sheet account for any excess in deposits as a receivable. Therefore, Echo Spring Dairy, Inc. was not bearing the personal risk of all the obligations of the dairy farm operation. Although there was a schedule prepared which showed the debits and credits by Echo Spring Dairy, Inc. to the Ru-Ann-Maddox Concentration Account, the only general ledger entries made are those that normally affect the Echo Spring Dairy, Inc. cash account and the offsetting entries to the general ledger. General ledger entries are not made showing the transactions between the Echo Spring Dairy, Inc. cash account and the Ru-Ann-Maddox Concentration Account.

2. The Creamery Division of Echo Spring Dairy, Inc. paid the Dairy Division of Echo Spring for milk received at its plant in Eugene, Oregon. The amount of payment was based on the classified use value of the milk at the Eugene plant using the class prices and the use classifications as established under the Oregon-Washington order with a minor adjustment for Class II milk. The payments were made on dates approximating the producer payment dates in the Oregon-Washington order. Payments were either wire-transferred to the Crocker National Bank or mailed to the offices maintained by Ru-Ann Dairy and Maddox Dairy, Ltd. in Riverdale, California. If there were any changes made in the use classification at the Eugene plant of Echo Spring Dairy, Inc. as a result of the Market Administrator's audit, no adjustments were made in payments to the Dairy Division of Echo Spring Dairy, Inc. No other payments were made to the Dairy Division by the Creamery Division.

3. Echo Spring Dairy, Inc. maintains two completely independent sets of books and records and bank accounts for their two divisions. The one for the Creamery Division is located at Eugene, Oregon. This set of books and records is maintained and controlled by employees of Echo Spring Dairy, Inc. They include all records pertaining to the operation of the processing plant as well as the sales journal, cash disbursement journal, general ledger and payroll

records. The statements for the bank account maintained at Centennial Bank, Eugene, Oregon and all records pertaining to this bank account are also kept in Eugene, Oregon. This bank account is used to pay the obligations of the Creamery Division of Echo Spring Dairy, Inc. The Dairy Division records of Echo Spring Dairy, Inc. are maintained at Riverdale, California and kept separate from the records of the Eugene operation. The records maintained at Riverdale are those pertaining to the operation of the leased dairy farm located at Burrel, California, the sale and payments of milk to Danish Cooperative Creamery, the hauling records on milk delivered to the Eugene, Oregon plant, cash disbursements, purchase journals, payroll records and general ledger. The employees who maintain and control the books and records of Ru-Ann Dairy, Maddox Dairy, Ltd., Burrel Farms, Inc. and their subsidiaries are the same persons who maintain and control the books and records of the Dairy Division of Echo Spring Dairy, Inc. There is no reimbursement for the services of these employees by Echo Spring Dairy, Inc. The Creamery Division of Echo Spring Dairy, Inc. furnishes to the Riverdale office a summary of their general ledger each month in order that a statement of operations and balance sheet can be made for each division along with a consolidated balance sheet and statement of operation for Echo Spring Dairy, Inc. Other than the money paid to the Dairy Division for milk delivered to the Eugene plant, there are no other payments made by the Creamery Division to the Dairy Division. The only adjustments made in the preparation of the consolidated statement of operation is for the movement of milk between the two divisions.

4. The Echo Spring Dairy, Inc. Dairy Division made lease payments for the dairy farm to Maddox Dairy, Ltd. out of all funds deposited in the Ru-Ann-Maddox Concentration Account. The Dairy Division issued a check to Maddox Dairy, Ltd. and that check was deposited into their account in the Crocker National Bank and on the same day was transferred to the Ru-Ann-Maddox Concentration Account. All transactions between the Echo Spring Dairy, Inc. Dairy Division and Ru-Ann Dairy and Burrel Farms, Inc. were handled in a similar manner.

5. In addition to the milk delivered to the Echo Spring Dairy, Inc. Creamery Division, the Echo Spring Dairy, Inc.

Dairy Division sold milk to the Danish Cooperative Creamery, Fresno, California, through Ed and Steve Maddox. During the course of the Market Administrator's audit, the auditors were told that Ed and Steve Maddox would deduct five cents a hundredweight from the proceeds of the milk sold to Danish Cooperative Creamery for marketing the milk; the remainder would be passed over to Echo Spring Dairy, Inc. However, an audit of the account failed to indicate that the amount due Echo Spring Dairy, Inc. from Danish Cooperative Creamery, less the five cents a hundredweight, was deposited in the Echo Spring Dairy, Inc. account. The amounts entered into the Echo Spring Dairy, Inc. account often varied considerably from the amounts paid by Danish Cooperative Creamery for the milk. Although there were some adjustments made in various months, the amount of the adjustments for these discrepancies cannot be reconciled to the amounts Danish Cooperative Creamery paid for the milk. The payment of $750,732.99 for milk delivered to Danish Cooperative Creamery for the months of January, February and March 1984 was not paid to Echo Spring Dairy, Inc. until May 7, 1984. In the absence of the money due from Danish Cooperative Creamery, the Dairy Division of Echo Spring relied on funds that were deposited in the Ru-Ann-Maddox Concentration account to pay their obligations.

16. Echo Spring continued to participate in the concentration account until mid-December of 1984, at which time it withdrew.

PERTINENT STATUTORY PROVISIONS

7 U.S.C. § 608c

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as 'handlers.' Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Orders issued pursuant to this section shall be applicable to (A) the following agricultural commodities . . . : Milk . . . .

* * * * * * *

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and . . . no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

* * * * * * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

* * * * * * *

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed

in accordance with paragraph (A) of this subsection.

* * * * * * *

(13)(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

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(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

PERTINENT ORDER PROVISIONS

Pursuant to statutory powers, the Secretary of Agriculture has issued Milk Marketing Order No. 124 (7 CFR Part 1124) to regulate the handling of milk in the Oregon-Washington marketing area. The Order requires handlers to file monthly reports of receipts and utilization, and pay assessments to the producer-settlement fund, as well as assessments for the cost of the Order's administration (7 CFR §§ 1124.30, 1124.80, and 1124.87). However, a qualifying "producer-handler" is exempt from such obligations and is required to file only those reports that the Market Administrator may prescribe as necessary (7 CFR § 1124.32). Order 124 specifically defines a producer-handler:

§ 1124.12 Producer-Handler.

(a) "Producer-handler" means any person who operates a dairy farm and a milk processing plant from which there is route disposition in the marketing area during the month, and who receives no skim milk (including nonfat dry milk or condensed skim milk or skim milk recombined from nonfat dry milk or condensed skim milk) or butterfat

from any source, other than his own production, for use in fluid milk products during the month: *Except* that such person may purchase from other pool plants packaged fluid milk products, other than whole milk, in an amount not in excess of an average of 100 pounds per day during the month; and

(b) Such person must provide proof satisfactory to the market administrator that the care and management of all the dairy animals and other resources necessary to produce the entire volume of fluid milk products (excluding receipts from pool plants) and the operation of the processing and distribution business is the personal enterprise of and at the personal risk of such person.

CONCLUSIONS

1. The Market Administrator of Order 124 correctly determined that Echo Spring was not a producer-handler for the period of November 1983 through December 1984 because the care and management of all the dairy animals and other resources necessary to produce the entire volume of fluid milk was not the personal enterprise of and at the personal risk of Echo Spring.

2. The Market Administrator of Order 124 correctly determined that, from November 1983 through December 1984, Echo Spring was subject to full regulation under Order 124 as a pool plant; thereby owing the producer-settlement fund $415,948.28 inclusive of late charges, and the administrative fund $17,024.78, inclusive of late charges.

DISCUSSION

Until July 1, 1983, Echo Spring was fully regulated under Order 124 as the operator of the Eugene, Oregon, creamery which had the status of a "pool distributing plant." On July 1, 1983, in order to obtain "competitively-priced milk" (Pet. brief, at 2), Echo Spring leased from Maddox Dairy, Ltd., its dairy operation and herd in Burrel, California. Since then, Echo Spring has been an Oregon corporation consisting of two divisions, a creamery division located in Eugene, Oregon, and a dairy division located in Burrel, California. (Pet. brief, at 2).

Upon completion of the lease transaction in mid-1983, Maddox Dairy, Inc., became a 20% shareholder in Echo Spring, and Steve Maddox was hired and paid by Echo Spring to run its dairy division in Burrel, California. The books and records of the dairy division are kept in Riverdale, California, where its accounting proce-

dures are handled by Mr. Rick Stacy who, although an independent accountant, spends 100% of his working hours on the accounts of Maddox entities and, as part of those duties, handles the accounting procedures for Maddox Dairy-Division of Echo Spring. Approximately half of the milk produced at the dairy farm in Burrel goes to Echo Spring's creamery in Eugene, Oregon; the rest is sold, through Maddox, to Danish Cooperative Creamery in Fresno, California.

Mr. James Burger, Market Administrator of Order No. 124, was advised by Echo Spring of these arrangements and, by letter dated June 30, 1983, gave tentative approval to Echo Spring's request for designation as a producer-handler. In so doing, he was applying Order 124's very liberally written producer-handler provisions which provide a broad-based exemption from the Order's monetary obligations not typically available under other federal milk orders. It is axiomatic, however, that whenever a milk order's exemptive producer-handler provisions are applied, they are to be strictly construed. *See Andrew W. Leonberg*, 32 Agric. Dec. 763, 801 (1973). Therefore, when later apprised by his auditors that Maddox Dairy-Division of Echo Spring was participating with various Maddox entities in a concentration account form of banking which made the deposits of each participant available to fund the others and resulted in Maddox Dairy-Division of Echo Spring using money above its own generated income, the Market Administrator properly concluded that Echo Spring was not entitled to exemption as a producer-handler. Petitioner has argued that the Market Administrator's computations, showing Maddox Dairy-Division of Echo Spring to have used more money than it generated, fail to take into account various offsetting debits for obligations owed it by Maddox entities that participated in the concentration account. This argument, however, only confirms the fact that Echo Spring did not have control over the bank account of the dairy farm operation. Maddox employees had the power to dictate transfers among the eleven participating entities, and during the months studied by the Market Administrator and his auditors, unassigned funds of the ten participating Maddox entities were applied to service the banking needs of the Maddox Dairy-Division of Echo Spring, demonstrating that its operation was not at the personal risk of Echo Spring.

Order 124 specifically restricts producer-handler status to those who:

> ". . . provide proof satisfactory to the market administrator that the care and management of all the dairy animals

and other resources necessary to produce the entire volume of fluid milk products (excluding receipts from pool plants) and the operation of the processing and distribution business is *the personal enterprise of and at the personal risk of such person*." (7 CFR 1124.12(b); underscoring supplied).

Echo Spring complains that the Market Administrator's reading of this Order provision is far too literal and unduly restrictive. In point of fact, only a very expansive reading of the Order's language enabled the Market Administrator to initially determine that Echo Spring's operations met producer-handler standards. Nor is petitioner helped when all of the facts of its operations (see finding of fact 17) are examined in terms of the Act's objectives and those of Milk Order 124.

In authorizing the marketwide pooling of all proceeds on milk sales subject to a federal milk order's regulation, the Act seeks to establish the return of uniform weighted average prices to the producers who serve the regulated market's need for a stable supply of milk. Additionally, it seeks to maintain competitive equity among the market's milk handlers by requiring each to pay for milk at its value as used by each handler. These objectives of the Act are effectuated by requiring all regulated handlers, other than those qualifying under the producer-handler exemption, to make monthly payments into Order 124's producer-settlement fund. Handlers are further required to make monthly payments to the Order's administrative fund to equitably spread the cost of the Order's operations among them all.

Any handler selling milk to the market who is exempted from these payments gains advantage over his fully regulated competitors. Furthermore, producers lose the benefit of the exempted producer-handler's fluid milk sales in the calculation of monthly uniform and weighted average prices for their milk.

For these reasons, Order provisions exempting producer-handlers are, necessarily, narrowly construed. *See Leonberg, supra*. Whenever such an exemption is claimed in circumstances where it appears that more than one entity is involved in the movement of milk from cow to consumer, convincing proof is needed to negative the normal inference that a sale has taken place. Otherwise, those producers who faithfully serve the regulated market may be improperly deprived from sharing, as is their right, in the proceeds of all sales in the market, and competing handlers may suffer competitive disadvantage. Such proof has not been provided in this case.

Review of earlier cases interpreting producer-handler order provisions indicates that even if Echo Spring had not participated in a concentration account form of banking, it would be hard pressed to prove its entitlement to producer-handler exemption. *See Elm Spring Farm Inc.* v. *United States*, 127 F.2d 920 (1st Cir. 1942); *Cosgrove* v. *Wickard*, 49 F.Supp. 232 (D.Mass. 1943); *Andrew W. Leonberg, supra; Sherman Fitzgerald, a/b/a Sher-Von Dairy*, 31 Agric. Dec. 593 (1972); *Clyde Lisonbee, d/b/a Temple-View Diary*, 31 Agric. Dec. 952 (1972); *Willow Crossing Dairy Farm, Inc.*, 29 Agric. Dec. 1007 (1970); *Fred B. Brown and Jennie Brown, d/b/a Gem Dairy*, 23 Agric. Dec. 18 (1964); *Eugene M. Olson*, 22 Agric. Dec. 877 (1963); *Independent Milk Producer-Distributors Associates*, 20 Agric. Dec. 1 (1961).

Under these circumstances, it cannot be said that the Market Administrator was arbitrary in concluding that the proof provided him was unsatisfactory and did not establish that the dairy farm operation in Burrel, California, was the personal enterprise of and at the personal risk of Echo Spring.

Petitioner has further argued that any monetary obligations that are imposed against it should be limited to those occurring after the Market Administrator issued his letter of September 28, 1984, in which he advised petitioner of its disqualification. However, the record shows that petitioner's participation in the concentration account, and the manner of its participation, was not brought to the Market Administrator's attention until an audit conducted in July 1984. He then properly studied the matter and after orally advising the petitioner of his concerns in August, he issued a timely written decision. To limit the assessments to the three months of October, November, and December of 1984, when the petitioner continued its practices in spite of the adverse determination by the Market Administrator, would stand justice on its head.

The following Order is therefore being entered.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner contends that the ALJ's findings are not supported by substantial evidence. But the record contains abundant evidence to support his findings. In addition, it is well settled that in a proceeding such as this, under § 8c(15)(A) of the Act, the burden of proof rests with petitioner. Petitioner has the burden of proving that the challenged obligations are "not in accordance with law" (7 U.S.C. § 608c(15)(A)).[3]

[3] *Lewes Dairy, Inc.* v. *Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc.* v. *Freeman*, 358 F.2d 681, 682 (2d

Continued

Petitioner contends on appeal that the Market Administrator disavowed reliance on any circumstance other than the concentration account, in reaching his decision that petitioner did not qualify as a producer-handler under the Order. However, although the circumstances involving the concentration account were the strongest circumstances relied on by the Market Administrator, his decision was also based on other circumstances referred to by the ALJ (see, e.g., Tr. 348–55, 382–403).

Petitioner argues that the ALJ was biased against the producer-handler exemption. But there is nothing in the record to support that view. The ALJ merely followed the Department's well settled principle that the producer-handler exemption should be strictly construed.

For example, in *In re Leonberg*, 32 Agric. Dec. 763, 799–801 (1973), it is stated:

> A producer-handler is exempt from payments into the producer-settlement fund on milk handled by him which payments represent, as indicated above, the amount by which the value of his milk at the class prices exceeds its value at the blend price. Obviously, a distinct economic benefit inures to a producer-handler under the Order, and the other dairy farmers who receive the uniform blended price do not share in the benefits from the producer-handler's Class I milk utilizations.[10]

[10] The producer-handler exemption was sharply criticized in the *Report to the Secretary of Agriculture by the Federal Milk Order Study Committee*, p. 57 (1962), which states:

Historically, exemption from regulation has been given to certain handlers, particularly public-owned processors and producer distributors. Little justification exists today for exemption from regulation and only under the most unusual circumstances should such exemptions be granted.

If handlers were able to circumvent the requirements of the Order by employing spurious schemes to claim producer-handler status, it would bring chaos to the milk industry. As stated in Elm Spring Farm v. *United States*, 127 F.2d 920, 927 (C.A. 1):

Cir. 1966); *United States* v. *Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied*, 374 U.S. 832, 375 U.S. 819 (1963); *Windham Creamery, Inc.* v. *Freeman*, 230 F. Supp. 632, 635–36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co.* v. *Jones*, 61 F. Supp. 209, 217 (E.D. Mo. 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc.* v. *Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860, 862–63 (3d Cir. 1945).

> The result inevitably would be that the whole regulatory scheme would break down. The maintenance of the uniform blended price to each producer, whether or not his milk goes predominantly into the fluid milk market, is impossible unless handlers who have more than the market average of fluid milk sales make the prescribed equalization payments into the pool. The Act and the Order seek to achieve a fair division of the more profitable fluid milk market among all producers, thereby eliminating the disorganizing effects which had theretofore been a consequence of cutthroat competition among producers striving for the fluid milk market. This is clearly set forth in the opinion in United States v. Rock Royal Co-operative, Inc., 1939, 307 U.S. 533, 548, 550, 59 S. Ct. 993, 83 L. Ed. 1446.

While the Secretary could have elected to fully regulate producer-handlers (*Freeman* v. *Vance*, 319 F.2d 841, 842 (C.A. 5), certiorari denied, 377 U.S. 930; *Ideal Farms, Inc.* v. *Benson*, 288 F.2d 608, 618 (C.A. 3), certiorari denied, 372 U.S. 965), he has not done so in this Order. But producer-handler status is an exception to the general regulatory scheme of the Act, and as such it must be strictly construed, and must be established by a handler seeking the exception. See *Trade Comm'n* v. *Morton Salt Co.*, 334 U.S. 37, 44-45; *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U.S. 1, 10; *Detroit Edison Co.* v. *Securities & Exchange Commission*, 119 F.2d 730, 739 (C.A. 6), certiorari denied, 314 U.S. 618; *Shilkret* v. *Musicraft Records*, 131 F.2d 929, 931 (C.A. 2), certiorari denied, 319 U.S. 742. The burden of proof is upon the petitioner to show that the Market Administrator's determination that it is not entitled to the producer-handler exemption is not in accordance with law (see citations immediately above; and *Lewes Dairy, Inc.* v. *Freeman*, 401 F.2d 308, 316-317 (C.A. 3), certiorari denied, 394 U.S. 929; *Boonville Farms Cooperative, Inc.* v. *Freeman*, 358 F.2d 681, 682 (C.A. 2); *Windham Creamery, Inc.* v. *Freeman*, 230 F. Supp. 632, 635-636 (D.N.J.), affirmed, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979; *Bailey Farm Dairy Co.* v. *Jones*, 61 F. Supp. 209, 217 (E.D. Mo.), affirmed, 157 F.2d 87 (C.A. 8), certiorari denied, 329 U.S. 788; *Wawa Dairy*

Farms v. *Wickard*, 56 F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 863 (C.A. 3)).

Claims to producer-handler status have been frequently litigated because of the economic benefits resulting therefrom and because of the variety of schemes and devices handlers have employed to claim producer-handler status. As was stated in *In re Independent Milk Producer-Distributors Association*, 20 Agriculture Decisions 1, 28 (1961):

> The regulatory scheme set forth in such section is merely an attempt to prevent the evasion or circumvention of the distinction established in the order between producer-handlers and handlers by methods employed in the past or those that could be reasonably anticipated. In the past, elaborate and ingenious schemes have been employed to achieve apparent producer-handler status and thus to circumvent regulation. See, *e.g.*, *Elm Spring Farm, Inc.* v. *United States*, 127 F.2d 920 (1st Cir. 1942); *In re Martin & Costa*, 4 A.D. 636 (1945); *In re John Velozo*, 5 A.D. 739 (1946), and cases cited therein.[11]

[11] See, also, *Brown* v. *United States*, 367 F.2d 907, 910-911 (C.A. 10), certiorari denied, 387 U.S. 917; *Cosgrove* v. *Wickard*, 49 F. Supp. 232, 233-238 (D. Mass.).

> For this reason, and by virtue of the fact that producer-handler status represents a defined and circumscribed exemption from or exception to regulation, the producer-handler definition of Order No. 36 (7 CFR 1036.14) should be strictly construed and strictly complied with to achieve such exemption.

The same principle was applied in *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 982-98 (1974), in affirming a decision by a Market Administrator that a dairy lost its producer-handler status for a month in which it gratuitously stored one tanker of milk for another milk company as a "courtesy." In affirming the Market Administrator's determination, the Judicial Officer stated (33 Agric. Dec. at 985-86):

> The loss of the petitioner's "producer-handler" exemption for the month of July 1972 in the circumstances of this case is a very harsh and unfortunate result. Although the petitioner was contractually obligated to supply milk to Flagstaff Milk Company, and petitioner stored the milk

for Flagstaff when it could not fulfill its contractual obligation, there is no evidence that Flagstaff would have sought damages from petitioner for its failure to meet its contractual obligation. Moreover, petitioner saved Flagstaff only $200 or $300 by storing the milk. On the other hand, petitioner lost its "producer-handler" status for the month, which cost it about $7,500. Obviously, neither the petitioner nor Flagstaff contemplated the effect of the storage on petitioner's "producer-handler" status.

The storage occurred when the petitioner's President was out of town. As stated by the Administrative Law Judge (Initial Decision, p. 6):

> The simple fact is, Petitioner is a relatively inexperienced producer-handler whose operating personnel entered into this arrangement to assist one of their customers with no realization of the possible legal consequences that might flow from it. It was a mistake.

However, the Market Administrator has no authority to amend the Order to protect a handler from the consequences of unwise or mistaken action. It is the duty of the Market Administrator to "[a]dminister the order in accordance with its terms and provisions" (7 CFR 1000.3(b)(1)). Any amendments must come from the Secretary of Agriculture—not the Market Administrator. 7 U.S.C. 608c(1). See, also, *Foster* v. *Freeman*, 271 F. Supp. 33, 38–39 (S.D.N.Y.); *In re Heber Valley Milk Company*, 31 Agriculture Decisions 1319, 1332 (1973), affirmed, *Heber Valley Milk Co.* v. *Butz*, 32 Agriculture Decisions 1630 (D. Utah), reversed and remanded because of inadequate District Court findings, No. 73-1725 (C.A. 10), decided June 26, 1974 [, *aff'd*, No. C-354-72 (D. Utah Dec. 9, 1974) (decision on remand), *printed in* 34 Agric. Dec. 45 (1975)]. If the Order produces inequitable or harsh results, the remedy is by means of an amendment to the Order by the Secretary. Until the Order is amended, the plain terms of the Order must be followed.[3]

[3] An amendment to permit petitioner to retain "producer-handler" status for July 1972 in the circumstances of this case would not appear administratively desirable, see, *infra*.

If the Market Administrators of approximately 60 milk Orders, regulating over $4 billion worth of milk annually,

had the power to alter the terms of the Orders to effectuate what they regarded as equity in each case, the entire regulatory program would break down. Also, suspicions would arise that their views were influenced by extraneous factors such as friendship, political affiliation, campaign contributions, etc.

In the *Associated Milk* case, just discussed, the great weight to be given to the Market Administrator's interpretation of the Order is stated as follows (33 Agric. Dec. at 982-83):

> The Market Administrator charged with the responsibility of enforcing the Order interpreted the word "[r]eceives" in accordance with its normal, dictionary definition. His interpretation is entitled to great weight. *Lawson Milk Company* v. *Freeman*, 358 F.2d 647, 650 (C.A. 6); *Allen M. Campbell Co. Gen. Con., Inc.* v. *Lloyd Wood Const. Co., Inc.*, 446 F.2d 261, 265 (C.A. 5). See, also, *Udall* v. *Tallman*, 380 U.S. 1, 16-17; *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414; *Federal Comm'n* v. *Broadcasting Company*, 309 U.S. 134, 143, fn. 6; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 335; *United Truck Lines* v. *Interstate Commerce Commission*, 189 F.2d 816, 817 (C.A. 9), certiorari denied, 342 U.S. 830; *L. Gillarde Co.* v. *Joseph Martinelli & Co., Inc.*, 169 F.2d 60, 60-61 (C.A. 1), certiorari denied, 335 U.S. 885; *Armstrong Co.* v. *Walling*, 161 F.2d 515, 517 (C.A. 1); *Superior Packing Co.* v. *Porter*, 156 F.2d 193, 195 (C.A. 8), certiorari denied, 329 U.S. 788; *Bowles* v. *Mannie & Co.*, 155 F.2d 129, 133 (C.A. 7), certiorari denied, 329 U.S. 736; *Bowles* v. *Cudahy Packing Company*, 154 F.2d 891, 892 (C.A. 3); *In re Yasgur Farms, Inc.*, 33 Agriculture Decisions 389, 417-418 (1974); *In re Weissglass Dairy Corporation*, 32 Agriculture Decisions 1004, 1055 (1973), affirmed, *Weissglass Gold Seal Dairy Corporation* v. *Butz*, 369 F. Supp. 632 (S.D.N.Y.).

The doctrine of affording considerable weight to the Administrator's interpretation is particularly applicable in the field of milk. As stated by the Court in *Queensboro Farms Products* v. *Wickard*, 137 F.2d 969, 980 (C.A. 2):

> The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for

that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

For the foregoing reasons, the Market Administrator's determination should be upheld, and the petition should be dismissed.

ORDER

The petition is hereby dismissed and the relief requested therein is denied.

In re: KENNETH BURDETTE and JAMES BURDETTE. A.Q. Docket No. 167. Decided January 22, 1986.

Interstate movement of cattle.

Kris Ikejiri, for complainant.
Kent O. Hyde, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. Section 111 and Section 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Kenneth Burdette and James Burdette violated the Act and regulations promulgated thereunder (9 CFR Section 71.1 *et seq.* and Section 78.1 *et seq.*) Respondent Kenneth Burdette and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent Kenneth Burdette admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Kenneth Burdette also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Kenneth Burdette, respondent, is an individual whose address is Route 1, Pleasant Hope, Missouri 65725.

2. On or about July 11, 1984, the respondent moved interstate from Pleasant Hope, Missouri, to Lamar County, Texas, approximately five cattle.

CONCLUSIONS

Respondent, Kenneth Burdette having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Kenneth Burdette is assessed a civil penalty of one thousand five hundred dollars ($1,500.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day of the service upon the respondent.

In re: JOHN A. EASTWOOD. A.Q. Docket No. 157. Decided January 27, 1986.

Interstate movement of brucellosis-exposed cattle.

Ronald A. Cipolla, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed March 15, 1985, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated sections 78.8(a)(2), 78.8(a)(3) and 71.18(a)(1)(ii) of the regulations promulgated thereunder (9 CFR §§ 78.8(a)(2), 78.8(a)(3) and 71.18(a)(1)(ii)). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were attempted to be served by the Hearing Clerk, by certified mail, upon respondent but were returned "unclaimed", and were subsequently served by regular mail.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the com-

plaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and respondent has not requested an oral hearing. There is some indication in the file that, before the General Counsel, the Respondent was represented by an Attorney. However, no written entry of appearance has been made herein.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. John A. Eastwood, herein referred to as the respondent, is an individual whose mailing address is Box 141, Boswell, Oklahoma 74727.

2. On or about June 29, 1983, the respondent moves interstate 39 head of brucellosis exposed cattle from Boswell, Oklahoma, to Texarkana, Texas, in violation of section 78.8(a)(2) of the regulations (9 CFR § 78.8(a)(2)) in that the cattle were not accompanied by a VS Form 1-27 permit or an "S" brand permit, as required.

3. On or about June 29, 1983, the respondent moved interstate 39 head of brucellosis exposed cattle from Boswell, Oklahoma, to Texarkana, Texas, in violation of section 78.8(a)(3) of the regulations (9 CFR § 78.8(a)(3)) in that the cattle were not "S" branded, as required.

4. On or about June 29, 1983, the respondent moved interstate 39 head of brucellosis exposed cattle from Boswell, Oklahoma, to Texarkana, Texas, in violation of section 71.18(a)(1)(ii) of the regulations (9 CFR § 71.18(a)(1)(ii)) in that the cattle were not accompanied by an owner's or shipper's statement or other document, as required.

CONCLUSION

Respondent has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above the respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent John A. Eastwood is hereby assessed a civil penalty of three thousand dollars ($3,000). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on January 27, 1986.—Ed.]

In re: BILL JOHNSON d/b/a BILL JOHNSON CATTLE COMPANY, and EDGAR L. HOLCOMB. A.Q. Docket No. 158. Decided January 28, 1986.

Interstate movement of cattle.

Mark Dopp, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent Edgar Holcomb violated sections 78.3(b) and 78.8(a)(2) of the regulations promulgated thereunder (9 CFR §§ 78.3(b) and 78.8(a)(2)). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by

the Hearing Clerk, by certified mail, upon respondent Edgar Holcomb.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent Edgar Holcomb was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent Edgar Holcomb that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent Edgar Holcomb has failed to respond in any manner to allegations in the complaint and respondent Edgar Holcomb has not requested an oral hearing.

Respondent Edgar Holcomb's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent Edgar Holcomb's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Edgar L. Holcomb, herein referred to as a respondent, is an individual whose mailing address is General Delivery, Ft. Deposit, Alabama.

2. On or about September 27, 1984, the respondent Edgar L. Holcomb moved one (1) bull from Montgomery, Alabama, to Brookville, Indiana, in violation of section 78.8(a)(2) of the regulations (9 CFR § 78.8(a)(2)) in that the bull was not accompanied by a VS Form 1-27 permit or an "S" brand permit, as required.

3. On or about September 27, 1984, the respondents moved one (1) bull from Montgomery, Alabama, to Brookville, Indiana, in violation of section 78.3(b) of the regulations (9 CFR § 78.3(b)) in that the bull was not accompanied by a permit, as required.

CONCLUSION

Respondent Edgar L. Holcomb has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above the respondent Edgar L. Holcomb has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent Edgar L. Holcomb is hereby assessed a civil penalty of one thousand dollars ($1000). The respondent Edgar L. Holcomb shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent Edgar Holcomb, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on January 28, 1986.—Ed.]

In re: JAMES GRADY, PATRICK J. GRADY and ROSEMARY GRADY. A.Q. Docket No. 54. Decided January 31, 1986.

Violation of regulations governing interstate cattle movement.

The Judicial Officer affirmed Judge McGrail's order assessing civil penalties totalling $29,000 for violating the regulations governing the interstate movement of cattle to prevent the spread of brucellosis. Respondents failed to have a statement or other document showing prescribed information accompanying their cattle moved interstate, failed to have a health certificate, and failed to have cattle identified by a backtag or other approved identification. Intrastate health certificates lack the detail required for interstate movement. Respondents' failure to testify gives rise to the inference that their testimony would have been adverse. Even if respondents could have shown that the regulations were not scrupulously followed in other cases, that would not be a defense here.

Thomas E. Bundy, for complainant.
Warren L. Bush, for respondents.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR §§ 71.18, 78.9). An initial Decision and Order was issued on September 26, 1985, by Administrative Law Judge Edward H. McGrail (ALJ) assessing civil penalties totalling $29,000.

On October 28, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's

cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on November 29, 1985.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few changes too trivial to be itemized), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is an administrative proceeding instituted by a complaint filed on March 15, 1984, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, seeking assessment of civil penalties against respondents under the Act of February 2, 1903, as amended, 21 U.S.C. §§ 111 and 120, and the regulations promulgated thereunder (9 CFR §§ 71.18 and 78.9). An amended complaint was filed on October 2, 1984, pursuant to the Rules of Practice, 7 CFR § 1.130 *et seq.*

The amended complaint alleges thirty-one (31) violations involving interstate movement of cattle during the period March 11, 1983, through December 4, 1983. All violations involved interstate movement of cattle to or from the State of Iowa, a Class A State, without being accompanied by a certificate or other document showing prescribed information as required by the pertinent regulations, specifically 9 CFR §§ 71.18, 78.9(b)(3)(ii) and 79.9(c)(3)(ii). Respondent James Grady is cited for twenty (20) violations; respondent Patrick J. Grady is cited for six (6) violations; respondent Rose Mary Grady is cited for two (2) violations; and respondents James Grady and Patrick J. Grady are jointly cited for three (3) violations.

Answer to the original complaint was filed by respondents on March 15, 1984, denying all material allegations. In answer to the amended complaint, filed by respondents on October 21, 1984, all allegations were again denied, as well as paragraph I(c) citing Rose

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Mary Grady as a respondent. However, whereas counsel for respondents filed the original answer as a representative for James Grady, Patrick J. Grady and Rose Mary Grady, the answer to the amended complaint was filed as representative of James Grady, Patrick J. Grady and Rose Mary Kryeakakis.

Oral hearing was held before the undersigned Administrative Law Judge on May 7–9, 1985, at Sioux City, Iowa. Complainant was represented by Thomas E. Bundy, Esq., and Kevin Thiemann, Esq., Office of General Counsel, U.S. Department of Agriculture, Washington, D. C. Respondents were represented by Warren L. Bush, Esq., Wall Lake, Iowa. Simultaneous briefs were requested to be filed on or before July 10, 1985 and reply brief on or before July 30, 1985. Complainant's brief was filed on July 10, 1985. Respondent's brief was not filed until July 16, 1985. A reply brief was filed on or before July 30, 1985, by complainant. However, no reply brief was filed on behalf of respondents.

STATEMENT OF LAW

Generally, Title 21 of the United States Code, § 122, provides for the assessment of civil penalties for the violation of regulations issued pursuant to authority invested in the Secretary of Agriculture in Sections 111 and 120 of Title 21 of the United States Code. Sections 111 and 120 of Title 21, United States Code, authorize the Secretary to promulgate such regulations as to prevent the introduction, dissemination, or spread of contagious animal diseases through interstate movements of cattle.

Sections 71.18, 78.9(b)(3)(ii) and 78.9(c)(3)(ii) of the regulations promulgated by the Secretary pursuant to the above authority require that cows over twenty-four months of age or parturient or postparturient from herds not known to be affected by brucellosis, and moved other than directly to slaughter or to a quarantined feedlot, must be accompanied on an interstate movement by a statement or other document showing prescribed information and a health certificate, and be individually identified with a U.S. Department of Agriculture prescribed backtag or other approved identification. For ready reference the specific sections of these regulations, as well as Sections 111, 120, and 122 of Title 21, United States Code, are set forth in Appendix A hereto.

The States of Iowa, South Dakota and Nebraska are Class A states, as designated by 9 CFR 78.20(b). The area of Montana which includes Valley County (Hinsdale) was a Class A area at the time of the movement in question, as designated by 9 CFR 78.20(b).

The State of Oklahoma is a Class B state, as designated by 9 CFR 78.20(c).

FINDINGS OF FACT AND CONCLUSIONS

General Findings

So that repetition may not burden the length of these findings, certain General Findings pertaining to two or more of the allegations of the amended complaint are set forth as follows:

1. The record does not clearly show whether each of the respondents own or operate individual farms at Dunlap, Iowa. It is therefore assumed that there is one "Grady" farm at Dunlap, Iowa, which was used by all respondents for the interstate movement of the cattle involved herein.

2. The records of the South Dakota Livestock Sanitary Board, Pierre, South Dakota (Board) were searched for the period March to September 1983 by experienced personnel of the Board and by Mr. George Crowell, Compliance Officer, U.S. Department of Agriculture, to determine whether any health certificates consigning cattle owned by James Grady, Patrick Grady or Rose Mary Grady from any point in Iowa to any point in South Dakota had been received by the Board. A negative reply, dated January 11, 1984, was received from Dr. D. E. Hughes, State Veterinarian and Executive Secretary of the Board. The search by Mr. Crowell also proved negative. These records were not searched for the name Rose Mary Kryeakakis (CX-91; Tr. 373-375).[1]

3. The records of the Iowa Department of Agriculture, Division of Animal Industry, Des Moines, Iowa (Department) were caused to be searched by experienced personnel of that Department to determine if any health certificate had been issued to James Grady, Patrick Grady, Wendell Grady or Rose Mary Grady for the importation of cattle into the State of Iowa, or the export of cattle from Iowa to the States of Minnesota, South Dakota and Nebraska during the year 1983. This Division is the repository for copies of health certificates issued by accredited veterinarians for the interstate movement of cattle. When cattle are moved from Iowa, a copy of the health certificate is forwarded to the destination state. In turn, Iowa receives a copy of any health certificate from the origin state when Iowa is the destination state. These searches failed to show any health certificates issued in any of these names for the interstate movement of cattle in the year 1983. The name Rose Mary Kryeakakis was not searched through these records (CX-60-61; Tr. 303-308, 309-313).

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[1] Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent respectively. References to the hearing transcript are designed "Tr."

4. Brucellosis is an infectious, contagious, communicative disease of livestock which can also infect humans. In livestock it is considered a reproductive disease which causes abortions, weak and still born calves, and a decrease in milk production of the cows. Additionally, it can cause undulant fever in humans who come in contact with infected livestock. Nationwide, production losses to the livestock industry due to brucellosis infected cattle has been estimated as approximately $30 million per year (Tr. 10–11, 17).

5. The overall aim of regulations governing the interstate movement of cattle is to eradicate such animal diseases as brucellosis and tuberculosis in order to reduce and prevent losses to the livestock industry. They also provide protection to the receiving state and to a buyer of livestok against the introduction of such infectious diseases into the herds of the state and the individual. Specifically, the prescribed metal eartag enables authorities to trace the animal back to its source and identify other animals that have been associated with that animal in its travel (Tr. 9, 431–432).

6. Test eligible animals, subject to the regulations and moving from a Class A or B state, are designated by age or as parturient or postparturient. A parturient cow refers to one showing visible signs of approaching parturation, or calving, or within two weeks of calving. Postparturient refers to a cow that has given birth to a calf. The usage of the term "cow/calf pairs" implies in the language of the industry, a cow and a calf born of that same cow. They are in fact a pair (Tr. 16–18, 429).

One method of determining the age of a cow is by a mouth inspection of its teeth. However, an experienced person may also determine the age of a cow from physical changes which take place in a cow in proceeding through the various stages of growth. Such changes include the addition or loss of teeth, the widening of the mouth as additional teeth are formed, the formation of a longer head, bone structure changes in the body, development of the udder after calving and weight (Tr. 67–68; 103–104; 115–116; 180–182).

7. In 1983, there were some Simmental cattle at the Grady farm; however, it was unknown as to whether or not they were registered. The only testimony or documents of record relating to purebred cattle is that relating to the Limousin breed (RX–9, Tr. 465, 500, 514–515). There is no evidence of record which shows that the requirements for classifying Simmental cattle are the same as those required for classifying Limousin cattle. Generally, a tattoo in a cow's ear is not recognized by a purebred association unless a certificate has been issued by that association. The registered certificate should accompany these cattle. Without the registration

certificate, the tattoo would not be recognized as anyone with a tattoo iron could tattoo any cow.

The record fails to show that any of the cattle shipped by respondents were accompanied by a purebred association certificate. To the contrary, it has been shown that the cattle shipped were crossbred cows (CX-13, 18, 31, 68, 74; Tr. 40-42; 93-94; 124-129; 219; 229-230; 240-244; 321; 354; 384-385).

Specific Findings

As with the counts of the complaint the below listed findings will be treated *seriatim*.

I

(a) Respondent Patrick J. Grady is an individual whose mailing address is Dunlap, Iowa 51529.

(b) Respondent James Grady is an individual whose mailing address is Dunlap, Iowa 51529.

(c) Respondent Rose Mary Grady is an individual whose mailing address is 7703 Cedarwood Circle, Boca Raton, Florida 33432. She is the same individual identified in the record as Rose Mary Kryeakakis.

II-III

Mr. Leslie Pedersen, Denison, Iowa, provided an affidavit showing that on March 11, 1983, while an employee of Les Brown Trucking, he loaded 54 cows at the Wendell Grady farm, Dunlap, Iowa, transported them to a weighing station at Dunlap, Iowa, then transported them to Donald Vogt's farm near Blair, Nebraska. He could not recall having been provided any certificates by the Gradys to accompany the cattle. The only document he was provided was an invoice for the price of the cattle which he gave to Mr. Donald Vogt upon delivery. Mr. Vogt gave him a check made out to Pat Grady for the cost of the cattle which he gave to Pat Grady. Mr. Vogt paid for the cost of transportation of the cattle from Dunlap, Iowa, to Blair, Nebraska (CX-50; Tr. 267).

An affidavit of Mr. Donald J. Vogt, a farmer and cattle feeder, Rte. 1, Blair, Nebraska, obtained by a compliance officer, Agriculture Veterinary Service, U.S. Department of Agriculture (USDA), stated that on or about March 11, 1983, he received a shipment of 54 cows, all over two years of age, at his farm in Blair, Nebraska, from the Grady farm, Dunlap, Iowa. He had previously examined these cows at the Grady farm and was told they had been pregnancy tested and were all open. Almost all of the cows had had at least one calf, and four or five of the cows had calves soon after he received them.

This shipment of cows was first taken to Dunlap, Iowa, for weighing after which Mr. Vogt agreed to purchase the cows. The Gradys made the arrangements for the Les Brown Trucking Company to transport these cows to Dunlap, Iowa, and later to Mr. Vogt's farm in Blair, Nebraska. The Gradys paid for the trucking into Dunlap, Iowa and Mr. Vogt paid for the trucking from Dunlap, Iowa to his farm in Blair, Nebraska. The check for the cows was either sent back with the truck or it was mailed. Mr. Vogt did not receive a health certificate when the cows were delivered. The only document he received was an invoice showing the number of cows delivered, the price per hundredweight and the total dollar amount due (CX-27; Tr. 163).

Mr. Maurice Partridge, former compliance officer, Agriculture Veterinary Service, USDA, new retired, while on active duty obtained a copy of the invoice from Mr. Vogt which showed that the 54 cattle weighed a total of 41,935 pounds and, at $52.50 per hundredweight, Mr. Vogt paid a total of $22,015.88. From this amount, $72.00 was deducted for the cost of transportation from Dunlap, Iowa, to Blair, Nebraska, leaving a total of $21,943.88 as the amount to be paid to Pat Grady for these cattle (CX-25; Tr. 162).

Mr. Partridge also obtained from Mr. Vogt a copy of a sight draft dated March 11, 1983, paid to the order of Pat Grady in the amount of $21,943.88 for 54 heifers at $52.50 per hundredweight. The buyer was listed at Donald H. Vogt. The sight draft was drawn on the Washington County Bank of Air, Nebraska, endorsed by, and deposited in the account of Pat Grady (CX-26; Tr. 162).

The above facts are not rebutted in this record. The 54 parturient/postparturient cows were moved from the Grady farm, Dunlap, Iowa, to Mr. Vogt's farm at Blair, Nebraska, an interstate movement. Mr. Pedersen, the truck driver who delivered the cattle, was not provided an owner's statement nor a health certificate to accompany the cattle. He was only given an invoice listing the amount of money to be paid for the cattle. Such invoice does not comply with the requirements of § 71.18. Documents of record show that the invoice was issued by Pat Grady, and that payment for the cattle was made to, and acknowledged by check endorsement by Pat Grady. See also General Findings 2 and 3, *supra*.

Nor can respondent Patrick Grady claim that this movement, without the required certificate, comes within the exceptions set forth in § 78.9(b)(3)(iii) or 78.9(b)(3)(iv) since the Grady farm cannot be considered a "Farm of Origin", as defined in § 78.1(dd). The record shows that it was a place where purchased cattle were assembled for sale. Moreover, § 79.9(b)(3)(iv) provides the exception only when there is an interstate movement of cattle without

change of ownership to another premise belonging to the same owner. The latter was not the situation here since the cattle were moved to Mr. Vogt's farm.

Therefore, it must be found that Patrick Grady moved, or caused to be moved interstate, 54 parturient/postparturient cows over 2 years of age, from Dunlap, Iowa, to Blair, Nebraska, without being accompanied by an owner's statement or other document in violation of § 71.18, and without a certificate, as defined in § 78.1(n), in violation of § 78.9(b)(3)(ii).

IV

Mr. Dan Snyder, Sr., Atkinson, Nebraska, is a livestock trucker in partnership with his sons, Melvin, Danny and Clifton, and his son-in-law, Les Nelson, operating under the name Snyder Trucking. During 1983, he received a number of calls from Pat Grady for need of a truck to transport cattle. Upon receipt of such a call he would contact one of his sons, or son-in-law, whoever was available, to respond to Pat Grady's request. The information concerning the dates of trips and who transported a specific load was provided him by his sons and son-in-law (CX-4; Tr. 46-47).

Mr. Danny D. Snyder, Jr., Atkinson, Nebraska, is the son of Dan Snyder, Sr., and is a driver for Snyder Trucking. On May 23, 1983, Pat Grady helped him load 43 cows, 4 bulls, and 34 calves from the Grady farm in Dunlap, Iowa to be delivered to the Kehn Ranch, St. Charles, South Dakota. Pat Grady, who was the owner of the cattle, gave him a sealed envelope which he assumed contained the health papers to accompany the cattle. Mr. Snyder delivered the cattle to a pasture location at the Kehn Ranch, Inc., St. Charles, South Dakota (Tr. 56-60; CX-5, 7).

Mr. Edwin C. Kehn is a rancher, who operates Kehn Ranch, Inc., St. Charles, South Dakota. Kehn Ranch grazes livestock in its pastures for a fee. Mr. Kehn has had conversations with Jim Grady but the bulk of his business has been with Pat Grady. On May 23, 1983, he received a shipment of cattle from Pat Grady, Dunlap, Iowa, consisting of 34 cow/calf pairs, 9 heifers and 4 bulls, a total of 81 cattle to be let out in his pasture for the grazing season. The cattle were delivered by Danny D. Snyder of Snyder Trucking who acknowledged on a Kehn Ranch "Cattle Kit" form that he had deliverd a total of 81 cattle consisting of the 34 cow/calf pairs, 9 heifers and 4 bulls. Mr. Kehn was only given a bill of lading by Danny Snyder, whereas he also expected to receive the necessary health papers for these cattle. When Mr. Kehn contacted Pat Grady about health papers, Pat Grady advised that they would be forthcoming but Mr. Kehn never received them (CX-8).

On May 24, 1983, Pat Grady and Mr. Kehn signed an agreement whereby Mr. Kehn agreed to pasture at his ranch the above 34 cow/calf pairs, 4 bulls and 9 yearling heifers owned by Pat Grady. At the same time, Pat Grady issued a check to Mr. Kehn in the amount of $1,150.00 for the services provided by Mr. Kehn. The cattle were placed in a separate pasture on Mr. Kehn's ranch, and remained there throughout the grazing period.

While the cattle were still in pasture at the Kehn Ranch, an agent from the South Dakota State Livestock Sanitary Board (Sanitary Board) contacted Mr. Kehn regarding health papers on the cattle shipped by Pat Grady to the Kehn ranch. The agent was advised by Mr. Kehn that no health papers for the cattle were provided by Pat Grady. Later, Mr. Kehn was visited by another agent from the Sanitary Board inquiring about the health papers for the Pat Grady cattle. Since none were provided by Pat Grady, the agent issued a citation, dated October 17, 1983, in the name of Patrick J. Grady, notifying him that his cattle were quarantined for lack of a health certificate. These were the same Pat Grady cattle Mr. Kehn received on May 23, 1983 (CX-5, 40-42; Tr. 227-237).

Mr. Kehn believed that possibly one of the cows could be a purebred cow but that the others were crossbreeds. However, he believed if any of the cattle were purebred, Pat Grady would have identified them. Mr. Kehn would also want to know about them for purposes of insurance (CX-43-46; Tr. 239-251).

His opinion as to what type of cows they were was based on their appearance, and the fact that if they were purebred such would certainly show up in the calves. Such purebred characteristics and markings did not show in the calves involved. Additionally, the calves would be more valuable, have been registered, and have been accompanied by the necessary purebred papers. Further, it has been his experience that a purebred calf not only bears an ear tattoo but also a metal tag for identification to match up with the mother cow. None of the calves had metal eartags, nor did several of the calves he examined have ear tattoos.

From the record, it is readily apparent that 34 cow/calf pairs were moved from the Grady farm, Dunlap, Iowa, to the Kehn Ranch, St. Charles, South Dakota, an interstate movement. It is equally apparent that the 34 cow/calf pairs were owned by Patrick Grady, and were moved by him interstate for the purpose of grazing them on land owned by the Kehn Ranch. The signed agreement shows that the fee paid by Patrick Grady was for grazing and other services to be provided and was not a lease for the grazing land. That the required certificate for the interstate transportation of these cattle was never obtained, or provided, is attested to by the

citation issued by the Sanitary Board of the State of South Dakota. See General Findings 2 and 3, *supra*. Nor is the exception of § 78.9(b)(3)(iv) available to respondent. Although ownership was retained by Patrick Grady, the cattle were not moved to another premises owned by him.

Therefore, it must be found that Patrick Grady moved, or caused to be moved interstate, 34 postparturient cows from Dunlap, Iowa, to St. Charles, South Dakota, in violation of § 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not accompanied by a certificate, as required.

V

Clifton J. ("Tip") Snyder, O'Neill, Nebraska, is the son of Dan Snyder, Sr., identified in Finding IV, and is a driver for Snyder Trucking. On June 8, 1983, in response to a call from his father, he picked up 45 cow/calf pairs and 2 bulls from the Grady farm, Dunlap, Iowa, for delivery to Vance M. Feyereisen, Iona, South Dakota. His "Permit for Live Stock Transportation," No. 1711, dated June 8, 1983, showed the name of John Kryeakakis, Dunlap, Iowa, as the owner. Jim Grady signed as the authorized agent for the owner. He listed only the total number of cow/calf pairs and the two bulls on this Permit. As a transporter of cattle, he is required to fill out this Permit by the State of Nebraska for every load of cattle he hauls. He was given the name of the owner and the fact that he was from Florida by Mr. Feyereisen. He only received a sealed envelope from Jim Grady to accompany the cattle and turned it over to the consignee upon delivery of the cattle. Mr. Snyder did not know what was in this envelope (CX-49, 11; Tr. 71-75).

Mr. Vance M. Feyereisen, Gregory, South Dakota, provided an affidavit stating that in June and July, 1983, Pat and Rose Mary Grady boarded cattle in his pastures. He was present each time when the cattle were unloaded, but the truck driver did not provide him with any official health papers on either load when the cattle were delivered, nor did he have any record of eartags being on the cattle. By a written agreement, dated June 8, 1983, between "John Grady," cattle owner, and Mr. Feyereisen, the latter agreed to provide grazing in Lyman County, South Dakota, and other services for 45 cow/calf pairs and two bulls for the 1983 season of no less than five (5) months, at the rate of $14.00 per month per cow/calf pair, and $14.00 per month for each bull. Mr. Feyereisen signed the agreement before a notary public on June 8, 1983. Although the name "John Grady" is the name listed in the body of the agreement, it was deleted as the owner on the signatory line

and the name Rose Mary Grady was inserted as cattle owner. Rose Mary Grady signed the agreement before a notary public in Broward County, Florida, on June 21, 1983. John Grady was inserted in this agreement because Mr. Feyereisen assumed the "John" who was at his ranch was John Grady. However, he was in error and this was the reason for the signature change in the agreement. The "John" was believed to be John Kryeakakis (CX-65, 66).

The evidence of record shows that Rose Mary Grady was the owner of the 45 cow/calf pairs and two bulls involved here, that James Grady was her authorized agent, and that the cattle were moved interstate for her benefit and at her behest from Dunlap, Iowa to grazing land owned by Mr. Feyereisen in Lyman County, South Dakota. These facts are not rebutted in this record. See also General Findings 2 and 3.

As with Finding IV, the signed agreement shows that the fee charged Rose Mary Grady was for grazing and other services to be provided and not for lease of grazing land. Further, since James Grady was designated as her duly authorized agent she, as principal and owner of the cattle, is responsible for his action in moving the cattle interstate without a certificate as required. Further, the action of James Grady was acknowledged and approved by Rose Mary Grady in signing the grazing agreement approximately two weeks after the interstate movement of the cattle. Again, as with Finding IV, the exemption of Section 78.9(b)(3)(iv) is not available since the cattle were moved to a premise not owned by Rose Mary Grady.

Therefore, it is found that Rose Mary Grady moved, or caused to be moved, 45 postparturient cows interstate in violation of Section 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as they were not accompanied by a certificate, as required.

VI

Mr. Clifton J. ("Tip") Snyder is the same person identified in Finding V, *supra*. In response to a call from his father on June 21, 1983, he transported a load of cow/calf pairs, some loaded at the Grady farm, Dunlap, Iowa, and some loaded at the Moorehead Livestock Market, Moorehead, Iowa. He delivered some of these cattle to a farm near Moville, Iowa, and the remainder to a sale barn in Huron, South Dakota. As with the previous load in June, 1983, he received a sealed envelope from one of the Gradys and was told it contained the health papers covering the cattle. Upon arrival at this destination, this sealed envelope was delivered to the consignee. Jim Grady paid for the transportation of these cattle. The Nebraska "Permit for Live Stock Transportation," No. 1714, dated

June 21, 1983, which Mr. Snyder filled out, shows Jerry Bales, Huron, South Dakota, as owner, and that 23 cow/calf pairs were transported from Dunlap, Iowa, to Huron, South Dakota on that date. Total transportation charges were $393.90 toward which Jim Grady paid $100. The authorized owner's agent was shown as (sic) Alan Bales (CX-4, 11, 70; Tr. 79-80, 84-85).

At a meeting between Mr. George Crowell, Compliance Officer, Animal and Plant Health Inspection Service, USDA, Jerry, Kent and Allen Bales, records of the Bales Continental Commission Company (BCCC), Huron, South Dakota, were provided which showed that this company purchased 23 mixed cow/calf pairs at $525.00 per pair, a total of $12,075.00, from Jim Grady, Route 2, Dunlap, Iowa, and that $150.00 was added for charges by Snyder Trucking. The company records also showed that it issued a check to Jim Grady, dated August 22, 1983, in the amount of $12,075.00.

It was explained by Jerry Bales in an interview with Mr. Crowell that Jim Grady had contacted that company to have them sell some of his cattle at their auction barn. When the cattle first arrived, Jim Grady was advised they were too thin and would not sell for the price Jim Grady desired. It was recommended before any sale that they be placed in pasture, and they were. A month or two later, Jim Grady called Jerry Bales advising him of his need for money. At that time, the above check was issued to Jim Grady (CX-68-69; Tr. 341-347).

Documents and testimony of record show that 23 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa, to the BCCC, Huron, South Dakota, an interstate movement requiring the necessary certificate. Although Mr. Snyder, the truck driver for this movement, listed Mr. Jerry Bales as the owner of these cattle on his permit, it is clear from other testimony and documents of record relating to the transaction that James Grady was the owner of the 23 cow/calf pairs and shipped them to BCCC for sale at auction.

The above evidence is not rebutted in this record. See General Findings 2 and 3, *supra*. As stated in Findings II-III, the exceptions set forth in § 78.9(b)(3)(iii) and § 78.9(b)(3)(iv) are not available here for the reasons stated in that Finding. It must therefore be found that James Grady moved, or caused to be moved interstate the postparturient cattle involved here in violation of Section 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as they were not accompanied by a certificate, as required.

VII

Mr. Leslie Dean Brown, Denison, Iowa, has been transporting livestock approximately six years under the name Les Brown Trucking Company. He stated in his affidavit that during the period July to October, 1983, nine loads of cattle were moved by his trucking company from the Grady farm at Dunlap, Iowa, to various locations in South Dakota. His company records show that on July 12, 1983, he transported 96 cattle from the Grady farm at Dunlap, Iowa, and delivered them to "Armstrong, Flandreau, South Dakota." These cattle were mostly cow/calf pairs. The movement of these cattle was ordered by Jim Grady. However, the only papers provided to accompany the cattle was a sealed envelope which was turned over to the consignee upon delivery (CX-22; Tr. 264-266).

Mr. Douglas A. Armstrong, Flandreau, South Dakota, has been a farmer for eight years. In his affidavit, he stated that in the summer of 1983, he saw an ad in the Sioux Falls Argus Leader advertising cows for sale in Iowa. Initially, Mr. Douglas asked his brother-in-law, Sam Flinders, Sutherland, Iowa, to examine some of the cow/calf pairs advertised. Later, Mr. Douglas went to Dunlap, Iowa, where he contracted with Jim Grady to purchase 48 cow/calf pairs. Mr. Flinders was not with him at the time of the purchase, nor did he have any financial interest in the transaction. Mr. Armstrong paid Jim Grady $1,000.00 as a down payment on the purchase price of the cattle. It was understood that Jim Grady was to deliver these cattle to him at Flandreau, South Dakota, and that Jim Grady was to take care of the necessary papers and health certificate.

Upon delivery at his farm, the only papers provided Mr. Armstrong by the truck driver was an intrastate health certificate. This was made out to Sam Flinders, his brother-in-law, who had no interest in the cattle, and was made out for intrastate shipment to Sutherland, Iowa. The "Intrastate Health Certificate" was issued on July 11, 1983, by the Iowa Deparment of Agriculture, Division of Animal Industry, and contained the caution "Not Valid for Interstate Shipment." It showed that on the date issued, the seller, James Grady, had 48 cattle tested (No. 42CND2101 through No. 42CND2148) for brucellosis. Their backtags were listed as Nos. 3550-3598, with No. 3567 being voided. The purchaser was listed as Sam Flinders, Sutherland, Iowa. Mr. Armstrong gave the truck driver a certified check, made out to Jim Grady, for the balance due on the purchase price of the cattle, and also gave the truck driver a personal check for the transportation charges due.

Mr. Armstrong provided a copy of a certified cashier's check, No. 46504, dated July 11, 1983, "Payable to James Grady for deposit only at the Dunlap Savings Bank." The check was issued in the amount of $26,120.00 which reflected the purchase price agreed upon, $27,120.00, less the $1,000.00 Mr. Armstrong had previously given James Grady as a down payment on the cattle. This check was given to the truck driver to be delivered to James Grady (CX-71, 72, 73; Tr. 348-350, 388-389).

Affidavits on record reflect that 48 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa, to the farm of Mr. Armstrong at Flandreau, South Dakota, an interstate movement. The record also reflects that negotiations for the purchase of the 48 cow/calf pairs were carried out between James Grady as owner and Mr. Armstrong as purchaser. That the latter was the true purchaser is evidenced by the fact that he paid $1,000.00 down as part of the purchase price and the remainder of the purchase price by a certified check obtained by Mr. Armstrong the day prior to delivery of the cattle. There is no indication in the record to show that Mr. Les Brown, the truck driver, ever stopped in Sutherland, Iowa. Rather, the record shows that it was a straight haul to Flandreau, South Dakota.

Additionally, the health certificate issued by the Iowa Department of Agriculture, Division of Animal Industry, clearly carried the caution that the certificate was not valid for interstate shipment. As has been noted in the record, the information required by an interstate certificate is more detailed than that required on the Iowa Intrastate Health Certificate (Tr. 13). These facts are not rebutted in this record. See General Findings 2 and 3, *supra*.

Although the documents and testimony pertaining to this count, as also in other counts, were objected to on the basis of hearsay, the Rules of Practice applicable to this proceeding permit reception into the record of relevant and material evidence, § 1.141(g)(iv). Further, responsible and probative hearsay evidence is admissable in administrative proceedings. Such proceedings are not bound by the procedural and evidentiary rules in effect in court proceedings. See 1 Davidson, *Agricultural Law*, § 3.22 and cases cited therein at fn. 113.

Therefore, it must be found that James Grady moved, or caused to be moved, 48 postparturient cows from Dunlap, Iowa, to Flandreau, South Dakota, in violation of Section 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as the cows were not accompanied by an interstate health certificate, as required.

VIII

Mr. Clifton J. ("Tip") Snyder is the same person identified in Finding V, *supra*. In response to a call from his father, Dan Snyder, Sr., on July 19, 1983, he picked up 45 cow/calf pairs at the Grady's farm, Dunlap, Iowa, and delivered them to Mr. Vance Feyereisen, Iona, South Dakota. The name he placed on his Nebraska "Permit for Live Stock Transportation," No. 1718, dated July 19, 1983, as owner was "Sam B. in care of Pat Grady." Mr. Snyder believed that Pat Grady may have been acting for someone else. As with the previous loads of cattle in June, 1983, Mr. Snyder was only given a sealed envelope to accompany the cattle and told that the envelope contained the necessary health papers for the cattle. On each trip he delivered the sealed envelope to the consignee. Pat Grady paid for the transportation of these cattle (CX-4, 10, 11; Tr. 75-79, 82-84).

Mr. Vance M. Feyereisen, Gregory, South Dakota, is the same person identified in Finding V, *supra*. As with the delivery in June, the truck driver that delivered the July load of cattle did not leave any official health certificate, nor does Mr. Feyereisen have records which show the cattle had eartags. Mr. Feyereisen was present when these cattle were unloaded. An agreement, dated July 19, 1983, between Mr. Feyereisen and Rose Mary Grady, cattle owner, provided that the former would provide grazing land in Lyman County, South Dakota for 45 cow/calf pairs and 2 bulls for approximately 4 months at a price of $14.00 per month, per cow/calf pair, and $14.00 per month per bull. It also included other services to be provided by Mr. Feyereisen, and obligated Rose Mary Grady to pay the sum of $1,316.00, for grazing and services. The agreement was signed by Mr. Feyereisen on July 26, 1983, and by Rose Mary Grady as cattle owner on August 4, 1983, before a notary public in Broward County, Florida (CX-65, 67; Tr. 340-341).

The record is clear that 45 cow/calf pairs and two bulls were owned by Rose Mary Grady and were moved for her benefit and at her behest from the Grady farm, Dunlap, Iowa to grazing land owned by Mr. Feyereisen in Lyman County, South Dakota, an interstate movement. As with the previous shipment of cattle in June 1983, Rose Mary Grady acknowledged and approved this movement by signing the grazing agreement approximately one week following their delivery to South Dakota. This agreement was for use of grazing land and other services and was not a lease for the land. As found in Findings IV and V, the exemption found in § 78.9(b)(3)(iv) is not available to Respondent since the premises were not owned by Rose Mary Grady. See General Findings 2 and 3, *supra*.

Therefore, it is found that Rose Mary Grady moved, or caused to be moved, 45 postparturient cows interstate in violation of § 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as the cows were not accompanied by a certificate, as required.

IX

The records of Mr. Leslie Dean Brown, who is identified in Finding VII, show that 90 head of cattle were transported on July 31, 1983, from the Grady farm at Dunlap, Iowa, by one of his drivers, Jim Comstock. Jim Grady ordered the movement of these cattle. As with other shipments transported from the Grady farm, the only papers that accompanied the load was a sealed envelope (CX-22, Tr. 265-266).

Mr. Jim Comstock, Denison, Iowa, has on occasion driven a livestock truck for Leslie Brown, *supra*. On or about July 31, 1983, he loaded approximately 90 head of cattle at the Grady farm, Dunlap, Iowa. This load consisted of approximately 45 cows and 45 calves. At the time of loading, one of the Grady brothers, an older man, and Leslie Brown were present. Mr. Comstock delivered these cattle to two different farms, one in Trent, South Dakota, and the other in Dell Rapids, South Dakota. As far as he knew there were no health papers given him to accompany the cattle. However, he was given a sealed envelope to leave with the consignees and health papers may have been in this sealed envelope (CX-51; Tr. 269-270).

Mr. Gary Williams farms and raises cattle at Trent, South Dakota. He purchased 30 cow/calf pairs and 1 Limousin yearling bull from Jim Grady which were delivered to his farm at Trent, South Dakota on July 31, 1983. When Mr. Williams and Jim Grady arrived at an agreement on the purchase of these cattle, Mr. Williams understood that the necessary health papers would accompany the shipment of cattle. Jim Grady arranged for the transportation of the cattle. The only paper presented to him by the trucker upon delivery of the cattle was a handwritten invoice addressed to him showing the price per cow/calf pair ($537.50), the total price for the 30 cow/calf pairs ($16,125), the price for the Limousin bull ($600), and the total price for the shipment ($16,725). A notation on the invoice stated "make check to Jim Grady." Mr. Williams indicated on this invoice that check no. 1062, dated July 31, 1983, was issued at 10:00 p.m. that evening. A copy of the check indicates that it was issued to Jim Grady on July 31, 1983, in the amount of $16,725, and that it was endorsed by Jim Grady.

Mr. Williams did not check the cattle for identification at the time of delivery because of the darkness. However, a few days

later, he brought the cattle out of pasture and ran them through a restraining chute to put his own eartags and pasture identification numbers on them. Upon examination, none of the cattle had metal eartags or other identification. He did not check for ear tattoos (CX-18, 19, 20; Tr. 122-130).

Affidavits of record show that 45 cow/calf pairs and one bull were transported from the Grady farm, Dunlap, Iowa, to two separate locations in South Dakota, an interstate movement. As pertinent to this finding, 30 cow/calf pairs and 1 bull were delivered to Mr. Williams' farm at Trent, South Dakota. As will be shown in Findings X-XI, *infra*, the remaining 15 cow/calf pairs were delivered to Mr. Mark Crisp, Dell Rapids, South Dakota.

The transaction here involved Jim Grady as the seller and Mr. Williams as the purchaser. Transportation was arranged by Jim Grady and a check was issued to him by Mr. Williams in payment of the purchse of 30 cow/calf pairs. Additionally, it is apparent that the only document accompanying the shipment was an invoice for the price of the cattle. A health certificate, as described in § 78.1(n) was not provided Mr. Williams by Jim Grady. See General Findings 2 and 3, *supra*. The affidavits here provide substantial evidence to prove the violation alleged and, although they may be considered hearsay evidence, they are admissible in an administrative hearing, as noted in Finding VII.

Therefore, it must be found that James Grady moved, or caused to be moved, 30 postparturient cows from Dunlap, Iowa to Trent, South Dakota in violation of § 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as the cows were not accompanied by a certificate, as required.

X-XI

The records of Mr. Leslie Dean Brown, identified in Finding IX, show that on July 31, 1983, one of his drivers, Jim Comstock, transported 90 head of cattle from the Grady farm, Dunlap, Iowa, to Trent, South Dakota.

Mr. Jim Comstock, also identified in Finding IX, on or about July 31, 1983, loaded 90 head of cattle at the Grady farm, Dunlap, Iowa, under the same set of circumstances as set forth in Finding IX. He delivered these cattle to two different farms in South Dakota. As pertinent to this Finding, these cattle were delivered to a farm approximately 1 mile southeast of Dell Rapids, South Dakota. As far as Mr. Comstock knew, there were no health papers given him to accompany the cattle. However, he was given a sealed envelope to leave with the consignee and health papers may have been contained in this sealed envelope (CX-51; Tr. 269-270).

Mr. Mark Crisp is a farmer who resides in Dell Rapids, South Dakota. In two affidavits he stated that in response to an ad he had seen in the Sioux Falls Argus Leader, he called Mr. Grady and told him that he was interested in crossbred cows. Several weeks later, Pat Grady called Mr. Crisp and told him that such cows were available and that they were vaccinated and tested. Mr. Crisp bought 15 cow/calf pairs which were delivered to him on the night of July 31, 1983. However, the trucker did not deliver any health certificates for the cattle to him. The cows delivered to him did not have any metal eartags, plastic tags or paper backtags, nor did Mr. Crisp receive a brand certificate, or breed association certificate for any of the cattle.

Mr. Crisp contacted Pat Grady who told Mr. Crisp that he could not provide a health certificate for the cattle he had purchased. When asked about eartags, Pat Grady told him that any eartags the cows may have had were removed because he did not sell cattle with eartags. Check No. 2462, dated July 31, 1983, in the amount of $8,250.00 was issued by Mr. Crisp to Pat Grady in payment for the 15 cow/calf pairs delivered to him. The check shows that it was endorsed by Pat Grady (CX-74, 75, 76; Tr. 251-254).

The affidavits of record clearly show the transportation of 15 cow/calf pairs from the Grady farm, Dunlap, Iowa, to the farm of Mr. Crisp at Dell Rapids, South Dakota, an interstate movement. That these 15 cow/calf pairs were owned by Pat Grady, as distinguished from those delivered to Mr. Williams, Trent, South Dakota, which were owned by Jim Grady (Finding IX), is shown by the fact that Mr. Crisp conducted this purchase with Pat Grady and held him responsible not only for the necessary health certificate and identification papers, but also issued the check in payment for the 15 cow/calf pairs to Pat Grady. In negotiations, Mr. Crisp requested crossbred cows. Pat Grady represented and sold these cows to Mr. Crisp as crossbred cows. Thus, although Jim Grady arranged for the transportation of these cattle, as well as those in Finding IX, it is readily apparent that the 15 cow/calf pairs involved here were owned by Pat Grady. See General Findings 2 and 3, *supra*.

Again, as with findings VII and IX, the affidavits here are substantial evidence upon which to find the violations as alleged. Although they may be considered hearsay evidence, they are admissible as relevant and material in an administrative proceeding, as noted in Finding VII.

Therefore, it must be found that Patrick Grady moved, or caused to be moved, 15 postparturient cows from Dunlap, Iowa to Dell Rapids, South Dakota, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, in that the cows were not

identified with U.S. Department of Agriculture backtags or other approved identification, and were not accompanied by a certificate, as required.

XII-XIII

The records of Mr. Leslie Dean Brown, identified in Finding VII, show that on August 2, 1983, his driver, Harold Wulf, transported 65 head of cattle from the Grady farm, Dunlap, Iowa, to Egan, South Dakota and that on August 16, 1983, he himself transported a load of 63 head of cattle from the same origin to the same destination. These loads were mostly cow/calf pairs, and the movements were ordered by Jim Grady. The only documents accompanying these loads were invoices for the cost of the cattle. No health certificates or other documents were provided to accompany these shipments of cattle. Mr. Brown had never been told to pick up any health certificate or any other document at any point in the movement of cattle for Jim Grady to places in South Dakota or Minnesota (CX-22, 57; Tr. 265-266).

Mr. Harold Wulf, Denison, Iowa, is a truck driver and has on occasion driven a livestock truck for Mr. Leslie Brown, *supra*. On or about August 2, 1983, Jim and Pat Grady helped him load 65 head of cattle at the Grady farm, Dunlap, Iowa. Mr. Leslie Brown was also present at the time of loading. Mr. Wulf delivered some calves and yearlings to the Sheldon Sale Co., Sheldon, Iowa, and the remainder, 23 cow/calf pairs, to a farm approximately 8 miles north of Egan, South Dakota. The consignee was Mr. Hugh Hagel, Flandreau, South Dakota. Mr. Wulf testified that he was only given a sealed envelope to accompany the cattle which he gave to Mr. Hugh Hagel. Mr. Wulf was present when Mr. Hagel opened the envelope. The only document in the envelope was a note listing the price of the cattle and a request to make out the check for the cattle to Jim Grady. No health papers or other identifying papers for the cattle were included. Mr. Wulf recalled that the cattle were cow/calf pairs and it was his opinion that they were not purebred cows. He knew they were cow/calf pairs because the calves paired up with the respective mother cows when unloaded. He obtained two checks from Mr. Hagel, one made out to Les Brown in the amount of $150.00 for the trucking charges, and one made out to Jim Grady for something over $11,900.00 for the cattle. He brought back both checks and gave them to Leslie Brown (CX-37, 38; Tr. 217-225).

Mr. Hugh R. Hagel, Flandreau, South Dakota, advised in his affidavits that in August 1983 he purchased a total of 48 cow/calf pairs from Jim Grady, Dunlap, Iowa. When those cattle were deliv-

ered to his farm, the cows did not have any eartags, backtags or any other means of identification. Likewise, they were not accompanied by an official certificate, brand release, or breed association certificate (CX-77, 78).

Mr. George Crowell, Compliance Officer, Animal and Plant Health Inspection Service, USDA, obtained copies of four checks from Mr. Hugh Hagel. The first, check no. 9554, dated August 2, 1983, was issued to Jim Grady in the amount of $11,937.00. Mr. Hagel had noted on the copy of the check that it was for 23 pairs at $515.00 per pair plus a charge of $4.00 for worming each pair. The second, check no. 9555, dated August 2, 1983, was issued to Les Brown in the amount of $150.00 in payment of trucking charges for the transportation of these cattle. The third, check no. 9604, dated August 16, 1983, was issued by Jane E. Hagel, Mr. Hagel's wife, to Jim Grady in the amount of $12,850.00. Mr. Hagel's notation on the copy of the check shows that this amount was for 25 cow/calf pairs at $514.00 per pair. The amount of the check also included a $4.00 worming charge per pair. The fourth, check no. 9605, dated August 16, 1983 in the amount of $150.00 was issued to Les Brown in payment of trucking charges for the transportation of these cattle (CX-39; Tr. 356-358).

Testimony and affidavits of record show that on two separate dates, August 2, 1983, and August 16, 1983, a total of 48 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa to the farm of Mr. Hagel, Egan, South Dakota, an interstate movement. On the first date, Mr. Hagel received 23 cow/calf pairs and on the second date he received 25 cow/calf pairs. All 48 cow/calf pairs were purchased from Jim Grady, who was also responsible for their movement on both dates. The only document accompanying each load was an invoice for the cost of these cattle. Testimony of Mr. Wulf, who was present upon the opening of his sealed envelope, and by Mr. Hagel whose affidavit shows that no health papers or other documents listing or identifying the cows were found in the sealed envelopes presented to him by the drivers. The envelopes only contained invoices showing the price of the cattle delivered to him. On each occasion a check was issued to Jim Grady, the owner of the cattle, in payment for the delivered cattle. See General Findings 2 and 3, *supra.*

The affidavits of Mr. Brown and Mr. Hagel, together with the testimony of Mr. Wulf are substantial evidence upon which to find the violations as alleged. Mr. Hagel's affidavit is further corroborated by the checks issued in payment to Jim Grady for the cattle. As stated in other findings, *supra,* such affidavits are admissible as relevant and material in this administrative proceeding.

Therefore, it must be found that on August 2, 1983, and August 16, 1983, James Grady moved, or caused to be moved, 23 postparturient cows and 25 postparturient cows, respectively, from Dunlap, Iowa to Flandreau, South Dakota in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, in that the cows were not individually identified with U.S. Department of Agriculture backtags or other approved identification and were not accompanied by a certificate, as required.

XIV-XV-XVI

In his affidavit, Mr. Jerry Christensen, Secretary/Treasurer and Dispatcher, Speedway Transportation, Inc., Holdredge, Nebraska, stated that his company records show that on August 8, 1983 one of his trucks driven by David Johnson, Holdredge, Nebraska, transported cows and calves from Dunlap, Iowa to St. Paul, Nebraska. His records further show that Jim Grady was the shipper and owner of the cattle and that Mr. Harold Niemoth, Route 2, Grand Island, Nebraska, was the consignee. It is the policy of Mr. Christensen's company to have drivers request health certificates for the cattle they haul. However, he did not know if a health certificate was provided to accompany these cattle (CX-23; Tr. 155-156).

Mr. Daniel L. Johnson, Holdredge, Nebraska, is a truck driver employed by Speedway Transportation, Inc., *supra.* On August 8, 1983, he loaded about 35 cow/calf pairs at a farm southwest of Dunlap, Iowa. He could not recall the names of the men at the farm. He inquired about the necessary health papers to accompany the cattle, but he could not recall what he was told about them. He does know that he was not given any health papers. He could not recall the name of the consignee; however, he did deliver the cattle to the St. Paul Veterinary Clinic at St. Paul, Nebraska on that same date (CX-1; Tr. 31-33).

Dr. Lyle Rasmussen practices veterinary medicine at the St. Paul Veterinary Clinic, St. Paul, Nebraska (Clinic). He testified his records show that on August 8, 1983, he received a shipment of cattle at his Clinic which were owned by Mr. Harold Niemoth, Grand Island, Nebraska. The cattle, which were unloaded from a Speedway truck, consisted of 39 cows with calves, and were of various mixed breeds. Since he was aware that they had been shipped from another state, he asked the Speedway driver for the health certificate which should accompany such a shipment. He was advised by the driver that he did not have one. Dr. Rasmussen testified that the purpose of the stop-off was to brand, worm, dip and give shots to the cattle. This service was done at the request and expense of Mr. Niemoth. After the process was completed the

cattle were shipped to Mr. Niemoth at Grand Island, Nebraska. Dr. Rasmussen's records also show that at a later date, January 24, 1984, he went to the Niemoth farm where he bled and tested these cattle for brucellosis. It was his opinion that these were the same cow/calves he had examined on August 8, 1983, because they were the same breed mixture and of the same age range as those he had previously tested. His records also show that they were beef cattle imported into the State of Nebraska and that they ranged in age from three to twelve years. Metal eartags were also inserted because the cows were not carrying eartags when bled (CX-2, 3; Tr. 35-44).

Mr. Harold Niemoth owns a farm near Grand Island, Nebraska. In his affidavit he stated he purchased 39 cow/calf pairs, all over two years of age, from Jim Grady, Dunlap, Iowa. When they were delivered on August 8, 1983, they were not accompanied by a health certificate, brand certificate or any other document showing individual identification. Further, they had no metal eartags, or USDA backtags. A check obtained from Mr. Niemoth, No. 5883, dated August 7, 1983, shows that he issued it to Jim Grady in the amount of $20,475.00 in payment for 39 cow/calf pairs. This check was endorsed by Jim Grady (CX-28, 29; Tr. 165-166).

The discrepancy, if it can be considered one, between the "about 35 cow/calf pairs" recited by Mr. Johnson, *supra*, and the 39 cow/calf pairs actually received by Mr. Niemoth is noted and is not pertinent here since Mr. Niemoth has established that 39 cow/calf pairs were purchased and received by him. Dr. Rasmussen stated that he received at his Clinic 39 cow/calf pairs owned by Mr. Niemoth and which were later shipped to him that same date after processing.

Testimony and documents of record show that Jim Grady sold 39 cow/calf pairs to Mr. Niemoth, Grand Island, Nebraska. They were delivered to the St. Paul Veterinary Clinic, St. Paul, Nebraska for treatment, as described above, at the request of Mr. Niemoth. The records of Speedway Transportation, Inc., verify this movement. However, the record, either through testimony or affidavits, fails to show who transported the cattle from the Clinic to Grand Island, Nebraska, or who was responsible for this movement. It has been shown, however, that the delivery to the Clinic was only a stop-off for processing on the way to the Niemoth farm since the cattle were received there on the same day after the processing.

Although the record does not show that James Grady was responsible for the movement from the Clinic to Grand Island, Nebraska, it has been shown that James Grady was the owner and consignor of the cattle and that he shipped the 39 cow/calf pairs

from the Grady farm, Dunlap, Iowa to the Clinic in St. Paul, Nebraska, an interstate movement. It has also been shown that the truck driver received no identification papers or health certificate to accompany the shipment, although the cows were described by Mr. Niemoth as being over two years of age, and listed by Dr. Rasmussen as ranging in age from 3 to 12 years, with the majority being 4 years of age and older. I find to be very credible the testimony of Dr. Rasmussen that the cows he processed on August 8, 1983, were the same cows he tested for brucellosis at the Niemoth farm on January 24, 1984. See General Findings 2 and 3, *supra.*

Thus, whether the cattle were delivered directly to Mr. Niemoth at Grand Island, Nebraska, or to the Clinic at St. Paul, Nebraska, this was still an interstate movement instituted by James Grady, and subject to the regulations. Therefore, it is found that on or about August 8, 1983, James Grady moved, or caused to be moved interstate 39 postparturient cows over two years of age from the Grady farm, Dunlap, Iowa to the St. Paul Veterinary Clinic, St. Paul, Nebraska, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, as the cows were not individually identified with U.S. Department of Agriculture backtags or other approved identification; were not accompanied by an owner's statement or other document, as required; and were not accompanied by a certificate, as required.

XVII-XVIII-XIX

The records of Mr. Dan Snyder, Sr., who is identified in Finding IV, show that his company transported 42 cows and 32 calves from the Grady farm, Dunlap, Iowa, to Bill Allemang, Clearwater, Nebraska on August 15, 1983 (CX-4).

Mr. Les Nelson is the son-in-law of Dan Snyder, Sr., *supra.* He stated in his affidavit that on August 15, 1983, Dan Snyder, Sr., sent him to pick up a load of cattle at the Grady farm, Dunlap, Iowa. He loaded 32 cow/calf pairs at the Grady farm and approximately 4 or 5 cows at a sale barn near Moorehead, Iowa. When he asked for health papers to accompany the cattle, he was given a sealed envelope and told everthing he needed was in the envelope. He delivered the cows to Bill Allemang's farm near Clearwater, Nebraska and gave Mr. Allemang the sealed envelope. When Mr. Allemang opened the envelope in Mr. Nelson's presence, it only contained an invoice covering the cost of the cattle (CX-24).

Mr. William Allemang, Clearwater, Nebraska, is a farmer/rancher. He stated in his affidavit that on or about August 15, 1983 he bought 32 cow/calf pairs from Jim Grady, Dunlap, Iowa. They were mixed colored cows, some spotted, some black and some brown, and

the cows ranged in age from 2 to 5 years. On the same date, and on the basis that Jim Grady would pay the transportation costs in shipping these cattle, he purchased an additional 10 cows from Jim Grady. These latter were an average of about 4 years old and they gave birth to calves a few days after he received them.

The cattle were delivered to Mr. Allemang's pasture near Clearwater, Nebraska. The truck driver gave him a sealed envelope which accompanied the cattle. However, when he opened it, it only contained a self-addressed envelope to Jim Grady, an invoice addressed to him showing the purchase of "32 mixed pairs" for $17,600.00, and the purchase of "10 bred cows" for $4,100.00. A notation on the invoice stated "make check to Jim Grady." Jim Grady's telephone numbers were listed as (712) 643-2187 and (712) 643-5495. (These are the same telephone numbers as are listed in CX-32, the advertisement in the Grand Island (Neb.) Daily Independence at page 34. See Findings XX, XXI and XXII). The truck driver was present when he opened the envelope. These cattle were not accompanied by a health certificate, brand certificate, or any other document showing individual identification of the cattle. Mr. Allemang did not examine the cows for ear tattoos.

Mr. Allemang provided a copy of a sight draft, dated August 15, 1983, made out to Jim Grady in the amount of $21,700.00 in payment for the 42 cows and 32 calves. The sight draft was given to the truck driver who then forwarded it to Jim Grady. It was later endorsed by Jim Grady and cleared the Dunlap Savings Bank, Dunlap, Iowa, on August 19, 1983.

Mr. Allemang stated that he later had the Grady cattle, as well as four other cows in the same pasture, examined for brucellosis inasmuch as the Grady cattle had come into the state without proper blood testing (CX-13, 14, 15; Tr. 93-106, 119).

It is noted here that the Amended Complaint cites James Grady as having moved approximately 40 cows on this date, whereas Mr. Allemang acknowledges purchasing 42 cows and 32 calves from Jim Grady. The difference is not pertinent here. Mr. Allemang has acknowledged receiving and paying for the 42 cows and 32 calves in the shipment.

In his affidavit Richard N. Bruce, D.V.M., Orchard, Nebraska, stated that on September 28, 1983, he brucellosis tested 46 head of cattle for Mr. William Allemang, Clearwater, Nebraska. He understood that 42 of the cattle were recently purchased by Mr. Allemang and shipped into Nebraska without tests 3 or 4 weeks before, and the other 4 were cows he had running with them in the pasture. He noted that the majority of the cows were 6-10 years old, and that 4 or 5 of them were 3-4 years old. He further noted that

five of the cows had brucellosis vaccination tattoos, that one had an Iowa metal eartag, and that another cow had a Nebraska metal eartag. Some of the other cows had holes in their ears, indicating to him that they had previously been eartagged. He applied metal eartags to the 44 head which did not have them. Although Dr. Bruce did not mouth each cow, he recorded on his test sheet that they were all adult cows (CX-16; Tr. 174).

The documents of record show that 32 cow/calf pairs from the Grady farm, Dunlap, Iowa, and 10 cows from a sale barn at Moorehead, Iowa, were transported to the farm of Mr. Allemang, Clearwater, Nebraska, an interstate movement. It is clear that Mr. Allemang paid Jim Grady the amount for all of the cattle he received. It is also clear that only a sealed envelope was provided the truck driver to accompany the shipment and that when this was opened by Mr. Allemang it contained only an invoice listing total numbers of cattle and the price to be paid for each group. Added to the invoice was the notation to pay the purchase price to Jim Grady in the form of a check. No other identifying documents or health certificate accompanied this shipment. The sight draft for the amount due in payment of the cattle was made out to Jim Grady, forwarded to him by the truck driver, and endorsed by Jim Grady. It has also been shown that these cattle were tested by Dr. Bruce because they came into the State of Nebraska without the proper blood testing. The test chart of Dr. Bruce noted that these were the cows that were delivered to Mr. Allemang approximately 3 to 4 weeks previous, that the majority of the cows were of mixed breed and between 6 and 10 years of age, that one had an Iowa metal eartag while another had a Nebraska metal eartag, and that some had holes in their ears indicting that the eartags had been removed. See General Findings 2 and 3, *supra.* As noted in Finding VII, the affidavits here are relevant and material and are admissible in administrative proceedings.

Therefore, it must be found that James Grady moved, or caused to be moved interstate, forty-two cows either parturient or postparturient and over two years of age, from Dunlap and Moorehead, Iowa to Clearwater, Nebraska in violation of §§ 71.18 and 78.9(b)(3)(ii), Title 9, Code of Federal Regulations, because the cows were not individually identified with the U.S. Department of Agriculture backtags or other approved identification, as required; were not accompanied by an owner's statement or other document, as required; and were not accompanied by a certificate, as required.

XX-XXI-XXII

Mr. Dan Snyder, Sr., identified in Finding IV, stated that on September 2, 1983, his son, Danny Snyder, transported 31 cows from the Grady farm, Dunlap, Iowa, to the farm of Bob Ondracek, Greeley, Nebraska. On this trip Danny Snyder was checked for a health certificate at the state scales near Freemont, Nebraska. However, the sealed envelope given to his son at the Grady farm only contained a sales invoice and no health certificate. When he discussed this with his other drivers, Mr. Dan Snyder, Sr., was told that they also only received sealed envelopes to accompany any shipment of cattle from the Grady farm, Dunlap, Iowa (CX-4).

Mr. Danny Snyder, Jr., identified in Finding IV, on or about September 2, 1983, transported a load of cows for Pat and Jim Grady, Dunlap, Iowa, to Greeley, Nebraska. In filling out his Nebraska "Permit for Live Stock Transportation," No. 20727C, dated September 2, 1983, he recorded Pat and Jim Grady as the owners and Mr. Bob Ondracek, Greeley, Nebraska, as the consignee. Mr. Snyder listed the load as "31 heifers" because that is what he was told the load contained. However, in his opinion, they were full grown cows. As with other loads from the Grady farm, he received a sealed envelope, which he presumed contained the necessary health papers, to accompany the cattle. While enroute to Greeley, Nebraska, he stopped at the state scales at Freemont, Nebraska, where he was asked for the health papers. When he looked in the envelope, the only document it contained was a sales invoice covering the price of the cows on his truck (CX-6, 7; Tr. 60-68).

Mr. Bob Ondracek is a farmer residing near Greeley, Nebraska. In his affidavit he stated he purchased 31 bred cows from Jim Grady, Dunlap, Nebraska, which were delivered to him on September 2, 1983. These cows were not accompanied by a health certificate, brand certificate, or any other document showing individual cow identification. Nor did any of the cows carry metal eartags or USDA approved backtags. Mr. Ondracek had bangle tags placed on these cows for his own identification purposes. He purchased these cows through an advertisement he had seen in the Grand Island (Neb.) Daily Independent in late August or early September, 1983. He responded to the telephone numbers in the advertisement, (712) 643-2187 and (712) 643-5495, which resulted in his purchase of the 31 cows from Jim Grady. The telephone numbers listed in this newspaper advertisement are the same telephone numbers as are listed for Jim Grady on CX-13, and were later confirmed through the telephone company as being listed for Jim Grady and Pat Grady (See also Findings XVII-XVIII-XIX) (CX-32; Tr. 375).

Mr. Ondracek provided a copy of the invoice which was the only document he received from the truck driver upon delivery of these 31 cows. The invoice was addressed to him and listed the purchase price of "31 mixed bred cows", at $350.00 each for a total cost of $10,850.00. Mr. Ondracek made a notation on the invoice that he had issued check no. 2424 on September 2, 1983, in the amount of $10,850.00. Mr. Ondracek also provided a copy of check no. 2424, dated September 2, 1983, which showed that it was issued to Jim Grady in the amount of $10,850.00 for "31 cows." The check was endorsed by Jim Grady and was cleared through the Dunlap Savings Bank, Dunlap, Iowa (CX-30, 31, 32, 33; Tr. 166-173).

Mr. Maurice Partridge, identified in Findings II-III, was working at the state scales, Fremont, Nebraska, when Mr. Danny Snyder stopped there with the load of 31 cows on September 2, 1983. When Mr. Snyder was called in by the state scale operator all he had was a sealed envelope. When he opened the envelope it only contained an invoice. No health papers or other identifying documents were found in the envelope. Mr. Partridge looked at about two-thirds of the cattle through the slats in the trailer and in his opinion the load consisted of cows at least two years of age, and all of them appeared to have had at least one or more calves. He could not see any metal eartags on the cows. The only identification he could see on the cows were yellow bangle tags with numbers on them (Tr. 174-178).

An affidavit, dated March 6, 1985, provided by Doug Wurster, D.V.M., a partner for the past five years in the Twin Valley Veterinary Clinic, Dunlap, Iowa, stated that the records of the Clinic show no interstate health certificates for movement of cows were issued to Jim, Pat, or Wendell Grady in the 10 months prior to November 17, 1983. However, the Clinic records did show that six intrastate health certificates were issued to the Gradys during this time period. Of the cattle he has tested for the Gradys, none have had any identification and the eartags had obviously been removed from some cows (CX-52; Tr. 270-271).

Dr. Dan Nielsen, practices veterinary medicine at the St. Paul Veterinary Clinic, St. Paul, Nebraska. On September 7, 1983, he blood tested 31 cows recently purchased by Mr. Bob Ondracek. It was his understanding that Mr. Ondracek had purchased the cows in Iowa. When tested, a few of the first cows were mouthed and were found to be anywhere from four to six years of age. All 31 cows seemed to be a fairly uniform age group and he presumed that the cnes not mouthed were also four to six years of age. For this reason, he classified all of the 31 cows on his test sheet as adult cows. All of the cows had yellow plastic eartags which had

been previously placed on them by Mr. Ondracek. None had any official metal eartags. However, each of the cows had holes in their ears which were surrounded by scales. This indicated to him that they had had eartags but that they had been removed, possibly within the previous 2 or 3 weeks prior to the testing. It was his opinion that they were not removed by Mr. Ondracek since he did not have a restraining chute to hold a cow steady to remove such tags. Dr. Nielsen did not examine these cows for ear tattoos, nor was he acquainted with registration requirements for any purebred breed associations.

When these 31 cows were blood tested for brucellosis, each was identified by attachment of the approved metal eartag. Dr. Nielsen's records show that these cows were identified with metal eartags, numbers 47AVJ 4748 through 47AJV 4778, that he considered all of them to be adult cows, i.e, all over 2 years of age, and crossbred. All tested negative for brucellosis. Dr. Nielsen's records also show that Jim Grady, Dunlap, Iowa, paid for the 31 cows tested on September 7, 1983, and that he billed Jim Grady because Mr. Ondracek advised him that the owner of the cattle had agreed to pay for the testing. A receipt, no. 36025, acknowledging payment of $77.00, was issued by the Clinic to Jim Grady, owner, Dunlap, Iowa, for the testing of 31 cows for "blood test on Bob Ondracek cows."

Dr. Nielsen acknowledged that it was possible for a female cow to give birth at 16 months of age. However, it was his experience that owners of purebred cows would let them mature to 2 or 3 years before they would breed them. He would consider the general norm to be that a cow would birth a calf at two years of age (CX-62, 63, 64; Tr. 315-334).

The record, through testimony and documents, shows that 31 cows were transported from the Grady farm, Dunlap, Iowa to the farm of Mr. Bob Ondracek near Greeley, Nebraska, an interstate movement. Although the truck driver, Danny Snyder, was told by the Gradys that these cows were "heifers", and listed them as such on his Permit, it was his opinion that they were adult cows. Mr. Maurcie Partridge, Compliance Officer, U.S. Department of Agriculture, viewed about two-thirds of these cows at the Freemont, Nebraska State scales and believed them to be at least two years of age.

Dr. Nielsen blood tested the 31 cows and mouth examined the first few which he found to be 4 to 6 years of age. It was his opinion the others were of the same age group. He also noted that all of the cows had holes in their ears which were scaled, indicating to him that eartags had been removed 2 to 3 weeks before the testing

date. His bill for the testing was issued to, and paid by, Jim Grady who was listed as the owner of the cattle and responsible for the testing.

It is also apparent from the record that the only document provided the driver to accompany these cattle was an invoice listing the total number of cattle and the price. No identification papers or health certificate was provided him, nor were they provided Mr. Ondracek. See General Findings 2 and 3, *supra*. The bangle tags placed on these cows by Mr. Ondracek do not meet the identifying requirements of the regulations. Additionally, the amount due on the cattle was paid to Jim Grady, who acknowledged this payment by endorsement of the check. These facts are not rebutted in this record.

It is noted here, however, that both Patrick and James Grady are cited as dual violators under these counts. The only evidence of record to show that Patrick Grady was involved in this movement is the affidavit and testimony of Danny Snyder, the truck driver, who listed them as owners on his Permit. It is evident from the record that on several occasions both Patrick and James Grady were noted as having aided in loading cattle from the Grady farm. However, here the evidence is clear that James Grady alone negotiated with Mr. Ondracek for the purchase of the cattle, received payment for the cattle involved, and paid for the blood testing of the cattle. Therefore, I find that James Grady alone was responsible for this movement, and dismiss Patrick Grady as a party to these counts.

Therefore, it must be found that James Grady moved or caused to be moved interstate 31 cows, which were over two years of age, from Dunlap, Iowa, to Greeley, Nebraska, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not individually identified with the U.S. Department of Agriculture backtags or other approved identification; were not accompanied by an owner's statement or other document listing individual identification; and were not accompanied by a certificate, as required.

XXIII-XXIV

Mr. Leslie Dean Brown, identified in Finding VII, stated in his affidavit that his company records show on September 2, 1983, a load of cattle was picked up by one of his trucks at the Grady farm, Dunlap, Iowa, that 28 head were delivered to Harrisburg, South Dakota and the "rest of load" was delivered to (sic) "Klein, Del Rapids, South Dakota." As with previous loads picked up at the Grady farm, Dunlap, Iowa, the cattle were mostly cow/calf pairs.

Jim Grady ordered the movement of this load, and the only papers provided to accompany the cattle were invoices showing the cost of the cattle. No health certificates, or other identifying documents, were provided him or his drivers to accompany the interstate movement of the cattle (CX-22; Tr. 264-266).

In several affidavits provided by William J. Klein, Dell Rapids, South Dakota, he stated that on or about September 2, 1983, Jim Grady had 35 cow/calf pairs transported from Dunlap, Iowa to his farm in Dell Rapids, South Dakota. Mr. Klein noted that when unloaded, one of the cows was not the mother of the calf at her side. These cows were not accompanied by identification tags, backtags, eartags, breed registration papers, or any official health certificate. Before he had these cows tested, he sold nine of the cows for slaughter. Mr. Klein provided a copy of a check, no. 2830, issued by his wife on September 2, 1983, to Jim Grady in the amount of $16,625, in payment for the purchase of the 35 cow/calf pairs. This check was endorsed by Jim Grady. Mr. Klein provided a copy of a second check, no. 2831, also issued by his wife on September 2, 1983, to Les Brown in the amount of $175.00 in payment for trucking charges (CX-79, 80, 81, 82; Tr. 361-363).

Dr. Don M. Oolman, Jasper, Minnesota, a practicing veterinarian for thirty years, stated in his affidavit that on October 28, 1983, he tested 26 cows for Wiliam Klein, Dell Rapids, South Dakota. It was his professional opinion that all of the cows were over two years old. He further noted that he inserted eartags in each of the cows because they did not have official eartags. He listed all 26 as adult beef cows on his brucellosis test record, a copy of which was subsequently obtained from the South Dakota Livestock Sanitary Board (CX-83, 84; Tr. 361-363).

The documents of record show that 35 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa, to the farm of Mr. William Klein, Dell Rapids, South Dakota, an interstate movement. Further, that these cattle were not accompanied by any identifying documents or health certificate. Dr. Oolman noted, after testing the remaining 26 cows and based upon his years of experience in treating and testing cattle, that all of the cows were adult cows over two years of age. See General Findings 2 and 3, *supra*. Negotiations for the purchase of the cattle were conducted with Jim Grady, and the check for payment of the 35 cow/calf pairs was issued to, and endorsed by, Jim Grady. These facts are not rebutted in this record.

As was noted in Finding VII, the affidavits here comprise relevant and material evidence and are admissible in administrative proceedings. They provide substantial evidence to prove the viola-

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tions alleged. Therefore, it must be found that James Grady moved or caused to be moved interstate 35 postparturient cows over two years of age from Dunlap, Iowa, to Dell Rapids, South Dakota, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not individually identified with U.S. Department of Agriculture backtags or other approved identification; and were not accompanied by a certificate as required.

XXV

Mr. Dick Holmes is a truck driver for Sioux City Motor Express, Inc., Sioux City, Iowa. In his affidavit, he stated that on or about September 3, 1983, he was ordered by his dispatcher to pick up a load of cattle for Jim Grady at the Mid-America Stockyards, Bristow, Oklahoma. When he met Jim Grady at the Mid-American Stockyards, he told Mr. Holmes to proceed to a farm near Afton, Oklahoma, which he believed was the Dick Todd farm, and pick up a load of cattle. He believed it was the Todd brothers who helped him load 40 cows and 40 calves at the farm. He asked for the health papers when the loading was completed and was advised by the Todds that he didn't need any. When Mr. Holmes insisted on them they called Jim Grady at the Mid-America Stockyards, Bristow, Oklahoma. Mr. Holmes talked to Jim Grady of the need for health papers or other documents to accompany the cattle to Iowa. After Mr. Holmes again insisted on documents to accompany the cattle, Jim Grady impolitely ordered Mr. Holmes to get in his truck and go. Mr. Holmes then transported the 40 cows and calves to the Grady farm, Dunlap, Iowa, without any health certificate. Jim Grady's brother helped him unload the cattle (CX-53; Tr. 272-273).

Mr. Richard A. Gunderson, Compliance Officer, USDA, obtained a copy of a Sioux City Motor Express, Inc., bill of lading, no. 11781, dated September 3, 1983, from Mr. Holmes which showed that 40 cows and 40 calves were transported from the farm of Richard Todd, Jr., Vinito, Oklahoma to the consignee, Pat Grady, Dunlap, Iowa. Mr. Pat Grady signed the invoice when they were delivered (CX-54; Tr. 274-275).

Ms. Barbara Pearman, Supervisor, Records Section, Oklahoma Department of Agriculture, Oklahoma City, Oklahoma, provided an affidavit in which she stated that a search of the export files of that Department failed to show any documents issued to Jim or James Grady for cattle consigned from Mid-America L/S Auction, Bristow, Oklahoma, to Dunlap, Iowa (CX-1) nor was a destination copy of any export certificate received by the Iowa Department of Agriculture. See General Finding No. 3.

The affidavits of record show that 40 cows and 40 calves were transported from the Todd Brothers farm at Vinito, Oklahoma to the Grady farm, Dunlap, Iowa, an interstate shipment. It is apparent that although Mr. Todd is listed as the shipper, that the cattle were purchased by Jim Grady, and that he ordered their interstate movement. It is also apparent that "40 cows and 40 calves" were moved in this interstate shipment. However, the only indication that the 40 cows being transported may have been covered by the cited regulations was the request by Mr. Holmes for the health papers. This request alone is not sufficient to sustain the allegations here. Nor, is there any connective evidence to show the age of the cows, or whether they were "cow/calf pairs." The evidence only shows "40 cows and 40 calves" were transported. Since neither is shown, this allegation must be dismissed.

XXVI-XXVII

Mr. Melvin Snyder, Ansley, Nebraska, is the son of Mr. Dan Snyder, Sr., identified in Finding No. IV. Somewhere around the first of September, 1983, he received a call from Pat Grady, who wanted a load of cows transported to Avon, South Dakota. When Mr. Snyder advised Pat Grady that the cows would have to be brucellosis tested and have health papers to accompany them, Pat Grady became abusive and stated that the cows could be tested at destination. Pat Grady also stated that he would pay any fine if Mr. Snyder transported the cows. When Mr. Snyder refused to transport the cows without a health certificate, Pat Grady advised him he would get someone else to transport the cattle (CX-12; Tr. 87-91).

Mr. Bobby Lee Olsen, Avon, South Dakota, provided an affidavit in which he stated that he only transported one load of cattle for the Grady farm, Dunlap, Iowa, and that was to the Adolph Krcil farm near Avon, South Dakota. The load consisted of 29 cow/calf pairs; however, he was not given any health papers or certificates to accompany these cattle (CX-87; Tr. 366-367).

In his affidavit, Mr. Allen Krcil, Crooks, South Dakota, stated that on September 8, 1983, he purchased 29 cow/calf pairs from Jim Grady, Dunlap, Iowa. Jim Grady arranged for the transportation of these cattle which were delivered to Mr. Krcil's father's farm at Avon, South Dakota. The cows were not accompanied by any health certificates, nor did they have metal eartags or backtags (CX-85; Tr. 364-365). Mr. Krcil provided a copy of his check, no. 1534, dated September 8, 1983. This check was issued by Mr. Krcil to Jim Grady in the amount of $15,700.00 and was in pay-

ment of 29 cow/calf pairs. The check was endorsed by Jim Grady (CX-85; Tr. 365).

A copy of a Brucellosis Test Record, obtained from the South Dakota State Livestock Sanitary Board, shows that on October 30, 1983, Mr. Allen Krcil had 56 cows, described on the Test Record as adult, tested for brucellosis by Dr. David A. Barz, Parkston, South Dakota. At the time of the testing, a metal eartag was placed on each cow in numerical order (46INL2601-46INL2656). If there had been eartags on these cows, the record would have listed them and the numerical sequence would have been broken. The state veterinarian called Dr. Barz and was assured the cows did not have any previous metal eartags. Those designated in the extreme right column on the test record with the letter "H" were cows which Mr. Krcil already had on his farm, while those designated with the letter "P" were those purchased from Jim Grady, Dunlap, Iowa (CX-88; Tr. 367-371, 381).

Documents of record show that 29 cow/calf pairs were transported from the Grady farm, Dunlap, Iowa, to the farm of Mr. Allen Krcil's father near Avon, South Dakota, an interstate movement. The record further shows that the truck driver, Mr. Olsen, was not provided with any health papers to accompany this shipment of cattle, nor was any health certificate ever provided Mr. Krcil. It was noted by Mr. Krcil that the cows did not have any metal eartags, or backtags, when they were delivered at Avon, South Dakota. Because a health certificate was not provided, Mr. Krcil found it necessary to have these cows, along with others, brucellosis tested at a later date. At the time of the testing, Dr. Barz found it necessary to place eartags on these cows because none were present when received by Mr. Krcil or when tested by him for brucellosis. There is no question as to ownership of the cow/calf pairs, since Mr. Krcil stated they were purchased from Jim Grady, and a check for the purchase price was issued to Jim Grady and endorsed by him. These facts are not rebutted in this record. See General Findings 2 and 3, *supra*. As noted in Finding VII, the affidavits here are relevant and material and are admissible in this administrative proceeding.

Thus, it must be found that James Grady moved, or caused to be moved interstate, 29 postparturient cows from the Grady farm, Dunlap, Iowa, to Avon, South Dakota, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not individually identified with U.S. Department of Agriculture backtags or other appropriate identification, and were not accompanied by a certificate, as required.

XXVIII

The records of Mr. Leslie Dean Brown, who is identified in Finding No. VII, show that on September 16, 1985, he transported a load of cattle from the Grady farm, Dunlap, Iowa to "Kroupa, Kimball, South Dakota." As with previous loads transported from the Grady farm, the cattle transported were mostly cow/calf pairs, and the movement was ordered by Jim Grady (CX-22).

In an affidavit provided by Mr. Alan Kroupa, Kimball, South Dakota, he stated that in September, 1983, he received a load of cow/calf pairs from Iowa. The load was accompanied with a certificate listing Jim Grady as the seller and the Olsen Cattle Co., Merrill, Iowa, as the purchaser. To the best of his knowledge, all of the cows had silver metal tags (CX-89; Tr. 371-372).

Mr. Kroupa provided an Intrastate Health Certificate issued by the Iowa Department of Agriculture, Division of Animal Industry, on September 15, 1983. The Certificate carried a caution "Not Valid for Interstate shipment." It listed Jim Grady as the seller, and reflected the testing of 40 cows for brucellosis. The test for all was negative. The purchaser was listed as the Olsen Cattle Co., Merrill, Iowa. Mr. Kroupa certified on a copy of this certificate, that it had accompanied the cattle he purchased from Jim Grady. See General Findings, Nos. 2 and 3, *supra*. (CX-90; Tr. 372-373).

Mr. George Crowell, Compliance Officer, USDA, identified in Findings XII-XIII, testified that Mr. Arlo Olsen, Kimball, South Dakota, had been the order buyer or middleman who arranged the sale of these cattle between Mr. Kroupa and Jim Grady. Mr. Kroupa paid Mr. Olsen for these cattle. Mr. Crowell admitted that there was a possibility these cattle were sold to the Olsen Cattle Company, Merrill, Iowa, and that they were later sold and shipped by that company to Mr. Kroupa in Kimball, South Dakota. However, he doubted that this was the case since the records of Mr. Leslie Brown show that the cattle were to be transported from the Grady farm, Dunlap, Iowa to Mr. Kroupa at Kimball, South Dakota (CX-22; Tr. 373-374, 376-378).

From the records and affidavit of Mr. Les Brown, it is clear that the shipment of cattle was cow/calf pairs, and that they were transported from the Grady farm, Dunlap, Iowa, to Mr. Kroupa, Kimball, South Dakota, on September 16, 1983. This was an interstate movement which was ordered by Jim Grady. Mr. Brown's records also negate any inference that there was a stop-off at the Olsen Cattle Co., Merrill, Iowa, or that the cattle were reshipped from that company to Kimball, South Dakota. Mr. Kroupa also attests to the fact that the shipment consisted of cow/calf pairs. Further, that only the Iowa Intrastate Health Certificate, listing the 40

cows, accompanied the shipment and was presented to him when they were delivered in Kimball, South Dakota. The Certificate also shows Jim Grady as the seller of these cattle. These unrebutted facts buttress the testimony of Mr. Crowell who stated that Mr. Arlo Olsen had only been the middleman in the transaction between Jim Grady and Mr. Kroupa, and that the cattle were delivered directly from the Grady farm to Mr. Kroupa at Kimball, South Dakota. See General Findings 2 and 3, *supra*. It is also noted that the Iowa Intrastate Health Certificate contains the caution "Not Valid for Interstate shipment." Additionally, the information required by an interstate certificate, as described in § 78.1(n), is more detailed than that required on the Iowa Intrastate Health Certificate (Tr. 13). Hence, the Iowa Intrastate Certificate does not meet the requirements of the regulations nor achieve their purpose. As noted in Finding VII, the affidavits are relevant and material and such responsible and probative hearsay evidence is admissible in administrative proceedings.

Therefore, it must be found that James Grady moved, or caused to be moved interstate, 40 postparturient cows from the Grady farm, Dunlap, Iowa, to Kimball, South Dakota, in violation of § 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not accompanied by a certificate, as required.

XXIX

Mr. Leon Krueger, Emerson, Nebraska, is a truck driver for the Sioux City Motor Express, Inc., Sioux City, Iowa. On or about September 17, 1983, his dispatcher requested him to pick up a load of cattle for Jim Grady at the Sale Barn, Bristow, Oklahoma. He arrived at the Sale Barn about 7:00 p.m. on that Saturday night, September 17, 1983, and at about 2:00 a.m. Sunday morning Jim Grady helped him load about 20 cow/calf pairs, several other calves and some yearling steers. A cow/calf pair is a cow with her calf. Jim Grady knew which pens from which to take the cattle. Jim Grady accompanied him on the trip. He had a briefcase which Mr. Krueger assumed contained the health papers; however, Mr. Krueger never saw any health papers. When he asked about the health papers, Jim Grady told him he had all the papers they needed.

They arrived at the Grady farm, Dunlap, Iowa, at about noon on Sunday, at which time Jim Grady's father helped in unloading the cattle. The cow/calf pairs were put in a separate pen while the yearlings were run through a restraining chute where all Sale Barn backtags and eartags were removed. The yearlings were then loaded back on his truck and he transported them to the Moore-

head Sale Barn, Moorehead, Iowa. The cow/calf pairs remained at the Grady farm. It was his opinion that the cattle were mixed breeds. Mr. Krueger made no effort to determine how old the cattle were.

Mr. Krueger provided a copy of a Sioux City Motor Express, Inc., invoice, no. 11825, dated September 18, 1983, which he filled out and which showed that he transported 70 cattle from the Bristow Sale Barn, Bristow, Oklahoma, to the Grady farm, Dunlap, Iowa. Jim Grady signed this invoice as the consignee (CX-34, 35; Tr. 204-211).

Mrs. Barbara Pearman, identified in Finding No. XXV, could find no record which showed there were any documents issued by the State of Oklahoma to Jim or James Grady for cattle consigned from Bristow, Oklahoma, to Dunlap, Iowa. See also General Finding No. 3. The record shows that 20 cow/calf pairs were transported from Bristow, Oklahoma to the Grady farm, Dunlap, Iowa, an interstate movement, and that Jim Grady ordered this movement. Further, that the records of the Oklahoma and Iowa Departments of Agriculture failed to show any documents issued to James Grady for the interstate transportation of the 20 cow/calf pairs.

Therefore, it must be found that James Grady moved, or caused to be moved interstate, 20 postparturient cows from Bristow, Oklahoma, to the Grady farm, Dunlap, Iowa, in violation of § 78.9(c)(3)(ii), because the cows were not accompanied by a certificate, as required.

XXX-XXXI

Mr. Robert Smith, Woodbine, Iowa, is a trucker who normally transports livestock and grain locally. He stated in his affidavit that on November 28, 1983, he was asked by another local trucker to haul a load of cattle for Jim Grady, Dunlap, Iowa. Jim Grady helped him load 16 or 17 cows from the Grady farm which he delivered to the Leonard Gramlich farm, Gretna, Nebraska. Although Jim Grady gave him directions to the consignee's farm, he did not give him any health papers or other documents to accompany the cattle. He could not recall whether Jim Grady or Pat Grady was the owner of the cattle. Jim Grady told him to bill Pat Grady for the transportation of the cattle (CX-55; Tr. 275-277).

Mr. Leonard Gramlich is a farmer/rancher and is President of Black Hills Farms, Inc., Gretna, Nebraska. While attending a cattle auction in Omaha, Nebraska, he talked with Mike Guilfoyle, owner of the Corn Belt Livestock Company, Omaha, Nebraska (Corn Belt), which is a livestock commission company, and advised him that he was interested in purchasing some cows. He was later

called by Mr. Guilfoyle and told that such cows as he was interested in were available at the Grady farm, Dunlap, Iowa. Mr. Guilfoyle gave him the price being asked for the cows but left it up to Mr. Gramlich to make his own deal.

On November 26, 1983, Mr. Gramlich went to the Grady farm which was about 3 miles south of Dunlap, Iowa. There were three men there; however, he negotiated with the younger man who appeared to be approximately 30 years of age and told him he was one of the Grady sons. However, Mr. Gramlich couldn't identify him if he saw him. The cows which were being offered for sale were represented to Mr. Gramlich as being home raised cows, four years or older. He believed the latter to be true because they did not appear to have metal eartags. He purchased 16 cows at the price quoted, which included delivery to his farm and for the Gradys to obtain the necessary health papers to accompany the cows. These were predominantly black cows. The Gradys made arrangements for the transportation of the cows and told him they would take care of the necessary health papers.

When delivery of the 16 cows was made to Mr. Gramlich's farm at Gretna, Nebraska, on November 29, 1983, Mr. Gramlich asked the truck driver for the health papers and was told that they would be sent to him. No health papers accompanied the 16 cows and although Mr. Gramlich has called Corn State about the health papers, he has never received them. Additionally, he later determined the majority of the cows had eartags. In response to an invoice received from Corn Belt, check no. 1418 dated November 30, 1983, in the amount of $6,207.20, was issued by Mr. Gramlich to Corn Belt. A notation on the check showed that the amount of $6,160.00 was in payment for "Grady, 16 bred cows, Dunlap," and that the amount of $47.20 was paid as a commission to Corn Belt (CX-92, 93; Tr. 411-428).

It is clear from the record that Mr. Gramlich purchased 16 cows, four years or older, from the Grady farm, Dunlap, Iowa, and that they were transported to his farm at Gretna, Nebraska, an interstate movement. It is also clear that Corn Belt was the middleman in the transaction since it billed Mr. Gramlich and was paid for the cattle but only received a commission for its part in the transaction. There is no evidence in this record which shows that the purchase price was paid to a specific Grady.

In both his affidavit and testimony Mr. Gramlich recounts that the cows were purchased at the Grady farm, and that the Grady son whom he dealt with was approximately 30 years of age. However, he stated that he could not identify this man if he saw him. In this regard, official notice is taken of the fact that there are at

least two Grady sons, James and Patrick, and that James Grady sat at his counsel's table during Mr. Gramlich's testimony. Mr. Gramlich did not point out James Grady as the person with whom he negotiated the purchase of the cattle. Further, the record does not contain any evidence showing the ages of James or Patrick Grady. Nor does Mr. Gramlich's affidavit, or the remainder of his testimony, identify a specific Grady with whom he negotiated.

However, I find that the statement of Mr. Smith is sufficient to support a finding that James Grady was the movant for this interstate shipment, i.e., that James Grady not only helped him load the cattle but gave him directions as to how to reach his destination. Although the remainder of the testimony of Mr. Gramlich is too nebulous to identify any specific Grady, let alone James Grady as the owner of these cattle for this movement, ownership of the cattle is not a necessary ingredient to a violation of these regulations. Section 78.1(m) defines "moved" as ". . . shipped, transported, or otherwise moved or delivered or received for movement."

Therefore, it must be found that James Grady moved, or caused to be moved interstate, sixteen cows, which were over two years of age, from the Grady farm, Dunlap, Iowa, to Gretna, Nebraska, in violation of §§ 71.18 and 78.9(b)(3)(ii) of Title 9, Code of Federal Regulations, because the cows were not accompanied by an owner's statement or other document listing individual identification; and were not accompanied by a certificate, as required.

XXXII

Mr. Lawrence Wayne Hunter is the owner of Wayne Hunter, Inc., Jordan, Montana, which is a trucking company. In his affidavit, he stated that on or about December 3, 1983, he received a call to send a truck to Hinsdale, Montana, to pick up a load of cattle. He was told that the cattle were to be transported for a Mr. Pat Grady. He dispatched truck driver, Gary Flint, to Hinsdale, Montana, to pick up the cattle (CX-48; Tr. 257-258).

Mr. Gary Flint, Jordan, Montana, is a truck driver for Wayne Hunter, Inc. In his affidavit he stated that on December 3, 1983, he was dispatched to Hinsdale, Montana, to pick up a load of 60 cattle for a Pat Grady, Dunlap, Iowa. The cows were loaded at Hinsdale, Montana, on December 3, 1983. There were several trucks involved and Pat Grady was riding in one of the other trucks. The trucks stopped at Beach, North Dakota where Pat Grady made a phone call after which he decided to send Mr. Flint's load of cattle to the Grady farm, Dunlap, Iowa, instead of some place in Minnesota. The 60 cows were delivered to the Grady farm, Dunlap, Iowa, at about 2:00 or 3:00 p.m. on December 4, 1983 (CX-49; Tr. 258-259).

Mr. Vernon Zargdrager, South Sioux City, Iowa, is a truck driver for Livestock Express, Sioux City, Iowa. On or about December 4, 1983, his company sent two semi-trailer livestock trucks to Hinsdale, Montana, to transport cattle for Pat Grady, Dunlap, Iowa. The cattle were picked up at the Hinsdale Stockyards, Hinsdale, Montana. Mr. Zargdrager drove one truck and Mr. Kenny Jasperson, Kingsley, Iowa, drove the other truck. Pat Grady rode with Mr. Zargdrager to and from Hinsdale, Montana. Between the two trucks they transported 108 head of cattle to the Grady farm, Dunlap, Iowa. A third truck from Montana transported an additional 60 head of cattle to the Grady farm. The cattle the two trucks picked up were heifers. As far as Mr. Zargdrager knew the cattle were owned by Pat Grady because of the way he talked. He based this on the fact that the sales barn would not allow the cattle to leave without payment and that Pat Grady obtained the clearance for the trucks to leave (CX-36; Tr. 212-216).

Testimony and affidavits of record show that a total of 168 head of cattle (3 truckloads), owned by Pat Grady, were transported from Hinsdale, Montana, to the Grady farm, Dunlap, Iowa, an interstate movement. Mr. Flint, in his affidavit, refers to his truckload as "cattle" and "cows". Mr. Zargdrager refers to the other two truckloads transported by his company as "cattle" or "heifers". The ordinary definition of a "heifer" is a young cow that has not given birth to a calf, and the term "cow" may be applied to any female bovine, whether young or old. Further, the term "cattle" is even more general, since it includes both cows and bulls.

This allegation of the amended complaint charges that this shipment of cattle violated § 78.9(b)(3)(ii). This section requires that the cattle described therein (2 years of age, or parturient or postparturient) must be accompanied by a certificate as defined in § 78.1(n). However, the evidence of record fails to show whether such certificate was required, since the age of the "cattle", "cows", or "heifers" has not been established. Nor does evidence of record reflect that any of these cattle were parturient or postparturient. Thus, a principal element of this violation is lacking in this record. I therefore find that complainant has failed to sustain the burden of proof of the allegation in this count, and that it must be dismissed.

Civil Penalty

The nature and characteristics of brucellosis, its devastating effects, as well as the federal/state/cooperation programs to prevent the spread and eradication of the disease, have previously been set forth. The disease and the potential economic impact upon producers, regardless of herd size, has been shown to be a costly experience. Because of this the regulations promulgated must be adhered

to, and enforced vigorously. Noncompliance with these regulations impedes the efforts of federal/state governments to eliminate or prevent the further spread of brucellosis in the United States.

Evidence of record shows that there were previous indiscretions on the part of the respondents in the interstate transportation of cattle. Both Patrick and James Grady received warnings concerning the requirements of the regulations and the necessity to comply with them. Patrick Grady was contacted by Compliance Officers of the United States Department of Agriculture (USDA) on October 17, 1982, and questioned concerning an interstate movement of cattle. He was uncooperative at the time and refused to provide the Compliance Officers with requested information on the interstate movement of the cattle. He was advised of the regulations and the necessity to comply with them. Later he received a warning letter, dated November 10, 1982, from the Chief Staff Veterinarian, Veterinary Services, USDA, for still another interstate movement of cattle where proper documents had not accompanied the shipment. In that letter he was again advised of the requirements of the regulation and was offered help on any questions he had concerning the interstate movement of cattle (CX-59; Tr. 132-134, 283).

James Grady was contacted on August 13, 1983, by a USDA Compliance Officer concerning still another interstate movement of cattle. He too was uncooperative. At that time, the regulations and their requirements for the interstate movement of cattle was explained to him at some length. He was again contacted by USDA Compliance Officers on November 17, 1983, at which time a written statement of the interview was made. Although James Grady did not sign the statement, he acknowledged its contents by reading it and initialling a correction he had requested to be made. The statement reflects that James Grady admitted that he had purchased cattle in several eastern states, but had not obtained health certificates for their interstate transportation "because the Vets are never around when we load the cattle". He also advised that eartags and other man-made identification were removed from most of the cattle since "people would not buy them if they knew where they come from" (CX-21; Tr. 136-139, 151, 262-264).

The affidavit of Mr. Leslie Brown shows eight shipments of mostly cow/calf pairs, the cows being over two years of age, being transported from the Mid-America Stockyards, Bristow, Oklahoma, to the Grady farm, Dunlap, Iowa, during the period June-August, 1983. The movement of these cattle was ordered by Jim Grady. Immediately after the cattle were unloaded at the Grady farm, they were put through a restraining chute where all eartags and other man-made identification were removed. Mr. Brown witnessed Jim

Grady removing eartags from at least 150 cows, while Patrick Grady removed any backtags or other identification. Mr. Brown even assisted in removing eartags on some of the occasions. James Grady told Mr. Brown if he were ever asked where the cows came from he was to say that they originated from "a NFO Station in southern Kansas" (CX-22, 58).

When questioned as to a health certificate and eartags for the cows delivered to Mr. Mark Crisp on July 31, 1983, Pat Grady advised he could not provide a health certificate for the cows Mr. Crisp had purchased, and that any eartags the cows may have had were removed because Pat Grady did not sell cows with eartags (CX-74).

Dr. Dan Nielsen noted on September 7, 1983, when he examined the 31 cows purchased by Mr. Bob Ondracek from Jim Grady that none of the cows had metal eartags, but that all of them had scabby holes which indicated that eartags had been removed from the cows 2 or 3 weeks previous (Tr. 318).

Mr. Leon Kruger, a driver for the Sioux City Motor Express, transported cow/calf pairs for Jim Grady from Bristow, Oklahoma, to the Grady farm, Dunlap, Iowa, in September 1983. He stated that upon arrival at the Grady farm the yearlings in the shipment were put through a restraining chute where the eartags were removed. The yearlings were later reloaded and transported to the Moorehead Sales Barn, Moorehead, Iowa (CX-34).

Dr. Richard N. Bruce noted upon examination of cows purchased in September 1983 by Mr. William Allemang from Jim Grady that some of the cows had holes in their ears indicating that they had previously been eartagged (CX-17).

Dr. Doug Wurster has examined cattle for the Gradys for intrastate movement on approximately six occasions during the ten months previous to November 17, 1983. He noted during these examinations that eartags had obviously been removed from some of the cows (CX-52).

The record therefore reflects that over an extensive period of time the respondents had been made aware of, and indeed were aware of, the regulations and requirements governing the interstate movement of cattle. Nevertheless, on numerous occasions throughout the Findings, *supra,* they deliberately chose to ignore them. Indeed, their actions show a pattern of disdain and utter disregard for the regulations. Such actions denigrate, debase and undermine the brucellosis eradication program by defeating federal/state efforts to properly trace movements of exposed animals and prevent the spread and exposure to non-contaminated cattle.

Nor do respondents contentions that the "spirit of the law" was complied with since the record fails to disclose any of the cattle transported were found to have brucellosis; that it did not make any difference whether an intrastate or interstate health certificate accompany the shipments; and that they did not intentionally violate 9 CFR § 78.9(b)(3)(ii), have merit. As noted previously, the intrastate health certificates lack the detail required by 9 CFR 78.1(n). One of the purposes of the interstate health certificate is to alert officials of a receiving state so that they may determine whether such cattle require testing. Further, the intrastate health certificate remains in the origin state and is not forwarded to the proper destination state since it lacks the correct consignee and destination. With regard to "intent", the record as a whole shows a deliberate and wilful pattern of total disregard for the regulations. Additionally, "intent" to violate the regulations is not a requirement of the provisions of 21 U.S.C. § 122.

Finally, it is noted that respondents failed to take the stand and testify concerning the alleged violations. A well settled principle that has been followed in many proceedings before the Department of Agriculture is that failure to testify raises the inference that any testimony respondents would have given would have been adverse to their positions and that the *prima facie* case which the complainant presented here would have been bolstered if they had chosen to testify. See *In re Apex Meat Company,* 44 Agric. Dec. ____ (Sept. 5, 1985) (Slip opinion, pages 32-33), and cases and authority cited therein.

Section 122 of Title 21 of the United States Code provides for the assessment of a civil penalty "of not more than one thousand dollars" for each violation of the regulations published pursuant to authority granted to the Secretary of Agriculture in §§ 111 and 120 of Title 21 of the United States Code.

Sections 111 and 120 of Title 21 of the United States Code authorizes the Secretary of Agriculture to issue regulations which govern the interstate transportation of animals from any place where communicable disease exists or where he may have reason to believe it exists. The Secretary has issued such regulations governing the interstate transportation of cattle, as here pertinent, 9 CFR §§ 71.18, 78.9(b)(3)(ii) and 79.9 (c)(3)(ii). Each is a separate and distinct violation subject to the maximum civil penalty of $1,000. The complainant here seeks the maximum civil penalty assessment for each proven violation. Severe sanctions for violations of the Department's regulations has been an established policy. *In re Braxton Worsley,* 33 Agric. Dec. 1547, 1556-71 (1974); see also *In re Donald Hageman, S&H Hogs, Inc., et al.,* 42 Agric. Dec. 531, 546

(1983) and cases cited therein. The evidence of record is void of any mitigating or extenuating circumstances which would lessen the assessment of the maximum penalty. Rather, the evidence supports the requested $1,000 civil penalty for each violation alleged and proven as appropriate to accomplish the goals of compliance and deterrence of respondents and others simularly situated.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend that there is not sufficient evidence to support the ALJ's findings of fact. However, in view of the massive amount of evidence supporting the findings of fact, no useful purpose would be served by responding in detail to respondents' contentions.[2] In addition, notwithstanding the massive evidence introduced by complainant, respondents failed to testify. Under the settled principle that has been followed in many proceedings before this Department,[3] and which has been followed in many judicial

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[2] Complainant's Reply to Respondent's Appeal discusses respondents' contentions in detail. I agree with complainant's arguments.

[3] *E.g., In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. ____ (Oct. 17, 1985); *In re Saylor*, 44 Agric. Dec. ____ (Sept. 20, 1985); *In re Petty*, 43 Agric. Dec. ____ (Oct. 31, 1984), *appeal docketed*, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983); *In re Farrow*, 42 Agric. Dec. ____ (Sept. 21, 1983), *aff'd in part and rev'd in part*, No. 83-2548 (8th Cir. Apr. 24, 1985) (merits affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd* (unpublished), 742 F.2d 1462 (9th Cir. 1984); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied, 449 U.S. 1061 (1980)*; *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casco*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

proceedings,[4] I infer, as the ALJ did, that their testimony would have been adverse to their position here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch* v. *Archer*, Cowp. 66, quoted with approval in Wigmore, *Evidence* (3d ed. 1940), § 285.

Respondents argue that the ALJ erroneously excluded evidence which they contend would show that certain animals not involved in this case that tested positive to the brucellosis card test were permitted to move in violation of the regulations. That evidence was properly excluded. Even if respondents were able to show that the regulations were not scrupulously followed in certain particular instances where animals should not have been moved under the regulations, that would not be a defense to respondents' failure to obtain the required health certificates, and to have the proper documentation and identification for their animals.

The evidence here shows that the maximum civil penalty should be assessed against respondents. They had a total disregard for the requirements designed to prevent the spread of brucellosis. They ignored instructions given by regulatory officials and truckers as to the need for health certificates.

The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of $1 billion. It costs about $150 million a year (Tr. 440). There is no excuse for respondents' complete disregard of the regulatory requirements.

In their appeal, respondents contend that Count XXV of the amended complaint should have been dismissed. As complainant points out, the ALJ did dismiss Count XXV. Complainant also argues that the record supports the allegations of Count XXV of the amended complaint, but complainant did not file a cross-appeal, and complainant requests that "Respondents' Appeal Petition be dismissed and that the Judicial Officer affirm the Adminis-

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[4] 2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States* v. *Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-27 (1939); *Kirby* v. *Tallmadge*, 160 U.S. 379, 383 (1896); *Karavos Compania, Etc.* v. *Atlantica Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union* v. *NLRB*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co.* v. *Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cromling* v. *Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman* v. *CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co.* v. *Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer* v. *Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles* v. *Lentin*, 151 F.2d 615, 619 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co.* v. *Ratcliff*, 108 F.2d 253, 256-57 (C.C. P.A. 1939); *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 867-68 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

trative Law Judge's Decision and Order" (Complainant's Reply at 20). This further indicates that complainant was not seeking a reversal of the ALJ's ruling as to Count XXV.

For the foregoing reasons, the following order should be issued.

ORDER

IT IS ORDERED, that

1. Counts XX, XXI, XXII and XXXII be dismissed as to Patrick J. Grady, and that Count XXV be dismissed as to James Grady.

2. Respondent, James Grady, is assessed a total civil penalty of $22,000 for the violations as set forth in the Findings, *supra* ($1,000 each—VI, VII, IX, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXVI, XXVII, XXVIII, XXIX, XXX and XXXI).

3. Respondent, Patrick J. Grady, is assessed a total civil penalty of $5,000 for the violations set forth in the Findings, *supra* ($1,000 each—II, III, IV, X, XI).

4. Respondent, Rose Mary Grady, is assessed a total civil penalty of $2,000 for the violations set forth in the Findings, *supra* ($1,000 each—V and VIII).

5. The above civil penalties shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded by each respondent to Thomas E. Bundy, Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within 30 days after service of this order on such respondent.

Appendix A

Pertinent Statute and Regulations

Title 21, United States Code, § 122 provides that:

> Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order

reviewable under chapter 158 of title 28, United States Code [28 U.S.C. §§ 2341 *et seq.*]. The validity of such order may not be reviewed in an action to collect such civil penalty.

Title 21, United States Code, § 111 provides that:

> The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country in the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

Title 21, United States Code, § 120 provides that:

> In order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable disease in cattle and other livestock and/or live poultry, and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

Title 9, Code of Federal Regulations, § 71.18 provides, in relevant part that:

> (a) No cattle 2 years of age or over . . . shall be moved interstate other than in accordance with the requirements of this section. All interstate movements of any cattle

shall also comply with the other applicable provisions in this part and other parts of this subchapter.

(1) When permitted under such other provisions, cattle subject to this section:

(i) May be moved interstate from any point to any destination, if such cattle, when moved interstate, are identified by a Department-approved backtag affixed a few inches from the midline and just behind the shoulder of the animal, or by such other means approved by the Deputy Administrator, Veterinary Services, upon request in specific cases, and if such cattle are accompanied by a statement signed by the owner or shipper of the cattle, or other document [2] stating: (*a*) the point from which the animals are moved interstate; (*b*) the destination of the animals; (*c*) the number of animals covered by the statement, or other document; (*d*) the name and address of the owner or shipper; and (*e*) the identifying numbers of the backtags or other approved identification applied:

* * * * * * *

(iii) May be moved interstate for any purpose other than slaughter if such cattle, when moved interstate, are identified by Animal and Plant Health Inspection Service approved eartags in lieu of backtags, and are accompanied by owner's statement or other document [2] stating: (*a*) the point from which the animals are moved interstate; (*b*) the destination of the animals; (*c*) the number of animals covered by the statement or other document; (*d*) the identifying numbers of the eartags; and (*e*) the name and address of the owner or shipper:

[2] Other document means a shipping permit, an official health certificate, an official brand inspection certificate, a bill of lading, a waybill, or an invoice on which is listed the required information.

* * * * * * *

(3) Each person who ships, transports, or otherwise causes the movement of the cattle interstate is responsible for the identification of the animals as required by this section. No such person shall remove or tamper with or cause the removal of or tampering with an identification backtag or eartag required in this section for interstate movement of animals, except as be authorized by the Deputy Administrator, Veterinary Services, upon request in specific cases and under such conditions as he may impose to insure continuing identification."

Title 9, Code of Federal Regulations, § 78.9 provides, in relevant part, that:

"Cattle from herds not known to be affected with brucellosis must be moved interstate in compliance with § 71.18 of this subchapter, except where specifically exempt, and then only as follows:

* * * * * * *

(b) *Class A States.* If such cattle originate in a Class A State and are non-vaccinates under 18 months of age, or are official calfhood vaccinates of the beef breeds under 24 months of age, or are official calfhood vaccinates of the dairy breeds under 20 months of age, unless they are parturient or postparturient, may be moved interstate without being tested for brucellosis. If such cattle originate in a Class A State and are non-vaccinates over 18 months of age, are official calfhood vaccinates of the beef breeds over 24 months of age, are official calfhood vaccinates of the dairy breeds over 20 months of age, or if they are parturient or postparturient, they may only be moved

interstate from such area under the conditions specified below:

(1) *Movement for immediate slaughter.*

* * * * * * *

(2) *Movement to quarantined feedlots.*

* * * * * * *

(3) *Movement other than in accordance with paragraphs (b)(1) and (2) of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (b)(1) and (2) of this section only if:

* * * * * * *

(ii) Such cattle are subjected to an official test for brucellosis and found negative for brucellosis within 30 days prior to such interstate movement, and accompanied interstate by a certificate, and the certificate shows in addition to items required under § 78.1(n), the test dates and results of the official brucellosis tests; or

* * * * * * *

(c) *Class B States.* If such cattle originate in a Class B State and are non-vaccinates under 18 months of age, or are official calfhood vaccinates of the beef breeds under 24 months of age, or are official calfhood vaccinates of the dairy breeds under 20 months of age, unless they are parturient or postparturient, they may be moved interstate without being tested for brucellosis. If such cattle originate in a Class B state and are non-vaccinates over 18 months of age, or are official calfhood vaccinates of the beef breeds over 24 months of age, or are official calfhood vaccinates of the

dairy breeds over 20 months of age, or if they are parturient or postparturient and under these ages, they may only be moved interstate from such area under the conditions specified below:

(1) *Movement for immediate slaughter.*

* * * * * * *

(2) *Movement to quarantined feedlots.*

* * * * * * *

(3) *Movement other than in accordance with paragraphs (c)(1) and (2) of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (c)(1) and (2) of this section only if:

* * * * * * *

(ii) Such cattle are subjected to an official test for brucellosis and found negative for brucellosis within 30 days prior to interstate movement, are accompanied interstate by a certificate which shows, in addition to items required under § 78.1(n), the test dates and results of the official brucellosis tests, and if such cattle are accompanied interstate by a "Permit for Entry"; or"

Title 9, Code of Federal Regulations, § 78.1(n) defines "certificate" to be:

An official document issued by a Veterinary Services representative, State representative, or accredited veterinarian at the point of origin of a shipment of domestic animals which shows the official metal eartag, individual animal registered breed association registration tattoo, or individual animal registered breed association registration brand, or registration number or similar individual identification of each animal to be moved, the number of animals covered by the document, the purpose for which the animals are to be moved, the points of origin and destina-

tion, the consignor, and the consignee, and which states that the animal or animals identified on the certificate meets the requirements of 9 CFR Part 78 for interstate movement.

Title 9, Code of Federal Regulations, § 78.1(m) defines "moved" as:

[s]hipped, transported, or otherwise moved, or delivered or received for movement.

Title 9, Code of Federal Regulations, § 78.1(ccc) defines "parturient" as:

[v]isibly prepared to give birth or within 2 weeks of giving birth.

Title 9, Code of Federal Regulations, § 78.1(ddd) defines "postparturient" as:

[h]aving already given birth.

In re: ROLAND SCHUELIN. A.Q. Docket No. 206. Decided January 9, 1986.

Sherrie Kopka Kennedy, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

For good cause shown, Complainant's motion to dismiss the complaint in this proceeding is *granted*.

In re: MICHAEL C. BAILEY. A.Q. Docket No. 205. Decided February 5, 1986.

Interstate cattle movement.

Sherrie Kopka Kennedy, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, and 122), by a Com-

plaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that Respondent violated sections 111 and 120 of the Act (21 U.S.C. §§ 111 and 120) and section 78.9(c)(3) of the regulations promulgated thereunder (9 CFR § 78.9(c)(3)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on August 30, 1985.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Respondent was informed in the Complaint and the letter of service that an Answer should be filed with the Hearing Clerk within twenty (20) days after service of the Complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the Complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. On September 24, 1985, Respondent was sent, by regular mail, a notice that his Answer had not been received by the Hearing Clerk in the allotted time. More than twenty (20) days have elapsed since Respondent was served with the Complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an Answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Michael C. Bailey, Respondent, is an individual whose address is Route 1, Woodland, Alabama 36280.

2. On or about January 25, 1984, the respondent moved, from Randolph County, Alabama, within a class B state, to Bowden, Georgia, approximately five (5) postparturient cows in violation of section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)) because the cows were not accompanied by a certificate or other document, as required.

3. On or about January 25, 1984, the respondent moved, from Randolph County, Alabama, within a class B state, to Bowden, Georgia, approximately five (5) postparturient cows in violation of section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)) because the cows were not accompanied by a "Permit for Entry," as required.

4. On or about February 13, 1984, the respondent moved, from Randolph County, Alabama, within a class B state, to Bowden, Georgia, approximately one (1) postparturient cow in violation of

section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)) because the cow was not accompanied by a certificate or other document, as required.

5. On or about February 13, 1984, the respondent moved, from Randolph County, Alabama, within a class B state, to Bowden, Georgia, approximately one (1) postparturient cow in violation of section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)) because the cow was not accompanied by a "Permit for Entry," as required.

CONCLUSION

By reason of the facts in the findings of fact set forth above, Respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Michael C. Bailey is assessed a civil penalty of two thousand dollars [$2,000] ($500.00 per violation) which shall be paid within thirty (30) days from the date this Order becomes effective. This civil penalty shall be made payable to "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U.S. Department of Agriculture, Office of the General Counsel, Room 2422 South Building, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on February 4, 1986.—Ed.]

In re: BROOKS GRIFFIN. A.Q. Docket No. 210. Decided February 12, 1986.

Interstate movement of brucellosis-exposed cattle.

Jaru Ruley, for complainant.
Ralph C. Murray, West Helena, Arkansas, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint

filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Brooks Griffin, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Brooks Griffin, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain allegations and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Brooks Griffin, respondent, is an individual whose address is Route 3, Elaine, Arkansas 72333.

2. On or about December 4, 1984, the respondent moved interstate at least four brucellosis exposed cattle from Arkansas, to the South Memphis Stockyards at Memphis, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred dollars ($400.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Wash-

ington, D. C. 20250-1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: Dr. Jack B. Ross. VA Docket No. 34. Decided February 12, 1986.

Brucellosis test records.

Clement J. McGovern, for complainant.
Alice Dale Goodsell, Jackson, Mississippi, for complainant.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of such Accreditation (9 CFR § 160.1 et seq.), hereinafter referred to as the regulations, by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the Standards for Accredited Veterinarians (9 CFR §§ 161.2(d) and (h)). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admits the Finding of Facts set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980

(5 U.S.C. § 504 et seq.) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Dr. Jack B. Ross, hereinafter referred to as the respondent, is an individual whose address is P.O. Box 8827, Jackson, Mississippi 39204.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Mississippi under the provisions of the regulations of Title 9, Code of Federal Regulations, Parts 160–162.

3. Respondent, on or about December 9, 1983, signed and submitted brucellosis test records 295045A through 295056A regarding the brucellosis testing of approximately 143 cattle for Gaddis Farms which were not accurately and fully completed because respondent indicated it was a fee basis test when in fact it was a private test, and the respondent failed to properly record the results of the BBA card test utilized at the farm.

4. Respondent on or about December 9, 1983, performed a brucellosis test on approximately 143 cattle for Gaddis Farms other than in accordance with Federal and State regulations and instructions issued to him by the Veterinarian-in-Charge or the State Animal Health Official, or both, because he ran the BBA card test on the blood drawn from such cattle.

5. Respondent, on or about April 2, 1984, signed and submitted brucellosis test records 222132A through 222141A regarding the brucellosis testing of approximately 140 cattle for Gaddis Farms which were not accurately and fully completed because respondent indicated it was a fee basis test when in fact it was a private test, and the respondent failed to properly record the results of the BBA card test utilized at the farm.

6. Respondent, on or about April 2, 1984, performed a brucellosis test on approximately 140 cattle for Gaddis Farms other than in accordance with Federal and State regulations and instructions issued to him by the Veterinarian-in-Charge or the State Animal Health Official, or both, because he ran the BBA card test on the blood drawn from such cattle.

7. Respondent, by reason of the facts contained in paragraphs 3, 4, 5, and 6 above, failed to keep himself currently informed on procedures applicable to disease control and eradication programs.

8. Respondent on or about December 1, 1984, signed and issued to Ross Cattle Co. a State of Mississippi official health certificate, No. 264969, which was not fully completed, as required. Specifically, the health certificate was signed and issued by the respondent

without showing the consignee, number and weight of the animals it covered.

9. Respondent, on or about December 1, 1984, in connection with the facts contained in paragraph 8 above, failed to take proper precautions to prevent misuse of certificates used in his work as an accredited veterinarian.

10. Respondent by reason of the facts contained in paragraphs 3, 4, 5, 6, 7, 8 and 9 above, failed to carry out all of his responsibilities under the applicable Federal Programs and cooperative programs in accordance with Federal and State regulations and instructions issued to him by the Veterinarian-in-Charge or the state Animal Health Official, or both.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

1. Respondent's veterinary accreditation is hereby suspended from January 27, 1986, to April 26, 1986, provided, that, if the respondent performs any actions during such suspension for which veterinary accreditation is required, then respondent's veterinary accreditation shall be revoked. Before such action is taken, respondent will be afforded an opportunity for a hearing concerning the matter.

2. This order shall have the same force and effect as if entered after full hearing and shall become effective on the day upon which service of this order is made upon the respondent.

In re: KENNETH E. MARBLE. A.Q. Docket No. 218. Decided February 13, 1986.

Interstate movement of cattle.

Joseph P. Pembroke, for complainant.
William W. Ferguson, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120 and 122) by a com-

plaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Kenneth E. Marble, respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Kenneth E. Marble, respondent, is an individual whose mailing address is Route 3, Box 40E, Terry, Mississippi 39170.

2. On or about March 26, 1983, respondent shipped interstate 43 adult cattle from Terry, Mississippi, to Chicot County, Arkansas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred and fifty dollars ($550) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of Agri-

culture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: WAYNE SANDERS. A.Q. Docket No. 224. Decided February 18, 1986.

Interstate movement of cattle.

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Wayne Sanders, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.9(c)(3)). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Wayne Sanders, respondent, is an individual whose address is Route 2, Franklin, Georgia 30217.

2. On or about April 1, 1985, the respondent moved four cattle, over two years of age, interstate from Ranburne Livestock Sales, Inc., Ranburne, Alabama, to his premises at Franklin, Georgia.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars ($1,000.00). The respondent shall send a certified check or money order for $1,000.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: GEORGE WHITTEN. A.Q. Docket No. 137. Decided February 20, 1986.

Interstate movement of cattle.

Joseph Pembroke, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, and 122) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and section 78.9(d)(3)(iii) of the regulations promulgated thereunder (9 CFR § 78.9(d)(3)(iii)).

Copies of the complaint of the Rules of Practice governing proceedings under the Act were personally served upon respondent on December 19, 1984.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. George Whitten, is an individual whose mailing address is Route 1, Blue Springs, Mississippi 38652.

2. On or about September 28, 1983, respondent shipped one cow from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cow was not accompanied by a certificate as required.

3. On or about September 28, 1983, respondent shipped interstate one cow from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cow was not accompanied by a "Permit for Entry", as required.

4. On or about September 28, 1983, respondent shipped interstate one cow from Corinth, Mississippi to Savannah, Tennessee, in violation of section 71.18 of the regulations (9 CFR § 71.18), because the cow was moved interstate unaccompanied by an owner's statement or other document containing prescribed information, as required.

5. On or about November 2, 1983, respondent shipped interstate (2) two cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cattle were not accompanied by a certificate, as required.

6. On or about November 2, 1983, respondent shipped interstate two cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cattle were not accompanied by a "Permit for Entry", as required.

7. On or about November 2, 1983, respondent shipped interstate (2) two cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 71.18 of the regulations (9 CFR § 71.18), because the cattle were moved interstate unaccompanied by an owner's statement or other document containing prescribed information, as required.

8. On or about February 1, 1984, respondent shipped interstate four (4) cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cattle were not accompanied by a certificate, as required.

9. On or about February 1, 1984, respondent shipped interstate four (4) cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), because the cattle were not accompanied by a "Permit for Entry", as required.

10. On or about February 1, 1984, respondent shipped interstate four (4) cows from Corinth, Mississippi to Savannah, Tennessee, in violation of section 71.18 of the regulations (9 CFR § 71.18), because the cows were moved interstate unaccompanied by an owner's statement or other document containing prescribed information, as required.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent is hereby assessed civil penalty of ($4,500) four thousand five hundred dollars which shall be payable to the "Treasurer of the United States" by certified check and money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days (7 CFR § 1.142(e)) after service of this Decision and Order upon respondent,

unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on February 10, 1986.—Ed.]

In re: JOHNNY HICKS. A.Q. Docket No. 173. Decided February 20, 1986.

Interstate movement of cattle.

Jaru Ruley, for complainant.
Don Gillespie, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Johnny Hicks, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.9(d)(3)). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Johnny Hicks, respondent, is an individual whose mailing address is Route 1, Box 162, Magnolia, Arkansas 71753.

2. On or about September 17 and 24, 1984, the respondent moved cattle interstate from the Homer Livestock Commission Company, Homer, Louisiana, to the Magnolia Livestock Auction, Magnolia, Arkansas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars ($1,000.00). The respondent shall send a certified check or money order for $1,000.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: GLEN E. NICHOLS. A.Q. Docket No. 209. Decided February 20, 1986.

Interstate movement of cattle.

Kris Ikejiri, for complainant.
Webb Biard, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111 and § 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Glen E. Nichols violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.*, and § 78.1 *et seq.*). Glen E. Nichols and the complainant have agreed that this

proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Glen E. Nichols admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Glen E. Nichols also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Glen E. Nichols, respondent herein, is an individual whose mailing address is Route 6, Box 401, Clarksville, Texas 75426.

2. On or about January 7, 1985, the respondent moved interstate from Clarksville, Texas, to DeQueen, Arkansas, approximately six (6) cattle.

CONCLUSIONS

Respondent Glen E. Nichols, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Glen E. Nichols is assessed a civil penalty of nine hundred dollars ($900.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, U.S. Department of Agriculture, Washington, D.C. 20250-1400. Payments shall be paid as follows:

On or before February 28, 1986,	$300.00
On or before March 31, 1986	$300.00
On or before April 30, 1986	$300.00

This Consent Decision and Order shall become effective on the day of service upon the respondent.

In re: CLIFFORD RUSSELL. A.Q. Docket No. 217. Decided February 28, 1986.

Interstate movement of cattle.

Robert L. Broussard, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Clifford Russell, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 91.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980

(5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Clifford Russell, respondent, is an individual whose mailing address is General Delivery, Plato Center, Illinois 60170.

2. On or about April 30, 1985, respondent moved two (2) head of cattle from Burlington, Wisconsin, to Laredo, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred and fifty ($250) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Robert L. Broussard, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: HARRY RATLIFF. A.Q. Docket No. 219. Decided February 3, 1986.

Robert L. Broussard, for complainant.
Respondent, *pro se*.

Decision by Dorothea Baker, Administrative Law Judge.

COMPLAINT DISMISSED

Upon Motion filed January 31, 1986, the Complaint filed herein on November 25, 1985, is hereby dismissed with prejudice.

Copies hereof shall be served upon the parties.

In re: CITY OF HOPE NATIONAL MEDICAL CENTER. AWA Docket No. 364. Decided February 6, 1986.

Violations of the Animal Welfare Act.

Donald Tracy, Mktg. Div. OGC, for complainant.
John McDermott, Washington D.C., for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. 2131 *et seq.*), ("Act") by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, charging that respondent violated the Act and the regulations and standards issued thereunder (9 CFR Parts 1, 2, and 3§ 0. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings (7 CFR § 1.138).

The respondent admits the jurisdictional allegations contained in the complaint, specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, and waives oral hearing and further procedure. Complainant and respondent agree for the purpose of settling this proceeding to the entry of this decision.

FINDINGS OF FACT

1. Respondent, the City of Hope National Medical Center, has a mailing address of 1500 East Duarte Road, Duarte, California 91010.

2. At all times material herein respondent operated a research facility registered under the Act.

3. At the time of its original application for registration, respondent received a copy of the regulations and standards contained in 9 CFR Chapter 1, Subchapter A, and agreed in writing to comply with said standards and regulations.

CONCLUSION

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision and order, this decision and order will be entered.

ORDER

Respondent, City of Hope National Medical Center, shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) and the standards and regulations issued thereunder

(9 CFR Parts 1, 2, and 3) and shall cease and desist from any violation thereof.

To assure that any research at the City of Hope National Medical Center subject to the Animal Welfare Act is conducted in accordance with the Act and regulations, respondent shall institute the following actions within 30 days after the effective date of this Order:

1. The director of any research project utilizing animals, as defined in the Act and regulations, must consult with a veterinarian:

(a) On the proper use of anesthetics and analgesics; and

(b) On the proper care of injured animals.

It is understood that such consultations are to assure that respondent establishes and maintains an adequate program of veterinary care and are not intended to interfere with the actual conduct of research.

2. Respondent shall establish an advisory committee for laboratory animal care, responsible to the Executive Medical Director, to oversee respondent's compliance with the regulations and standards issued under the Act.

(a) The committee shall include at least one member who is not affiliated with either animal research or the animal rights movement.

(b) The committee's oversight shall include, but not be limited to, a review of the use of anesthesia, the degree of sanitation maintained in operating rooms, and the post-operative care given research animals.

(c) The committee shall make quarterly reports to the Executive Medical Director detailing its findings concerning respondent's compliance with the Act and the regulations and standards thereunder. Respondent shall send a copy of these reports to the Area Veterinarian in Charge, APHIS, 83 Scripps Drive, Sacramento, California 95825.

3. Respondent shall establish and maintain training programs to assure that all individuals involved in the care and handling of laboratory animals for research purposes are properly trained in the standards under the Act.

4. Respondent shall distribute a copy of this Decision and Order to all its personnel who are responsible for the care and handling of research animals subject to the Act. Respondent shall maintain an ongoing information program designed to insure that such personnel are aware of the provisions of this Decision and Order.

5. Respondent shall, within sixty days after service of this Decision and Order, send the Area Veterinarian in Charge a written

report setting forth the steps it has taken to implement the requirements of this Order.

Respondent is assessed a civil penalty of $11,000 which shall be paid by a certified check or money order payable to the Treasurer of the United States.

This order shall have the same force and effect as if entered after a full hearing and shall become effective on the first day after service of this Decision and Order on the respondent.

In re: MYRA SAVAGE. AWA Docket No. 198. Decided January 31, 1986.

Donald Tracy, Mkgt. Div. OGC, for complainant.
Gary Wiegel, Mt. Pleasant, Iowa, for respondent.

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

Complainant moves to dismiss the complaint without prejudice because the respondent has surrendered her license and complainant believes this accomplishes the purposes of the Act in this case.

It should be and hereby is ordered that the complaint is dismissed without prejudice.

In re: GENTLE JUNGLE, INC., AWA Docket No. 271. Decided February 10, 1986.

Numerous violations of the Animal Welfare Act.

The Judicial Officer affirmed Judge Palmer's order revoking respondent's license and assessing a civil penalty of $15,300 for numerous violations of the Animal Welfare Act. Complainant need only prevail by a preponderance of the evidence. A corporation is responsible for the acts or failures of its employees or other persons acting for it. Question left open as to whether anesthetizing animals solely for the purpose of making the animals appear dead while exhibited, or dyeing the animals, is unlawful.

Donald Tracey, for complainant.
Respondent, *pro se*.

Decision by Donald Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and stand-

ards issued thereunder (9 CFR § 1.1 *et seq.*). On March 6, 1985, Administrative Law Judge Victor W. Palmer (ALJ) issued an initial Decision and Order directing respondent to cease and desist from violating the Act and regulations, assessing a civil penalty of $15,300, and revoking respondent's license issued under the Act.

On June 5, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).* Complainant filed a cross-appeal on July 11, 1985. The case was referred to the Judicial Officer for decision on September 24, 1985.

Based on a careful reading of the entire record in this case, the initial decision by the ALJ is adopted as the final decision in this case (with a few trivial changes). Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is an administrative proceeding initiated by a complaint filed on October 17, 1983, by the Acting Administrator, Animal and Plant Health Inspection Service (APHIS), alleging that respondent, Gentle Jungle, Inc., violated the Animal Welfare Act (the Act), 7 U.S.C. §§ 2131-2155.[1] The complaint charges that respondent, as a

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* The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

[1] The provisions of the Animal Welfare Act pertinent herein are:

7 U.S.C. § 2132(e), (g), and (h), which defines the terms "commerce," "animal," and "exhibitor," so as to make respondent subject to the Act and to regulations issued under it by the Secretary of Agriculture.

7 U.S.C. § 2139 which establishes a broad and embracing standard of construction of principal-agent relationships to allow the Act to be enforced against an animal exhibitor for any act or omission by any person acting for it or in its employ.

7 U.S.C. § 2141 which requires that: "all animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe . . . ."

7 U.S.C. § 2143(a) which authorizes the Secretary to promulgate standards governing the humane handling, care, treatment and transportation of animals by dealers, research facilities and exhibitors, consisting of minimum requirements for

Continued

licensed exhibitor of wild animals, repeatedly violated applicable standards under the Act for the care and handling of its animals, and failed to maintain records as required by applicable regulations. On November 23, 1983, an answer was filed by attorneys on respondent's behalf. On February 24, 1984, an amended complaint was filed alleging additional incidents of inadequate animal care and handling by respondent and additional recordkeeping violations found on reinspections of respondent's premises made subsequent to the filing of the original complaint. On March 22, 1984, an answer to the amended complaint was filed on respondent's behalf by its attorneys. Pursuant to a motion by complainant that the proceedings were ready for hearing, a notice scheduling an oral hearing in Los Angeles, California was issued on June 4, 1984. On July 27, 1984, respondent's attorneys notified the Hearing Clerk that they had withdrawn from its representation. On August 8, 1984, a notice was issued to respondent advising that it would be treated as representing itself *pro se*; the hearing would continue to be scheduled for November 6, 1984, and would not be postponed; and that if respondent wished to retain new counsel it should do so well enough in advance of the hearing that its attorneys would be prepared to go to hearing on November 6, 1984. A reminder notice of the November 6, 1984 hearing was issued on October 11, 1984.

On November 2, 1984, a telephone conference was held with complainant's counsel and Ralph Helfer, the President of the respondent corporation, in which Mr. Helfer advised that he would personally represent respondent at the hearing since there were no funds to pay attorneys. The rules of practice and various procedural questions raised by Mr. Helfer were discussed during the conference. Completed subpoenas for direct service by respondent, with instructions on how this was to be done, and a pamphlet copy of the rules of practice were mailed to respondent by Express Mail on November 2, 1984.

On November 6, 7, and 8, 1984, an oral hearing was held in Los Angeles, California. Complainant was represented by Donald A.

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animal handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, and adequate veterinary care.

7 U.S.C. § 2149 which authorizes the Secretary, after notice and opportunity for hearing and after determining the Act has been violated, to revoke a license, assess a civil penalty of not more than $1,000 for each violation, and to enter a cease and desist order. Each violation and each day during which a violation continues is specified to be a separate offense. The Secretary is directed to give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

Tracy, Office of the General Counsel, United States Department of Agriculture, Washington, D. C. Respondent was represented by its President, Ralph Helfer. At the close of the hearing, both parties were given time to file proposed findings, conclusions, and supporting briefs. Staggered briefing was scheduled wherein complainant was required to file first to provide respondent with an opportunity to review complainant's materials and determine what, if any, responsive written arguments it might wish to enter. Complainant filed its proposed findings, conclusions, and brief on January 10, 1985. Respondent did not file a response within the allotted time and has not sought to file any written arguments.

Upon consideration of the evidence of record and the arguments of the parties, it has been decided that respondent violated the Act and pertinent regulations. An order is being entered revoking respondent's Class C license as an animal exhibitor, directing it to cease and desist from future violations, and requiring it to pay civil penalties totalling $15,300.00.

FINDINGS

A. General

1. Respondent, Gentle Jungle, Inc., 3815 West Olive Avenue, Suite 102, Burbank, California 91505, is a corporation which, at all times material herein, was an animal exhibitor and held a Class C license (No. 93 C-76) issued under the Act. Respondent is no longer engaged in business, but during the period 1980 through 1983, it was one of the largest suppliers of wild animals for exhibition in motion picture and television productions.

2. Ralph D. Helfer is the President of the respondent corporation.

3. At the time of respondent's license application, May 16, 1975, and each time the license was renewed, respondent received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A of the Code of Federal Regulations, and agreed in writing to comply with them.

B. Prior Warning

4. On November 24, 1981, Dr. James H. Roswurm, the APHIS area Veterinarian in Charge, sent a letter to respondent respecting its violation of regulations found in the course of an inspection of its facilities which warned that future violations would be prosecuted.

C. Recordkeeping and Untagged Cats

5. On September 23, October 14, and October 25, 1982, APHIS personnel inspected respondent's facilities and found: (1) the actual inventory of exotic animals differed from that shown in respond-

ent's records; (2) no records to account for the disposition of some animals; and (3) a set of records was not maintained at the site where the animals were housed.

6. On November 29 and December 6, 1983, APHIS personnel inspected respondent's facilities and found untagged domestic cats to be present.

D. Veterinary Care for an Orangutan

7. In the summer of 1980, an orangutan owned by respondent was taken away from the set during the location filming of "Any Which Way You Can" and was struck with a cane and an axe handle by respondent's head trainer to make it more responsive to his commands and more submissive during the filming. Immediately afterwards, the orangutan exhibited a very submissive manner but there were no physical signs of injury. The orangutan was not provided veterinary care after the incident until it died a month later from acute cardiac collapse resulting from undetermined causes. During the month that followed the incident, the orangutan was not observed to be injured, sick or otherwise in need of veterinary care. To the contrary, on one occasion, it had the strength to seize one of the respondent's other trainers who had come too near its cage and held the trainer in a powerful grip until its attention was diverted.

E. Handling and Veterinary Care Provided a Sick Tiger

8. On November 20, 1981, respondent had its tiger, "Sulton" dyed black for exhibition as a panther in a film. The tiger was dyed by a veterinarian who first administered the drug Sernalin, a phenocycline, or PCP, to knock the tiger down; and anesthetized it with Halothene gas. The tiger was then dipped in a solution of Clairol professional hair dye. Three other tigers owned by respondent were likewise dyed by the veterinarian and tolerated the procedure without incident. Sulton did not and died on November 30, 1981, from an apparent adverse reaction to the drug Sernalin. The tiger never fully came out of its anesthetized state. The treating veterinarian was in attendance from the time he dyed the tiger until the next day when it was moved to respondent's ranch at Colton, California, in response to directions from local Animal Control authorities. The veterinarian accompanied the tiger to the Colton ranch, set up procedures for its care, and placed it in a trailer with hay and heat lamps. The veterinarian returned to examine it two days later when he concluded its condition was stable and improving. The treating veterinarian did not attend the tiger again until its death on November 30, 1981. There is a conflict in the evidence as to the content of telephone communications respondent's employees had

with the veterinarian prior to the tiger's death. In any event, the tiger's condition progressively deteriorated from November 26, 1981, until its death on November 30, 1981.

(a) During the four-day period of November 26 and November 30, 1981, the tiger did not receive personal veterinary care to better address its health problems and to ameliorate its suffering.

(b) The tiger, on November 28 or 29, 1981, while very sick and unable to walk, was dragged from where it was housed by respondent's employees who used its tail to pull it, causing abrasions to the tiger's skin and increasing its suffering.

F. Failure to Provide Veterinary Care to a Sick Leopard

9. In January 1982, respondent's leopard, Satan, became sick and was not provided veterinary care from the time it was first observed to be sick (lethargic, refused food, just lay there), until its death nearly two weeks later. Veterinarians were called by respondent, but all but one refused to come because respondent already owed them overdue bills. The one who agreed to see the leopard required an experienced trainer to be in attendance and, again, all but one trainer refused to attend the leopard because they were unpaid for prior services. Respondent failed to coordinate the presence of the one willing trainer with the one willing veterinarian and the leopard died unattended and untreated.

G. The Anesthetizing of a Ferret

10. During the summer of 1980, a trainer employed by respondent used a non-medical grade of ether to anesthetize a ferret for exhibition in a film.

H. Housing a Bear in an Unclean Cage Without Drinking Water

11. In the spring of 1982, a full grown black bear owned by respondent was observed by one of respondent's former employees to have been confined in a cage that was not kept clean and was without drinking water.

I. Failure to Adequately Feed "Large Cats"

12. During mid-1980 through mid-1981, respondent was often without funds or acceptable credit to purchase needed food for the large cats (lions, tigers, etc.) it kept at the Colton facility. Respondent, as a consequence, provided no food to the large cats on a number of days when they were not scheduled to fast for health reasons or training purposes, and on various other days, fed the large cats only one chicken each instead of their normal food ration of three to four chickens each. During this period, the large cats were only rarely fed other types of food needed for a healthy diet.

J. Outdoor Housing of Camels, Llamas and Lions

13. On November 29, 1983, and again on December 6, 1983, an Animal Health Technician employed by APHIS inspected respondent's facilities at the Cougar Hill Ranch, Littlerock, California. She ordered respondent to correct deficiencies found at the time of the first inspection, but when she reinspected the facility, one week later, the following deficiencies were still in existence:

(a) Respondent's camels and llamas were confined outdoors by an open wire enclosure which provided them with no protection from the elements.

(b) Several of respondent's lions were housed outdoors in chain-link cages which did not contain den boxes needed for their protection from the elements.

K. Handling, Sanitation, Feeding, Watering, and Housing of Three Elephants

14. On November 29, 1983 and December 6, 1983, when the APHIS Animal Health Technician inspected respondent's facilities at the Cougar Hill Ranch, Littlerock, California, she also found that respondent was housing its three elephants in a trailer that was too small for normal movements by the elephants, and the inside walls of which had splintered plywood and protruding bolts endangering the elephants. At the time of her first inspection, the APHIS Health Technician ordered the correction of these conditions, but when she reinspected the facility, one week later, they existed as before.

15. In addition to the observations by the APHIS official on November 29 and December 6, 1983, the elephants were observed another time in December 1983 by another APHIS official accompanied by two elephant experts. On a subsequent day in December 1983, probably the 20th, they were observed by a third expert when he purchased and took possession of one of the elephants. Each time they were observed, the elephants were found to be chained inside a trailer where they were unable to move about sufficiently; the elephant chained between the wheel wells could not lie down; there was excessive accumulation of manure on the trailer floor which was wet and spongy from urine, indicating to the experts that the trailer had not been cleaned daily; and the elephants appeared to be thin, underfed, and in discomfort.

16. On December 20, 1983, approximately, Mr. Gary Johnson purchased and took possession of one of the elephants which he believed to be in the best condition of the three. Mr. Johnson found that elephant to be thin and apparently underfed, and its feet

needed special care because of an excessive buildup of dead tissue, which resulted from a lack of sufficient exercise.

CONCLUSIONS

1. *Respondent, at all times material herein, was and is subject to the jurisdiction of the Secretary of Agriculture as the holder of a Class C license issued to respondent as an animal exhibitor under the Act.*

2. *Respondent, on September 23, October 14, and October 25, 1982, violated regulations issued by the Secretary (9 CFR §§ 2.75 and 2.125) respecting the business records it was required to maintain as a Class C licensee. Additionally, on November 29 and December 6, 1983, untagged domestic cats were on respondent's business premises in violation of 9 CFR § 2.50. A civil penalty of $800.00 is appropriate.*

Respondent's recordkeeping violations arose out of its failure to keep a set of records at the facility where its animals were housed (9 CFR § 2.125), and its failure to maintain records in the prescribed form showing the details of all acquisitions and dispositions of animals in its possession at various times (9 CFR § 2.75).

Respondent was required by 9 CFR § 2.125 to furnish requested information to any Veterinary Service representative "within such reasonable time as may be specified in the request." Because respondent did not keep a set of books at the facility where it kept its animals, it was unable to promptly comply with such requests on three occasions. This is construed to be a violation of the regulation but was the result of respondent's misunderstanding of APHIS requirements and was not in furtherance of any scheme to circumvent the Act. A penalty of $100.00 for each of the three instances of this violation, or $300.00 total, is appropriate.

Primarily, to guard pet dogs and cats from thieves who would steal and later sell them for laboratory experimentation, APHIS imposes stringent recordkeeping requirements to document the ownership history of animals in the possession of dealers and other licensees. APHIS also requires dealers and exhibitors to affix collars with special identification tags to all dogs and cats in their possession. Harsh sanctions for violations of these recordkeeping and tagging requirements are typically imposed as necessary to the achievement of this laudable goal. *See Rudolph Vrana,* ___ Agric. Dec. ___, (Nov. 6, 1984). However, the dogs and cats on respondent's premises were either pets owned by its employees and students, or highly trained animal performers. Respondent's business is not the type that is used to launder the identity of stolen dogs and cats. Furthermore, the inaccuracies in respondent's records

chiefly concerned discrepancies in its inventory of exotic animals which apparently resulted from inadvertent bookkeeping errors of omission. Respondent's recordkeeping violations of 9 CFR § 2.75 are not concluded to be egregious in nature and a civil penalty of $300.00 is appropriate.

For these same reasons, complainant's violations of 9 CFR § 2.50, due to the presence of untagged domestic cats on its premises at the time of inspections by an APHIS official on November 29 and December 6, 1983, must also be construed to be minor in nature and, again, a civil penalty of $100.00 for each of the two violations, or $200.00 total, appears to be sufficient and appropriate.

3. *There is no record evidence showing respondent's orangutan was "sick, diseased, injured, lame or blind" needing veterinary care after it was repeqtedly struck by its trainer, in the summer of 1980; and therefore the one applicable regulation, 9 CFR § 3.84, was not violated.*

Departmental regulations applicable to nonhuman primates do not presently require their humane handling and treatment. This is a grievous oversight—an oversight that should be immediately corrected by concerned officials.

The only regulation now applicable to orangutans and other "nonhuman primates" has very limited application. It requires veterinary care to be provided to those animals observed to be "sick, diseased, injured, lame or blind." The testimony in this proceeding is that after being repeatedly struck, the orangutan exhibited a subdued manner for a time, but there were no physical signs or evidence of injury. Furthermore, its health was sufficiently vigorous to enable it to later seize and threaten one of its trainers.

The cause of its death a month later is undetermined, and to speculate that it was related to the beating, or that veterinary care could have prevented it, would be merely that—speculation.

4. *Respondent, on November 26, 27, 28, and 29, 1981, violated 9 CFR § 3.134 by failing to provide veterinary care to its sick tiger, Sulton.*

5. *Respondent, on November 28 or 29, 1981, violated 9 CFR § 3.135 when its employees mishandled respondent's sick tiger, Sulton, dragging it by the tail to move it from where it was housed, and caused it unnecessary discomfort and stress.*

6. *The maximum civil penalty of $1,000.00 for each of the respondent's five violations concerning its tiger, Sulton, or $5,000.00 total, is appropriate.*

At the hearing, Mr. Helfer questioned whether the failure to provide the tiger veterinary care for four days after its condition started to degenerate on November 26, 1981, is properly attributable to

respondent or should be instead considered to be a breach of duty by the treating veterinarian employed by respondent as an independent contractor. The Act renders this consideration academic in that a licensee is held directly responsible "for any act or omission by any person acting for it or in its employ" (7 U.S.C. § 2139). In short, the Act precludes a licensee from delegating away its responsibility to provide each of its animals humane treatment and needed veterinary care. Various of respondent's employees testified that they observed the tiger to be suffering and in need of veterinary care and treatment from November 26, 1981, until its death. Their observations established respondent's duty to secure the needed veterinary care. When it was finally provided on November 30, 1981, it came too late and the tiger had suffered needlessly for four days.

During those four days of suffering, some of respondent's employees cruelly added to the tiger's torment by dragging the animal across the ground to move it from the trailer where it was housed. This incident, when added to the four days when it should have been provided needed veterinary care, constitutes a fifth violation of the Act which, together with the other four, should be penalized at the statutory maximum amount.

7. *Respondent, in January 1982, violated 9 CFR § 3.134 by failing to provide veterinary care to its sick leopard, Satan, for over one week. A civil penalty of $3,000.00 is appropriate.*

There is less testimony in the record pertaining to the leopard, Satan, and its need for veterinary care than was given respecting the tiger, Sulton. Its physical suffering, apparently, was not as intense. For that reason, a lesser civil penalty of $3,000.00 is being assessed.

On respondent's behalf, it is to be noted that attempts were made to obtain veterinary care which came of nothing because of its poor financial circumstances. But those who would employ animals for profit, particularly the large profits realized when they are exhibited for films, must first assure that they are always able to faithfully and promptly attend to the medical and other needs of these dependent animals.

The Department of Agriculture's sanction policy is to deal harshly with those who, because they are undercapitalized, are unable to fully discharge their financial duties to growers and dealers in agricultural commodities. *See Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974). It is appropriate that this same standard be made applicable to licensed animal exhibitors to assume their faithful discharge of the duties they owe the animals they use for profit.

8. *Respondent, during the summer of 1980, violated 9 CFR § 3.135 when its trainer anesthetized a ferret with a non-medical grade of ether and caused it unnecessary behavioral stress. A civil penalty of $500.00 is appropriate.*

A veterinarian who respondent employed on various occasions to assist it in exhibiting its animals, testified that the preferred procedure for anesthetizing a ferret for exhibition in a film scene is to have a veterinarian put it to rest with halogen gas. In his opinion, the procedure employed by respondent's trainer was unnecessarily stressful to the animal.

Although the practice of anesthetizing healthy animals for special film illusions has not been questioned in this proceeding, the procedure employed should, at very least, be performed by a competent veterinarian using the finest grade of anesthetics.

Inasmuch as there was no proof that the animal suffered any permanent harm, the civil penalty is being assessed at one-half of the maximum amount.

9. *Respondent, in the spring of 1982, violated 9 CFR § 3.137(d) by failing to provide a bear a clean and sanitized cage, and violated 9 CFR § 3.130 by failing to provide the bear adequate drinking water. A civil penalty of $500.00 is appropriate.*

Although violations of two regulations were observed by one of respondent's employees, they both involved a single instance of neglect. A total civil penalty of $500.00 appears to be appropriate.

10. *Respondent, from the middle of 1980 through the middle of 1981, violated 9 CFR § 3.129 by failing to feed its large cats (lions and tigers, etc.) food of sufficient quantity and nutritive value to maintain all animals in good health. A civil penalty of $2,000.00 is appropriate.*

Credible testimony makes it very clear that during mid-1980 through mid-1981, respondent's lack of working capital and its poor credit rating, caused it to provide food of insufficient quantity and nutritive value to its lions, tigers and other large cats. What the record evidence leaves uncertain is the number of days when these violations were committed. Inasmuch as the principal witness on this subject recalled times when the cats were in need of food and were only given one chicken each, and others when they were fed nothing, the record does support the imposition of a maximum civil penalty for each of the two types of food deprivation, each of which must have occurred at least once.

11. *Respondent, on November 29, 1983 and December 6, 1983, violated 9 CFR § 3.127 by failing to provide llamas, camels, and lions with sufficient shelter from cold, sunlight, and inclement weather. A civil penalty of $500.00 is appropriate.*

These violations were detected after respondent moved its animals to a new facility and before it had completed permanent arrangements for their housing. Although such violations are serious in nature, none of the animals were noted to have suffered any adverse consequences, and a total civil penalty of $500.00 therefore seems appropriate.

12. *Respondent, on November 29, 1983, and December 6, 1983, violated 9 CFR § 3.128 by housing three elephants in a trailer that did not provide sufficient space to allow each animal to make normal postural movements.*

13. *Respondent, on November 29, 1983, and December 6, 1983, violated 9 CFR § 3.125(a) by housing three elephants in a trailer, the inside walls of which were not maintained in good repair to protect the animals from injury.*

14. *Respondent, on two other days in December 1983, violated 9 CFR § 3.129, in that its three elephants were observed to be underfed; and violated 9 CFR § 3.131 in that the trailer in which the elephants were enclosed was not adequately cleaned of their excreta.*

15. *A civil penalty of $3,000.00 for these violations is appropriate.*

Again, respondent's violations are the outgrowth of its poor financial condition at the time which led it to house its elephants in a trailer that was not suitable for longterm confinement, to cut back on their food rations, and to have a staff which was inadequate for the elephants' proper care.

The appropriate overall penalty for these violations, involving three elephants, appears to be $3,000.00.

16. *In addition to the civil penalties that are being assessed, respondent's license should be revoked.*

Respondent committed so many serious violations of the APHIS standards designed to protect the health and well-being of the animals it used for exhibition, its license as an exhibitor necessarily needs to be revoked.

In sum, upon consideration of the large and once extremely profitable business respondent conducted as an animal exhibitor, the gravity of specific violations found to have been committed, and the overall pattern of recurrent violations over a period of several years, a civil penalty totalling $15,300.00 is being assessed and respondent's license shall be revoked to preclude future violations.

Accordingly, the following order shall be entered.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's appeal, in the main, reargues matters that were fully considered by the ALJ and correctly decided. No useful purpose would be served by a detailed discussion of these matters. In

short, the record contains ample evidence to support the ALJ's findings,[2] and the record reveals no procedural irregularities.

Respondent's owner argues that the respondent corporation should not be responsible for the actions or failures of employees or other persons acting for the corporation, but the Act expressly makes an exhibitor responsible for the acts or omissions of employees or other persons acting for the exhibitor. Specifically, the Act provides (7 U.S.C. § 2139):

> § 2139. *Principal-agent relationship established*
>
> When construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by a research facility, a dealer, or an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission, or failure of such research facility, dealer, exhibitor, licensee, operator of an auction sale, intermediate handler, or carrier, as well as of such person.

Respondent's owner argues that its license should not be revoked "in perpetuity" (Appeal at 3). But the regulations provide that a person whose license has been revoked is eligible to apply for a new license after 1 year from the effective date of the revocation (9 CFR § 2.10).

Complainant seeks to increase the civil penalty by $3,000 because of the violations involving the three elephants, but the civil penalty assessed against respondent, in conjunction with the revocation order, is adequate to serve as an effective deterrent to future violations.

Complainant argues on appeal that the ALJ improperly dismissed the allegation relating to respondent's orangutan. But the record supports the ALJ's finding that there were no physical signs or evidence of injury to the animal requiring veterinary care. Accordingly, the ALJ properly dismissed the allegation in the complaint as to the orangutan. The ALJ correctly observed that the failure of the Department's regulations to require humane handling and treatment of nonhuman primates, in the circumstances of this case, "is a grievous oversight—an oversight that should be

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[2] Complainant need only prevail by a preponderance of the evidence. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

immediately corrected by concerned officials" (Initial Decision at 16).

I should note that nothing in this decision should be regarded as affirming the legality of anesthetizing an animal solely for the purpose of (i) making the animal appear dead while exhibited, or (ii) dyeing the animal a different color. The record in this case indicates that anesthetization, even when done "properly" by a veterinarian, is stressful. Whether anesthetization solely for the purpose of exhibiting an animal causes "unnecessary discomfort, behavioral stress, or physical harm to the animal" is a question that is not involved here and will be left open.

For the foregoing reasons, the following order should be issued.

ORDER

1. Respondent's license is hereby revoked.

2. Respondent is assessed a civil penalty of $15,300, which shall be paid not later than the 90th day after service of this order by certified check or money order, made payable to the United States Treasury and sent to Donald A. Tracy, United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, Washington, D.C. 20250.

3. Respondent and its officers, employees, agents and assigns, acting directly or indirectly, or through any corporation, trust or other device whatsoever, is ordered to comply with the Act and all the regulations and standards thereunder and to cease and desist from any violations thereof.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent. The revocation order shall become effective on the 30th day after service of this order on respondent.

In re: LARRY D. LITTLE. AWA Docket No. 309. Decided February 20, 1986.

Violation of Animal Welfare Act.

Robert A. Ertman, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("Act") by a Complaint filed by

the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, charging that respondent violated the regulations and standards issued under the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings (7 CFR § 1.138).

The respondent admits the jurisdictional allegations contained in the complaint, specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, and waives oral hearing and further procedure. Complainant and respondent agree for the purpose of settling this procedure to the entry of this decision.

FINDINGS OF FACT

1. Respondent is an individual whose mailing address is Box 186, Barnes City, Iowa 50027.

2. At all times material herein respondent was licensed as a dealer under the Act.

3. At the time of his original license application, respondent received a copy of the regulations and standards contained in 9 CFR Chapter 1, Subchapter A, and agreed in writing to comply with said standards and regulations.

CONCLUSION

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision and order, this decision and order will be entered.

ORDER

Respondent shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) and the standards and regulations issued thereunder (9 CFR § 1.1 *et seq.*) and shall cease and desist from any violation thereof.

This order shall have the same force and effect as if entered after full hearing and shall become effective on the first day after service of this Decision and Order on the respondent.

In re: CAROLYN MABERRY. AWA Docket No. 338. Decided February 20, 1986.

Violation of the Animal Welfare Act.

Robert Ertman, for complainant.
James J. Wheeler, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq.*, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act, 9 CFR § 1.1 *et seq.* This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Carolyn Maberry, hereinafter referred to as respondent, is an individual whose mailing address is Route 2, Dawn, MO 64638.

2. At all times material herein respondent was licensed under the Act as a Class B dealer.

3. At the time respondent's license was issued and annually thereafter, respondent received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A of the Code of Federal Regulations and agreed to comply with said regulations and standards.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent shall abide by each and every provision of the Animal Welfare Act, as amended, and the regulations and stand-

ards issued thereunder, and shall cease and desist from violations thereof. Further, respondent is assessed a civil penalty of $500.00, which is hereby suspended conditioned upon her compliance with this order.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: CARNIVORE EVOLUTIONARY RESEARCH INSTITUTE. AWA Docket No. 251. Decided February 24, 1986.

Violation of Animal Welfare Act.

Donald Tracey, for complainant.
Kim Wetherill, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq.*, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act, 9 CFR § 1.1 *et seq.*. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits that at times material to the allegations of the complaint it was registered as a research facility under the Act and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(1) Respondent, Carnivore Evolutionary Research Institute, the predecessor to Carnivore Preservation Trust, has a mailing address of Route 5, Box 326, Pittsboro, North Carolina 27312.

(2) Respondent, at times material herein, was registered as a research facility under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

(1) Respondent, its agents and employees, acting directly or through any corporate or other device shall not violate the Animal Welfare Act and the regulations and standards issued thereunder, and in particular:

a. Agrees to obtain a license before selling animals covered under the Act; and

b. Agrees not to interfere with inspections conducted by APHIS pursuant to the Act during normal business hours.

(2) Respondent is assessed a civil penalty of $2250.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: L.M. and WANDA BARNFIELD. AWA Docket No. 352. Decided February 28, 1986.

Violation of the Animal Welfare Act.

Robert Ertman, for complainant.
Harvey M. Tettlebaum, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER

This is a proceeding under the Animal Welfare Act. A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of practice was served upon respondents. This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR § 1.138).

For the purpose of settling this case and for such purpose only, respondents admit the jurisdictional allegations of the complaint, specifically admit that the Secretary of Agriculture has jurisdiction in this matter, and waive hearing and further procedure herein. Complainant and respondents consent to the issuance of this Order.

ORDER

Respondents, their agents and employees, acting directly or through any other person, agent, corporation or other entity, shall cease and desist from violating the Animal Welfare Act and the regulations and standards issued thereunder, and in particular, from selling animals without a license as required by the Act.

In accordance with section 19 of the Act (7 U.S.C. § 2149), respondents are assessed a civil penalty in the amount of $15,000.00.

From the effective date of this order, respondents shall not, directly or through any other person, agent, corporation or other entity, engage in, be associated with, or derive any benefit from, any business or activity requiring a license under the Animal Welfare Act, except with the prior written approval of the Area Veterinarian-in-Charge, United States Department of Agriculture. This provision shall not bar the sale or lease of property, real or personal, nor the sale of any business entity, so long as the amount of compensation of such sale or lease does not depend in whole or part upon income to be derived from activities subject to the Act; *Provided*, however, that notwithstanding this prohibition, respondent Wanda Barnfield may apply for a license as a Class "A" dealer after one (1) year from the effective date of this Order, and any such application shall be considered without regard for any incident which gave rise to the complaint in this action.

This order shall have the same effect as if entered after a full hearing and shall be effective upon service upon respondents.

Copies of this decision shall be served upon respondents.

COURT DECISION

UTICA PACKING COMPANY and DAVID FENSTER *v.* JOHN R. BLOCK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE,et al. Civil Action No. 85-1324. (USDA FMIA Docket No. 35.) Decided January 13, 1986.

James L. Quarles, III, Washington, D.C., and *Geoffrey S. Stewart*, for plaintiffs-appellants.

L. Michael Wicks, Assistant U.S. Attorney, Detroit, Michigan, for defendants-appelees.

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT.

Before LIVELY, Chief Judge, and CONTIE and WELLFORD, Circuit Judges. LIVELY, Chief Judge.

The question in this case is whether the Secretary of Agriculture may replace the Judicial Officer of the Department of Agriculture (hereafter USDA) after that officer has rendered a final decision in a case and then present a petition for reconsideration to the replacement. The district court found no legal impediment to this course of conduct, and affirmed the decision rendered by the second Judicial Officer. We disagree and reverse.

THE ADMINISTRATIVE SETTING

In 1940 Congress passed the Schwellenbach Act, 54 Stat. 81 (1940), now codified as 7 U.S.C. § 450c-450g (1982). This law authorized the Secretary of Agriculture (Secretary) to delegate his regulatory functions. Pursuant to this authority the Secretary established the position of Judicial Officer. "The Judicial Officer acts as the final deciding officer in lieu of the Secretary in Department administrative proceedings involving adjudicating or rate-making where the statute requires an administrative hearing or opportunity therefor." T. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 Geo. Wash.L.Rev. 277 (1957-58) (footnote omitted). The delegation to the Judicial Officer as final deciding officer in adjudication proceedings is contained in 7 CFR § 2.35 (1985).

The Federal Meat Inspection Act, 21 U.S.C. §§ 601, et seq. (1982), requires that all meat food products moving in or affecting commerce be "prepared," labeled and marked only as permitted by the statute and regulations and that inspectors be appointed for the purpose of enforcing these requirements. Section 401 of the Meat Inspection Act, 21 U.S.C. § 671, empowers the Secretary to remove a person or firm deemed unfit to deal with meat food products by withdrawing the inspection service:

> The Secretary may (for such period, or indefinitely, as he deems necessary to effectuate the purposes of this chapter) refuse to provide, or withdraw, inspection service under subchapter I of this chapter with respect to any establishment if he determines, after opportunity for a hearing is accorded to the applicant for, or recipient of, such service, that such applicant or recipient is unfit to engage in any business requiring inspection under subchapter I because the applicant or recipient, or anyone responsibly connected with the applicant or recipient, has been convicted, in any Federal or State court, of (1) any felony, or (2) more than one violation of any law, other than a felony, based upon the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food. This section shall not affect in any way other provisions of this chapter for withdrawal of inspection services under subchapter I from establishments failing to maintain sanitary conditions or to destroy condemned carcasses, parts, meat or meat food products.
>
> For the purpose of this section a person shall be deemed to be responsibly connected with the business if he was a partner, officer, director, holder, or owner of 10 per centum or more of its voting stock or employee in a managerial or executive capacity.
>
> The determination and order of the Secretary with respect thereto under this section shall be final and conclusive unless the affected applicant for, or recipient of, inspection service files application for judicial review within thirty days after the effective date of such order in the appropriate court as provided in section 674 of this title. Judicial review of any such order shall be upon the record upon which the determination and order are based.

The Secretary has promulgated rules of practice governing formal adjudicatory proceedings under various statutes, including the Meat Inspection Act. 7 CFR § 1.130, et seq. (1985). When an administrator of an agency within the USDA files a complaint with the Secretary the matter is referred to an administrative law judge (ALJ). Upon request the party complained against is entitled to a hearing before the ALJ. The decision of the ALJ is final unless there is a timely appeal to the Judicial Officer, who decides the appeal on the administrative record. The Judicial Officer may grant oral argument or accept submission on briefs. The Judicial

Officer renders a decision under procedures set forth in 7 CFR § 1.145(i):

> *(i) Decision of the Judicial Officer on Appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officershall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

The regulations further provide that if reconsideration is sought a petition to reconsider the decision of the Judicial Officer shall be filed within 10 days after service of the decision. 7 CFR § 1.146(a)(3).

I.

A.

In 1978 David Fenster, president and part owner of Utica Packing Company was convicted of bribing a meat inspector. After a hearing on a complaint filed by USDA the ALJ ordered withdrawal of meat inspection services from Utica unless Fenster divested himself of his holdings in the company and withdrew from management. Fenster appealed the decision and the Judicial Officer, Donald Campbell, affirmed the finding of the ALJ that Utica was unfit to receive inspection services because a responsibly connected person had been convicted of a felony which went to the heart of the inspection program. The Judicial Officer found Fenster's argument for leniency based on mitigating circumstances irrelevant and declined to consider any other circumstances in view of the type of felony involved. The effect of withdrawing inspection was to debar Utica from engaging in the meat products business so long as Fenster was associated with the company.

Fenster and Utica filed a complaint in the United States District Court for the Eastern District of Michigan pursuant to 21 U.S.C. § 674,[1] seeking review of the final decision of the Judicial Officer. After reviewing the administrative record the district court granted summary judgment affirming the decision. *Utica Packing Co.* v. *Bergland,* 511 F.Supp. 655 (E.D. Mich. 1981). On appeal this court found that the Judicial Officer erred in refusing to consider mitigating circumstances. The case was remanded "to afford the Judicial Officer an opportunity to consider the mitigating circumstances advanced by Fenster." *Utica Packing Co.* v. *Bergland,* 705 F.2d 460 (6th Cir. 1982) (Table).

Upon remand Judicial Officer Campbell expressed strong disagreement with the decision of this court, stating "*any* person who is convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector is unfit to receive Federal inspection regardless of *any* mitigating circumstances." *In re Utica Packing Company,* FMIA Docket No. 35, Decision at 27 (Nov. 18, 1982) (emphasis in original). Because he was required to do so by this court's decision, Campbell did review the evidence of mitigating circumstances which included: possible improper conduct by the inspectors; virulent anti-Semitic remarks by one of the inspectors (Fenster is a Jewish survivor of the Holocaust); Fenster's serious health problems at the time of the bribery; evidence that despite the bribery, Fenster wanted to operate a clean plant; and the Judicial Officer's finding that the bribery stemmed partly from a misunderstanding.

As he reviewed each of the mitigating circumstances Judicial Officer Campbell stated in his decision that, except for this court's decision, he would "give no weight to this circumstance." Nevertheless, Campbell concluded:

> If mitigating circumstances must be considered, I cannot reasonably imagine any stronger mitigating circumstances than appear here. If any felon convicted under 18 U.S.C. § 201(b) of bribing a meat inspector is fit to receive Federal meat inspection, then David Fenster is fit . . . . *Id.* at 28.

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[1] 1. 21 U.S.C. § 674 provides:

> The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other Territories, are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of, this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, except as provided in section 607(e) of this title.

The Judicial Officer ordered the complaint dismissed "with great reluctance and misgiving." *Id.* at 29.

B.

Since the Judicial Officer acts for the Secretary, the only post-decision proceeding open to the USDA is a petition to the Judicial Officer for reconsideration. Several USDA officials met shortly after receiving Campbell's second opinion to consider what options might be available. As the brief of the Secretary in this court states, the USDA "violently disagreed" with the latest decision of the Judicial Officer and had "little hope of reconsideration." Instead of petitioning for reconsideration immediately, these officials obtained the Secretary's agreement to revoke Campbell's authority to perform any further "regulatory function" in the Utica case and to "vest such authority in Deputy Assistant Secretary John J. Franke, Jr." Appellee's Brief at 8–9. Mr. Franke is not a lawyer and had never performed adjudicatory, regulatory or legal work. Richard Davis, an attorney in the Office of General Counsel of USDA, was assigned to assist Franke. Davis had no previous contact with the Utica case, but his immediate supervisor participated in the removal of Campbell and appointment of Franke, and also supervised the division responsible for the prosecution of Utica.

Late in the afternoon of the tenth day after Campbell's decision the Secretary filed a petition for reconsideration with Franke. After denying Utica's motion to strike the notice of revocation and redelegation the new Judicial Officer granted the motion for reconsideration. Franke found that "despite the mitigating circumstances presented by respondent, respondent is unfit to receive federal meat inspection so long as David Fenster is associated with the plant." He then ordered inspection service withdrawn indefinitely until Fenster should sever all association with Utica. Utica and Fenster again sought review in the district court, and the district court again granted summary judgment in favor of the Secretary. This appeal followed.

II.

A.

There are additional facts that should be stated before we undertake a consideration of the legal issues raised by the parties. The USDA officials who made the decision to replace Campbell were Dr. Houston, Administrator of Food Safety and Inspection Services, the client agency of the prosecution; James Barnes, USDA General Counsel; James Kelly, an Associate General Counsel who actually

participated in supervision of the Utica case at the time the revocation and redelegation took place and was the supervisor of Richard Davis; and Harold Reuben of the Office of General Counsel who also participated in supervision of the prosecution. The Secretary was out of Washington and did not have information available to make an independent decision. He accepted the recommendation of the others and signed the revocation and redelegation order.

In response to requests for admission the Secretary judicially admitted that "[o]ne of the purposes of appointing a 'second Judicial Officer' was to improve the Department's chances of winning a petition for reconsideration."

B.

Utica and Fenster have presented a number of arguments for reversal, two of which require our consideration. In the first place, they contend that the actions of USDA violated the Administrative Procedure Act, particularly 5 U.S.C. § 554(d), which provides in relevant part:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

The plaintiffs admit that Franke performed no investigative or prosecuting functions in the Utica case. They argue, however, that the selection of Franke and Davis by officials who were involved in the prosecution of the case violated the prohibition against prosecutors participating or advising in the decision of the second Judicial Officer. The Secretary counters that there was no violation of § 554(d) since neither Franke nor Davis had prior contact with the Utica case and no prosecutor or investigator participated as a judge.

The second basis for reversal urged by the plaintiffs is that the procedures followed by USDA in this case violated the due process guarantee of the Fifth Amendment. They assert that fundamental fairness was sacrificed to gain a desired decision from a handpicked judge and that all appearance of fairness was "shattered." The plaintiffs point out that Campbell was a career employee who was protected under the merit system and thus immune to departmental pressures (though he had no tenure in the position of Judicial Officer), whereas Franke, a political appointee, had no job protection and could be fired at will. In addition, they contend, the ap-

pointment of Davis, a subordinate of Kelly, guaranteed that the group who chose the "option" of revocation and redelegation would have strong influence over the decision on reconsideration.

The Secretary responds that there is a presumption of honesty and integrity on the part of responsible officers and that the plaintiffs produced no evidence of any improprieties by Franke or Davis. He argues that the supervision of agency adjudicators by prosecutorial officers has been upheld and that criminal cases involving blending of prosecutorial and judicial functions are not controlling in administrative settings.

III.

A.

Neither the court nor the parties have found a case with facts similar to those established by this record. This may be because very few federal agencies and departments have a position like the USDA Judicial Officer. He acts as delegee of the Secretary who appears to have total discretion in selecting and appointing the person to fill the position. While admitting that one of the reasons for removing Campbell and appointing Franke was to improve the chances of USDA on reconsideration, the Secretary asserts that the primary reason was that Campbell so "grossly misinterpreted" this court's decision ordering a remand that he was incapable of exercising an objective review. Reduced to its essence this is a claim that the Secretary's delegation can be withdrawn before reconsideration any time he disagrees with the Judicial Officer's conclusions. Yet discovery in this case disclosed that Judicial Officers had made hundreds of decisions since 1940, and none had ever had his delegation revoked on this ground. If the Judicial Officer is to have stature as an independent decision-maker, this argument of the Secretary cannot be accepted.

B.

The actions of USDA in this case do not appear to have violated APA § 554(d). The clear purpose of this section is to separate the investigative and prosecutorial functions from the adjudicative function. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 41, 70 S.Ct. 445, 450, 94 L.Ed. 616, *modified*, 339 U.S. 908, 70 S.Ct. 564, 94 L.Ed. 1336 (1950). We do not accept the Secretary's position that § 554(d) is to be read so narrowly that it applies only to cases where the same person acts as prosecutor or investigator and judge. However, so far as this record shows neither Franke nor Davis had any prior contact with the Utica case, and there was no showing that anyone

in USDA actually influenced the decision on reconsideration. Nor was there any showing that either Franke or Davis was acquainted with *ex parte* information about the case. By regulation USDA has specifically prohibited *ex parte* communications between investigators or prosecutors and the Judicial Officer:

> (a) At no stage of the proceeding between its institution and the issuance of the final decision shall the Judge or Judicial Officer discuss ex parte the merits of the proceeding with any person who is connected with the proceeding in an advocative or in an investigative capacity, or with any representative of such person: *Provided,* That procedural matters shall not be included within this limitation; and *Provided further,* That the Judge or Judicial Officer may discuss the merits of the case with such a person if all parties to the proceeding, or their attorneys have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

7 CFR § 1.151(a).

In *Grolier Inc.* v. *Federal Trade Commission,* 615 F.2d 1215, 1220 (9th Cir. 1980), the court stated the intention of Congress in adopting § 554(d) as follows:

> We conclude that by forbidding adjudication by persons "engaged in the performance of investigative or prosecuting functions," Congress intended to preclude from decisionmaking in a particular case not only individuals with the title of "investigator" or "prosecutor," but all persons who had, in that or a factually related case, been involved with *ex parte* information, or who had developed, by prior involvement with the case, a "will to win."

[1, 2] The focus under § 554(d) is on the past involvement of the adjudicator. Under the peculiar facts of this case we include both Franke and Davis within the term "adjudicator" or "judge" because of Franke's obvious reliance on Davis in all matters legal. In order for § 554(d) to cause disqualification where the adjudicator was not actually a prosecutor or investigator in the case or a factually related one, the person challenging his right to adjudicate has the burden of showing that some past involvement has acquainted him with *ex parte* information or engendered in him an unjudgelike "will to win." *Id.* at 1221. Though the "redelegation" of Franke as Judicial Officer was invalid for other reasons, the plain-

tiffs did not make this showing and we do not believe the move violated the Administrative Procedure Act.

IV.

A.

The Secretary does not quarrel with the indisputable fact that Anglo-American law does not permit anyone to be the judge of his own case. As least since Lord Coke's decision in *Dr. Bonham's Case*, 8 Rep. 114a (C.P.1610), this has been the rule. The Secretary also recognizes that *Tumey* v. *Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), established the principle that it violates due process for a judge to have a direct and substantial interest in the outcome of a case before him. However, the Secretary argues that these principles were not involved in the removal of Campbell and the appointment of Franke, since Franke was not a party and was not shown to have any interest in the outcome of the case.

The Secretary places principal reliance on *Marcello* v. *Bonds*, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955), in arguing that the due process rights of Fenster and Utica were not violated in the present case. *Marcello* involved proceedings under § 242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1252(b). The petitioner charged that the proceedings violated due process because they failed to provide for a fair and impartial hearing. The objection was that the special inquiry officer who conducted the deportation proceedings was subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions. Rejecting this claim, the Court stated:

> The contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters.

Id. at 311, 75 S.Ct. at 762. *Marcello* appears to be limited to immigration cases.

The Supreme Court affirmed in *Withrow* v. *Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), that the due process requirement of a fair trial in a fair tribunal "applies to administrative agencies which adjudicate as well as to courts." (Citation omitted). Nevertheless, the Court distinguished cases where the proba-

bility of actual bias is "too high to be constitutionally tolerable" from normal administrative adjudication:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. at 47, 95 S.Ct. at 1464.

B.

[3] There can be no doubt that the requirement of separation of functions is relaxed in administrative adjudication. However, the requirement of a fair trial before a fair tribunal has not been eliminated. *Withrow* v. *Larkin.* This concept requires the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality.

In *Amos Treat & Co.* v. *Securities and Exchange Commission,* 306 F.2d 260 (D.C. Cir.1962), the court considered a challenge to a former division director of the SEC participating after his appointment as a commissioner in a case in which he had prior involvement. The dual role of the commissioner was challenged both under the APA and on due process grounds. The decision was based on due process considerations. *Id.* at 267. In attempting to determine the application of due process to administrative adjudications the court quoted *Hannah* v. *Larche,* 363 U.S. 420, 442, 80 S.Ct. 1502, 1514, 4 L.Ed.2d 1307 (1960):

> "Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."

306 F.2d at 263 (footnote omitted). The court concluded that quasi-judicial proceedings must entail, "at the very least," a fair trial,

quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

306 F.2d at 263. *Hannah* was a civil rights case and *Murchison* was a criminal case, yet the court turned to them for guidance in determining what process is due in administrative proceedings of a judicial or quasi-judicial nature.

[4] We believe this is a case where the plaintiffs have shown the risk of unfairness to be "intolerbly high." Every disappointed litigant would doubtless like to replace a judge who in the regular course of his or her duties has decided a case against the litigant and present a motion for a new trial or for reconsideration to a different judge of his own choosing. All notions of judicial impartiality would be abandoned if such a procedure were permitted.

There is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer. Yet that is exactly what occurred in this case. Campbell was appointed Judicial Officer long before the Utica case arose, and considered the case in the normal course of his duties. When Campbell rendered a decision in the case with which USDA "violently disagreed," officials of the department unceremoniously removed him and presented a petition for reconsideration to their hand-picked replacement.

It is of no consequence for due process purposes that Fenster and Utica were unable to prove actual bias on the part of Franke or Davis. The officials who made the revocation and redelegation decision chose a non-career employee with no background in law or adjudication to replace Campbell. They assigned a legal advisor to the new Judicial Officer who worked under an official who was directly involved in prosecution of the Utica case. Such manipulation of a judicial, or quasi-judicial, system cannot be permitted. The due process clause guarantees as much. As the court stated in *D.C. Federation of Civic Ass'ns* v. *Volpe*, 459 F.2d 1231, 1246–47 (D.C.Cir.1971), *cert. denied*, 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972):

> With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality.

V.

Nothing in this opinion should be perceived as minimizing the seriousness of Fenster's criminal activities. Bribing an inspector does strike at the heart of the meat inspection program and cannot be tolerated. As we wrote in our earlier unpublished opinion in this case:

> The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. *See Wyszynski Provision, Co., Inc.* v. *Sec. of Agriculture*, 538 F.Supp. 361, 364 (E.D.Pa.1982).

Judicial Officer Campbell properly concerned himself with the nature of Fenster's criminal activities and the possible harm to the public which could flow from them. It is not certain that Campbell properly construed this court's remand order in considering mitigating circumstances. However, that is not the issue presently before us. Whether the Judicial Officer was correct or incorrect in his application of the law, the Secretary's efforts to change the result by the methods described in this opinion cannot be permitted to succeed.

The judgment of the district court is reversed, and the case is remanded with directions to remand it to the Secretary for re-entry of Judicial Officer Campbell's order dismissing the complaint against Utica and Fenster.

DISCIPLINARY DECISIONS

In re: THE BIG "O" HAMBURGER CO. INC. FMIA Docket No. 93. Decided January 9, 1986.

Violation of the Federal Meat Inspection Act.

Jaru Ruley, for complainant.
William Condon, New York, N.Y., for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

These are proceedings under Title I of the Federal Meat Inspection Act (FMIA) as amended (21 U.S.C. §§ 601 *et seq.*) to withhold and deny inspection services under the above acts to the respondent. These proceedings were initiated by a complaint filed on September 9, 1985, by the Administrator of the United States Department of Agriculture's Food Safety and Inspection Service. Respondent filed its answer to the complaint on October 4, 1985.

The parties have agreed that these proceedings should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For purposes of this stipulation and the provisions of the Consent Decision only, respondent admits all of the jurisdictional allegations set forth herein, admits the findings of fact set out below, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of this decision.

2. Respondent waives any action against the United States Department of Agriculture, under the Equal Access to Justice Act of 1980, Pub. L. 96-481, which went into effect October 1, 1981, for fees and other expenses incurred by Respondent in connection with this proceeding.

3. This Stipulation and Consent Decision are for settlement purpose in this proceeding only and do not otherwise constitute an admission or denial by respondent that it has violated the regulations or statutes involved.

FINDINGS OF FACT

I

Respondent, at all times material, was a company which operated a meat processing establishment in Brooklyn, New York, and was a recipient of meat inspection services under Title I of the FMIA. The respondent's mailing address is 218 Knickerbooker Avenue, Brooklyn, New York.

II

On or about June 14, 1985, in the United States District Court for the Eastern District of New York, the respondent was convicted of knowingly and willfully transporting in commerce meat food products of beef, which were capable of use as human food, and which were adulterated and misbranded in violation of the FMIA.

CONCLUSION

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Decision will be issued.

ORDER

Inspection services under Title I of the FMIA are withheld from and denied to the respondent, its successors, affiliates and assignees for a period of one year. However, said withholding and denial shall be suspended and held in abeyance and inspection services shall be provided to respondent so long as, in addition to all other requirements of inspection:

1. Respondent does not manufacture, handle, sell or transport any ground meat item which contains any added water, binders or extenders except as provided in special conditions number 2 and 3 of this order and 9 CFR § 319.15 (a) and (b).

2. After the effective date of this stipulation and consent decision, the respondent may handle, sell and transport its remaining inventory of ground meat items containing partially defatted beef fatty tissue, provided that all such activity shall cease at close-of-business on February 28, 1986.

3. Respondent may manufacture, handle, sell and transport ground meat items containing texturized vegetable protein with water in quantities adequate to facilitate mixing; provided such products are properly identified and/or labeled.

4. Respondent does not purchase, handle, or store at the official establishment any item, other than texturized vegetable pro-

tein, which could be used as an extender or binder in an uncooked meat food product.

5. Respondent maintains the inventory of texturized vegetable protein in a controlled or secured area of the plant.

6. Respondent maintains complete records of all transactions concerning the texturized vegetable protein including inventory with dates and amounts received as well as amounts used and amounts of the product which the additive was used in.

7. Respondent does not accept or receive product returned due to its condition or the condition of the box or container without prior notice to and supervision by the on-site U.S.D.A. Inspector.

8. Respondent does not process, recondition, wash, trim or separate any off-condition product without the knowledge and supervision of the USDA Inspector.

9. Respondent does not process, handle, or store custom exempt products or game, whether for customers, employees, the owner, friends or relatives.

10. Respondent maintains full, complete, accurate and appropriate written records of its business activities.

11. Respondent makes a detailed semiannual written report to the Meat and Poultry Inspection Office's Area Supervisor, New York, New York, concerning its adherence to this Stipulation and Consent Decision with a copy to the establishment's Inspector In Charge. The first such report is due July 1, 1986.

12. Respondent does not knowingly hire or permit the employment of any person who has been convicted of any violations of the FMIA, the PPIA, similar State and local food safety laws or of any crime of moral turpitude.

13. Respondent makes a request to the establishment's inspector that any of its formulations and labels containing additives other than water and texturized vegetable protein be rescinded.

The special conditions set forth in paragraphs 1 through 13 shall be applicable for a period of five years. During the five-year period, the Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth in paragraphs 1 through 12. Any summary withdrawal of inspection service shall be subject to respondent's right to request an expedited hearing on the violations alleged.

This order shall not be construed as precluding the Department from taking other appropriate action, including criminal referral, for violations of the FMIA.

In re: SIXTY-SIX PACKING CO. INC. FMIA Docket No. 87. Decided January 24, 1986.

Violation of the Federal Meat Inspection Act.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

STIPULATION AND CONSENT DECISION AND ORDER

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. § 601 *et seq.*), and the applicable Rules of Practice (9 CFR § 335.1 *et seq.*), to withdraw federal meat inspection service from Sixty-Six Packing Company, Inc. This proceeding was commenced by a complaint filed on April 24, 1985, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of federal meat inspection services. The parties have agreed that this proceeding should be terminated by the entry of the consent decision set forth below and have agreed to the following stipulations:

1. For purposes of this stipulation and the provisions of this Consent Decision only, Sixty-Six Packing Company, Inc., hereafter referred to as the respondent, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision are for settlement purposes in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it violated the regulations or statutes involved.

3. The respondent waives any action against the USDA under the Equal Access to Justice Act of 1980, (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is now, and at all times material herein, a corporation organized and existing under the laws of New Mexico and op-

erating a federally inspected meat packing establishment located at 100 North Sixth Street, Tucumcari, New Mexico 88401.

2. Respondent is now, and at all times material herein, a recipient of inspection service under Title I of the FMIA at said establishment.

3. On or about November 27, 1984, the respondent was convicted, and on January 7, 1985, judgment was entered, in the United States District Court for the District of New Mexico, of four (4) counts of false labelings of meat products, in violation of 21 U.S.C. Sections 601(n)(1), 610(c), 610(d), 611(b), 676(a), and 18 U.S.C. Section 2.

4. James Leonard was at all times material herein an employee in charge of the loading operations of, and responsibly connected with, the respondent.

5. On or about November 27, 1984, James Leonard was convicted, and on January 7, 1985, judgment was entered, in the United States District Court for the District of New Mexico, of three (3) counts of false labeling of meat products, in violation of 21 U.S.C. Sections 601(n)(1), 610(c), 610(d), 611(b), 676(a) and 18 U.S.C. Section 2.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Order will be issued.

ORDER

Inspection service under Title I of the FMIA is, for a period of five (5) years, withdrawn from and denied to respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate device. This five year period of withdrawal and denial will be held in abeyance, except for a period from February 23, 1985, through February 23, 1986, and will not become effective:

1. For so long as, within four years from February 23, 1986, respondent or any of its officers, partners, employees, agents, or affiliates do not violate (as that term is defined in paragraph II, *infra*) any section of the FMIA or state or local statute, involving the preparation, sale, transportation or attempted distribution of any adulterated or misbranded products; and

2. For as long as, within four years from February 23, 1986, respondent:

(a) Does not knowingly employ or add any individual who has been convicted, in any federal or state court of any felony, or of

more than one violation of any law, other than a felony, based upon the acquiring, handling, or distributing of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food; and

(b) Immediately terminates its connection with any such individual when that individual's conviction becomes known.

3. Respondent does not accept or receive any returned product due to its condition or the condition of the carton or container without prior notice to, and approval by, the on-site USDA Inspector.

4. Respondent does not handle, process, separate, wash, trim, recondition, or rework any returned or off-condition product without prior notice to and approval by the on-site USDA Inspector.

5. Respondent does not relabel any meat or meat food product without prior notice to, and approval by, the on-site USDA Inspector.

6. Respondent does not process, handle, or store custom exempt product or game animals, whether for customers, employees, friends, relatives, owners, directors or managers of Sixty-Six Packing Company, Inc., or others.

7. Respondent maintains full, complete, and accurate written records of all business activities applicable to the Federal Meat Inspection Act.

8. Respondent makes a detailed semi-annual written report to the Meat and Poultry Inspection Office's Area Supervisor, located at: 611 East 6th Street, Room 401, Austin, Texas 78701, concerning respondent's adherence to this Stipulation and Consent Decision. A copy of this report will be provided to the establishment's USDA Inspector In Charge. These semi-annual reports will be due on July 1 and December 1 of each year of probation.

II

The term violate, as used in paragraph I(1) herein, means a violation found upon conviction (or upon affirmation of conviction, if appealed), or upon a final decision in a formal adjudicatory proceeding before the Secretary (or upon affirmation of the Secretary's decision, if appealed), and if it is found that there is any such violation of any term of this Order, the suspension of the withdrawal and denial of inspection service under Title I of the FMIA shall be terminated and denial will become effective immediately. This shall not preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

III

The special conditions set forth in paragraphs 2 through 8 shall be applicable for a period of (4) four years. During this (4) four-year period, from February 23, 1986, to February 23, 1990, the Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth in paragraphs 2 through 8. Any summary withdrawal of inspection service shall be subject to respondent's right to request an expedited hearing on the violations alleged.

This Consent Decision and Order will become effective after being signed by an Administrative Law Judge and filed with the Hearing Clerk.

In re: TRI STATE MEATS & PROVISIONS, INC. FMIA Docket No. 92 & PPIA Docket No. 14. Decided February 20, 1986.

Withdrawal of Inspection Services of Fed. Meat Inspection Act & Poultry Products Inspection Act.

Harold J. Reuben, for complainant.
Michael F. Weuke, for respondent.

Decision by William J. Weber, Administrative Law Judge.

STIPULATION AND CONSENT DECISION AND ORDER

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. §§ 601 *et seq.*), the Poultry Products Inspection Act (PPIA), as amended (21 U.S.C. §§ 451 *et seq.*), and the applicable Rules of Practice (7 CFR § 1.130 *et seq.* and 9 CFR § 335.1 *et seq.*), to withhold and deny federal meat inspection service to Tri State Meats & Provisions, Inc. This proceeding was commenced by a complaint filed on August 30, 1985, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of federal meat and poultry inspection services. The parties have agreed that this proceeding should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Tri State Meats & Provisions, Inc., hereinafter referred to as respondent, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision is for settlement purposes in this proceeding only and does not otherwise constitute an admission or denial by the respondent that it violated the regulations or statutes involved.

3. The respondent waives any action against the USDA under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is an applicant seeking to operate a meat processing establishment located at 1376 Market Street, Linwood, Pennsylvania 19061.

2. On or about March 5, 1985, respondent applied for Federal meat and poultry products inspection services under Title I of the FMIA and under the PPIA, at the above-named establishment. The application listed Mark S. Perry as the President, Secretary and Treasurer of respondent.

3. Mark S. Perry is now, and at all times material herein was, listed as the only individual responsibly connected with the respondent's proposed operation.

4. Mark S. Perry formerly was the General Manager of the Summit Beef Company (hereinafter Summit), another meat processing establishment, which was located at 1376-1378 Market Street, Linwood, Pennsylvania.

5. On December 19, 1984, Administrative Law Judge Victor Palmer issued an Order indefinitely withdrawing inspection service under Title I of the FMIA from Summit. This Order furthermore denied and withheld such inspection service from Summit's officers, directors, successors and assigns, directly or through any corporate or other device, for an indefinite period of time.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Order will be issued.

ORDER

Inspection services under Title I of the FMIA and under the PPIA are withheld from and denied to respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate device, for a period of five years.

HOWEVER, said withholding and denial shall be suspended and held in abeyance and inspection services shall be provided to respondent so long as, in addition to all other requirements of inspection, the conditions set forth in paragraphs 1 through 13 below, are met. During this five-year period, the Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth in paragraphs 1 through 13. The summary withdrawal of inspection service shall be effective pending final determination of a violation in accordance with the applicable Rules of Practice. Such summary withdrawal shall have no relevance with respect to the final determination in the proceeding and will not preclude the respondent from requesting an expedited hearing.

1. Vincent L. Perry shall not associate with respondent, its successors, or assigns, directly or through any corporate or other device, as a partner, officer, director, shareholder, or employee; nor have access to respondent's premises; nor provide any direction or advice to or exercise any control over respondent, its successors or assigns, directly or through any corporate or other device; and

2. Respondent shall not knowingly employ or add any individual who has been convicted, in any federal or state court of any felony, or more than one violation of any law, other than a felony, based upon the acquiring, handling, or distribution of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food; and

3. Respondent immediately terminates its connection with any such individual when that individual's conviction becomes known; and

4. Respondent shall not violate any sections of the FMIA or the PPIA, or any regulations issued thereunder; and

5. Respondent shall identify any equipment used or located at its premises and which has been purchased or acquired after the effective date of this Order as belonging to Mark S. Perry; and

6. Respondent shall designate a full-time person who has overall, daily responsibility and control of respondent's operations (*i.e.*, plant manager or plant superintendent) to conduct daily reviews of all areas of the official establishment for sanitation. In addition, this Designee shall review daily products for condition, processing procedures, formulation, and labeling of finished products. All in-

coming meat and meat food products will be checked for condition upon arrival. Any product of questionable condition will be held for inspection by the assigned inspector before use. All daily reviews shall be recorded in a hardbound Log Book, including but not limited to, the date, time, name of Designee conducting the review, the findings, suggestions and/or corrective action taken, and initialed by the Designee. Entries pertaining to incoming meat will include source, condition, and time received. The Log Book shall be available for review by USDA personnel; and

7. Respondent's Designee shall immediately notify the USDA on-site inspector of any operational or sanitation deficiencies that would or have caused work stoppage and corrective actions taken during the daily reviews; and

8. Respondent shall not prepare, handle or store custom exempt articles or game, whether for customers, employees, the owner, friends or relatives; and

9. Respondent shall not accept or receive any returned product due to its condition or the condition of the carton or container without prior notice to, and approval by, the on-site USDA inspector; and

10. Respondent shall not handle, prepare, separate, wash, trim, recondition, or rework any returned or off-condition product without prior notice to, and approval by, the on-site USDA inspector; and

11. Respondent shall maintain full, complete, and accurate written records of all other business activities applicable to the FMIA and the PPIA, which are available for review by USDA personnel; and

12. Respondent shall make a detailed semiannual written report to the Meat and Poultry Inspection Office's Area Supervisor, Fort Washington, Pennsylvania, concerning its adherence to this Stipulation and Consent Decision with a copy to the on-site USDA inspector. The first such report is due July 1, 1986. All following semiannual written reports shall be submitted to the Area Supervisor on June 1 and December 1 of each calendar year that this Consent Decision and Order is effective; and

13. Respondent shall afford duly authorized personnel of the USDA an opportunity to examine and to copy all such records, reports, and other documents required of the respondent in this Consent Decision and Order.

The Consent Decision and Order shall become effective after being signed by an Administrative Law Judge and filed with the Hearing Clerk.

In re: PIETER VANDER ZWAN. P&S Docket No. 6512. Decided January 2, 1986.

Engaging in business while insolvent.

Thomas C. Heinz, for complainant.
Richard G. Anderson, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent's financial condition does not meet the requirements of the Act and that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Pieter Vander Zwan, doing business as Vander Zwan Livestock Commission Company and Vander Zwan Dairy Sales Yard, hereinafter referred to as the respondent, is an individual whose business mailing address is 14380 Euclid Avenue, Chino, California 91710.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency, selling livestock in commerce on a commission basis;

(b) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Pieter Vander Zwan, individually or through any corporate or other device, shall cease and desist from:

1. Engaging in the business of a market agency or dealer while his current liabilities exceed his current assets;

2. Failing to deposit in any Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42(c) of the regulations (9 CFR § 201.42(c)), amounts equal to the proceeds receivable from the sale of consigned livestock;

3. Failing to otherwise maintain any Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Failing to pay, when due, the full purchase price of livestock;

5. Failing to pay the full purchase price of livestock;

6. Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks upon presentation; and

7. Failing to remit, when due, the net proceeds received from the sale of consigned livestock to the consignors of such livestock.

Respondent shall create, keep and maintain books, records and memoranda which fully and correctly disclose all his business transactions subject to the Act, including but not limited to: (1) fully completed purchase and sales invoices and (2) brand inspector tally sheets.

Respondent is suspended as a registrant under the Act for 60 days and thereafter until such time as he demonstrates that the deficit in his Custodial Account for Shippers' Proceeds has been eliminated, and that he is no longer insolvent. When respondent demonstrates that the deficit in his Custodial Account for Shippers' Proceeds has been eliminated and that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 60-day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: JAMES E. CHAPMAN. P&S Docket No. 6604. Decided January 2, 1986.

Violation of bonding requirements.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James E. Chapman, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 2, Box 185F, Terry, Mississippi 39170.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

James E. Chapman, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and

desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Nine Hundred Dollars ($900.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: JAMES E. SUHR. P&S Docket No. 6528. Decided January 6, 1986.

Violation of bonding requirements.

Jory M. Hochberg, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James E. Suhr, hereinafter referred to as the respondent, is an individual whose business mailing address is 500 Atlantic Street, Walnut, Iowa 51577.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account under his own name and under the trade name of Western Cattle Company; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent James E. Suhr, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Seven Hundred Fifty Dollars ($750.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: DOUG WELCH d/b/a W.W. GARRY, MICHAEL BENSON, MARLOWE K. BENSON, WAGNER-HUDSON LIVESTOCK MARKETING AGENCY, INC., ROGER D. KOCH CORPORATION dba. SWITZER-WAGNER & CO., and SWITZER-BAR 10, and ROGER D. KOCH. P&S Docket No. 6537. Decided January 6, 1986.

Violation of the P&S Act.

Allen R. Kahan, for complainant.
John Murphy, Elk Point, S.D., for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO DOUG WELCH

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

Respondent Doug Welch admits the jurisdictional allegations in paragraph I of the Complaint as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Doug Welch, hereinafter referred to as respondent Welch, is an individual doing business as W. W. Garry, whose business mailing address is 208 Livestock Exchange Building, Sioux City Stockyards, Sioux City, Iowa 51107.

2. Respondent Welch is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Doug Welch, his agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale, on a commission basis or otherwise, of that person's livestock;

2. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent or such market agency for the purpose of purchasing consigned livestock at less than its fair or true market value;

3. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, which would enable such market agency, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the consignors of livestock to such market agency;

4. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, to split or otherwise share in any profits derived from the resale of livestock purchased from consignments to such market agency;

5. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency buying livestock on a commission basis, or any employee or agent of such market agency, which would enable such market agency, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the market agency or its customers or principals; and

6. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency buying livestock on a commission basis, or any employee or agent of such market agency to split or otherwise share in any profits derived from the sale of livestock sold to or bought on a commission basis for such market agency.

Respondent Doug Welch is suspended as a registrant under the Act for a period of six (6) months.

In accordance with section 312(b) of the Act (7 U.S.C. 213(b)), respondent Doug Welch is assessed a civil penalty in the amount of Ten Thousand dollars ($10,000.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

In re: JIMMIE A. BROWN. P&S Docket No. 6505. Decided January 9, 1986.

Violation of bonding requirements.

Peter V. Train, for complainant.
Tilden P. Wright, III, Fayetteville, AK, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jimmie A. Brown, hereinafter referred to as the respondent, is an individual whose address is Route 1, Box 293 A, Diamond, Missouri 64840.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jimmie A. Brown, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations; and

2. Failing to pay, when due, the full purchase price of livestock.

Respondent shall keep accounts, records and memoranda which fully and correctly disclose all transactions in connection with his operations subject to the Act, including purchase and sale invoices which show the true and correct purchaser or seller of the livestock, scale tickets, check-in or receiving tickets, and a cash receipts and disbursements journal.

Respondent is suspended as a registrant under the Act for a period of ninety (90) days and thereafter until such time as he complies fully with the bonding requirements under the Act and regulations and demonstrates that he is no longer insolvent as required by the order issued in P. & S. Docket No. 5474. When respondent demonstrates that he is in compliance with the bonding requirements and that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 90-day period.

The provisions of this order shall become effective on the sixth day after service of this order on respondent.

In re: DOYLE HARMS. P&S Docket No. 6581. Decided January 9, 1986.

Violation of bonding requirements.

Dennis Becker, for complainant.
Thomas P. Tonner, Aberdeen, S.D., for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Doyle Harms, doing business as Harms Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 2, Box 56, Redfield, South Dakota 57469.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Doyle Harms, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required

under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: CORPORATE CAPITAL COMPANY, INC., and JOHN F. McNEELY.
P&S Docket No. 6438. Decided January 10, 1986.

Violation of the P&S Act.

Stephen Luparello, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Corporate Capital Company, Inc., herein referred to as the corporate respondent, is a Nevada corporation with its principal place of business located at Los Angeles, California. Its business mailing address is 4151 Cromwell Avenue, Los Angeles, California 90027.

2. The corporate respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for its own account and buying and selling livestock as the agent of the vendor or purchaser; and

(b) A dealer within the meaning of that term as defined in the Act, and subject to the provisions of the Act.

3. John F. McNeely, herein referred to as the individual respondent, is an individual whose business mailing address is P.O. Box 491, Bandon, Oregon 47411.

4. The individual respondent, at all times material herein, was:

(a) President and Secretary of the corporate respondent;

(b) Owner of the corporate respondent; and

(c) Responsible for the direction, management and control of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Corporate Capital Company, Inc., its officers, directors, agents, and employees, and respondent John F. McNeely, individually or as an officer, agent or employee of respondent Corporate Capital Company, Inc., directly or through any corporate or other device, in connection with their business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock;

3. Failing to pay the full purchase price of livestock;

4. Misrepresenting, in connection with the purchase of livestock, the actual amount of the buying commission or other charges assessed by respondents, or any other material condition concerning such livestock transaction;

5. Collecting monies from the sellers of livestock on the basis of any false, inaccurate or misleading representation with respect to price or other material condition concerning such livestock transaction;

6. Collecting deposits or any other type of payment in connection with a livestock agreement and failing and refusing to remit

such deposits or payments to the owners if respondents fail to comply with the terms and conditions of such agreement; and

7. Entering into an agreement with any person to lease livestock where such agreement contains false, invalid or misleading provisions, statements or promises or where such agreement is in direct conflict with the respondents' rights or interests in the livestock.

The respondents are prohibited from operating subject to the Act for a period of ten (10) years.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: GLEN L. SCHULTZ. P&S Docket No. 6582. Decided January 13, 1986.

Violation of bonding requirements.

Stephen Luparello, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Glen L. Schultz, hereinafter referred to as the respondent, is an individual whose business address is R.R. #6, Highway 19, Box 162-A, Watertown, Wisconsin 53094.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted to the jurisdictional facts and the parties having agreed to the entry of this decision, such decision shall be entered.

ORDER

Respondent Glen L. Schultz, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Since respondent is now in full compliance with the bonding requirements, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Four Hundred Dollars ($400.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: JOSEPH EICH. P&S Docket No. 6619. Decided January 16, 1986.

Violation of the P&S Act.

Roberta Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated

the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Joseph Eich, hereinafter referred to as the respondent, is an individual whose business mailing address is R.R. #3, Mendota, Illinois 61342.

2. The respondent at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Joseph Eich, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of one hundred and twenty (120) days.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: HORACE W. MCCURDY, P&S Docket No. 6641. Decided January 16, 1986.

Violation of the P&S Act.

Stephen Luparello, for complainant.
Respondent, *pro se*.

Decision by Edward M. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Horace W. McCurdy, doing business as Jay Livestock Auction Market, hereinafter referred to as the respondent, is an individual whose address is P.O. Box 385, Jay, Florida 32565.

2. The respondent at all times material herein was:

(a) Engaged in the business of conducting the Jay Livestock Auction Market stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Horace W. McCurdy, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the times prescribed in section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Issuing checks in payment of the proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented; and

4. Failing to remit to the owners and consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock.

The respondent is suspended as a registrant under the Act for a period of twenty-eight (28) days.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: LINSEY E. ECKERT, RONALD T. BOWMAN and GEORGE YOUNG.
P&S Docket No. 6474. Decided January 22, 1986.

Violation of the P&S Act.

Eric Paul, for complainant.
Daniel W. Olsen, for respondent.

Decision by Dorothea A. Baker, Adminstrative Law Judge.

CONSENT DECISION WITH RESPECT TO RONALD T. BOWMAN & GEORGE YOUNG

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision pro-

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visions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Bowman and Young admit the jurisdictional allegations in paragraph II of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(1) Ronald T. Bowman and George Young, doing business as United Livestock Commission Co., hereinafter referred to as respondents Bowman and Young, are partners whose business mailing address is Pershing Road, Maquoketa, Iowa 52060.

(2) Respondents Bowman and Young are, and at all times material herein were:

(a) Engaged in the business of buying and selling livestock in commerce on a commission basis;

(b) Engaged in the business of buying and selling livestock in commerce for their own account and for the accounts of others;

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis; and

(d) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts neither admitting or denying the remaining allegations and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Ronald T. Bowman and George Young, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

(1) Failing to pay, when due, the full purchase price of livestock;

(2) Failing to pay the full purchase price of livestock; and

(3) Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining

a reasonable bond or its equivalent as required by the Act and the regulations.

Respondents Ronald T. Bowman and George Young are suspended as registrants for a period of seven (7) days.

In accordance with section 312(b) of the Act, respondents Ronald T. Bowman and George Young are jointly and severally assessed a civil penalty in the amount of four thousand dollars ($4,000.00). One thousand dollars of which shall be payable on February 23, 1986, and the remaining $3,000 that shall be payable in ten monthly installments of $300 each commencing March 21, 1986.

The provisions of this order shall become effective on February 23, 1986 and service of this decision on the respondents has been made on January 21, 1986.

Copies of this decision shall be served upon the parties.

In re: D.M. "NICK" SMITH. P&S Docket No. 6649. Decided January 22, 1986.

Violation of bonding requirements.

Ben E. Bruner, for complainant.
William Glaser, Dalhart, TX., for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. D. M. "Nick" Smith, hereinafter referred to as the respondent, is an individual whose mailing address is 1302 Willow Lane, Dalhart, Texas 79022.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Smith, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: GRANT CITY LIVESTOCK MARKET, INC., and GEORGE YOUNG.
P&S Docket No. 6418. Decided January 23, 1986.

Engaging in business while insolvent.

Eric Paul, for complainant.
Ernest A. Van Hoser, for respondents.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Depart-

ment of Agriculture, alleging that the financial condition of the corporate respondent does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Grant City Livestock Market, Inc., hereinafter referred to as the corporate respondent, is a corporation organized under the laws of the State of Missouri, with its principal place of business located at Grant City, Missouri. The corporate respondent's business mailing address is Box N, Grant City, Missouri 64456.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Grant City Livestock Market, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in the business of a market agency, selling livestock on a commission basis at the stockyard; and

(c) Engaged in the business of a dealer, buying and selling livestock in commerce for its own account and for the accounts of others.

3. The corporate respondent is, and at all times material herein was, registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

4. Respondent George Young, hereinafter referred to as the individual respondent, is an individual whose business mailing address is Box N, Grant City, Missouri 64456.

5. The individual respondent is the owner, president and general manager of the corporate respondent. The individual respondent is, and at all times material herein was, responsible for the direction, management and control of the corporate respondent.

6. The individual respondent is, and at all times material herein was, engaged individually in the business of a dealer, buying and

selling livestock in commerce for his own account and for the accounts of others.

7. The individual respondent is, and at all times material herein was, registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts only and neither admitting nor denying the remaining allegations in the complaint and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Grant City Livestock Market, Inc., its officers, directors, agents and employees, successors and assigns, and respondent George Young, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a market agency or dealer while insolvent, that is, while their current liabilities exceed their current assets;

2. Failing to deposit to their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the proceeds due consignors for livestock purchased by respondents for market support, and amounts equal to the outstanding proceeds receivable due from other purchasers of consigned livestock;

3. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock, or the payment of sums due the respondents for lawful marketing charges; and

5. Preparing or issuing accounts of sale which fail to disclose the full, true and correct names of the consignors, owners or shippers of livestock.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their businesses subject to the Act including: (1) notes payable records; (2) proceeds receivable and accounts receivable records; (3) sales invoices; (4) scale tickets; and (5) load make-up records of all livestock sold.

Respondent Grant City Livestock Market, Inc., is suspended as a registrant under the Act for a period of 14 days and thereafter until it demonstrates that it is no longer insolvent and that the deficiency in its Custodial Account for Shippers' Proceeds has been eliminated. When respondent Grant City Livestock Market, Inc., demonstrates that it is no longer insolvent, and that the deficiency in its Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 14-day period.

Respondent George Young is suspended as a registrant under the Act for a period of 14 days.

The provisions of this order shall become effective February 23, 1986.

Copies of this decision shall be served upon the parties.

In re: MEATHOUSE, INC., GENE THORPE, and RUSSELL THORP. P&S Docket No. 6252. Decided January 24, 1986.

Violation of the P&S Act.

Peter V. Train, for complainant.
J. Robert Leach, Everett, WA., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of Meathouse, Inc. does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). The complaint was subsequently amended. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Meathouse, Inc., hereinafter referred to as the corporate respondent, is a corporation whose mailing address is 19829 Niederle Road, Monroe, Washington 98272.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Gene Thorpe and Russell Thorp, hereinafter referred to as the individual respondents, are individuals whose business address is 19829 Nierderle Road, Monroe, Washington 98272.

4. The individual respondents at all times material herein were:

(a) Manager and President, respectively, of the corporate respondent; and

(b) Jointly responsible for the management, direction and control of the corporate respondent.

5. The individual respondents are, and have been since approximately September 30, 1983, partners engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale in shipment in commerce operating under the trade name Thorp Meats, the successor operation to respondent Meathouse, Inc.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Meathouse, Inc., its successors, officers, directors, agents and employees, and the individual respondents Gene Thorpe and Russell Thorp, individually, as partners doing business as Thorp Meats, or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock in commerce while insolvent, *i.e.*, while current liabilities exceed current assets, unless the respondents pay the full purchase price of the livestock at the time of purchase in U.S. currency, by cashier's check or by wire transfer.

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented for payment; and

3. Failing to make payment or failing to mail a check, where the seller has explicitly agreed in writing that payment may be made by the mailing of a check, before the close of the next business day following the purchase of livestock and the transfer of possession thereof.

Respondents shall prepare and maintain accounts, records and memoranda which fully and correctly disclose all transactions in their business as a packer subject to the Act including: (1) kill sheets and (2) accountings to sellers which show the number of head purchased and the weight and price of individually identified livestock carcasses.

In accordance with section 203(b) of the Act (7 U.S.C. 193(b)), respondents Meathouse, Inc., Gene Thorpe and Russell Thorp are jointly and severally assessed a civil penalty in the amount of $8,000.00, of which $7,000.00 shall be held in abeyance for a period of 5 years provided however that if respondents violate this Order in any manner within this period, the full amount of the civil penalty shall immediately become due and payable.

This order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondents.

Copies of this decision shall be served upon the parties.

In re: CRISSMAN, INC., and JACK G. CRISSMAN. P&S Docket No. 6460. Decided January 24, 1986.

Violation of the P&S Act.

Allan R. Kahan, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically

admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Crissman, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of Pennsylvania. Its business mailing address is Box No. 57, Castanea, Pennsylvania 17726.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of purchasing livestock in commerce for the purpose of slaughter; and of marketing meat, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer or distributor in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Jack G. Crissman, hereinafter referred to as the individual respondent, is an individual whose mailing address is 100 Bridge Street, Castanea, Pennsylvania 17726.

4. The individual respondent is, and at all times material herein was:

(a) President and Treasurer of respondent Crissman, Inc.; and

(b) In combination with other family members, an owner of the corporate respondent; and

(c) Responsible for the management, direction and control of the practices and activities of respondent Crissman, Inc.

5. The individual respondent was, at all times material herein, a packer within the meaning of the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of the decision, such decision will be entered.

ORDER

Respondent Crissman, Inc., its officers, directors, agents and employees, and respondent Jack G. Crissman directly or through any

corporate or other device, shall cease and desist from failing to pay, and from failing to pay when due, for meat or meat food products.

Respondent Crissman, Inc. and Jack G. Crissman are hereby jointly and severally assessed a civil penalty of Thirty Thousand Dollars ($30,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: RICHARD D. BAUMERT. P&S Docket No. 6586. Decided February 3, 1986.

Violation of bonding requirements.

Andrew Y. Stanton, for complainant.
Isaac J. Tressler, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Richard D. Baumert, hereinafter referred to as the respondent, is an individual whose business mailing address is R.D. 1, Herndon, Pennsylvania 17830.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. The Packers and Stockyards Administration notified respondent on May 24, 1985, that the $22,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was being terminated effective June 14, 1985, and that it was necessary to file a bond or bond equivalent in the amount of $30,000.00 before continuing in dealer operations. Respondent was further notified that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account, without maintaining bond coverage or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Richard D. Baumert, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Five Hundred Dollars ($1,500.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order Upon Admission of Facts by Reason of Default became final on February 3, 1986.—Ed.]

In re: DIRECT MEAT CO. INC., et al. P&S Docket No. 6552. Decided January 21, 1986.

Violation of the P&S Act.

Peter Train, for complainant.
Arthur J. Schuh, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER AS TO LAWRENCE J. AMANN UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Direct Meat Co., Inc., hereinafter referred to as the corporate respondent, is a corporation whose business mailing address is 11564 Gondola Drive, Cincinnati, Ohio 45241.

(b) The corporate respondent at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

2. (a) Gerald Naehring and Lawrence J. Amann, hereinafter referred to as the individual respondents, are individuals whose business mailing address is 11564 Gondola Drive, Cincinnati, Ohio 45241.

(b) The individual respondents at all times material herein were:

(1) President and Vice-President, respectively, of the corporate respondent; and

(2) Jointly responsible for the direction, control and management of the corporate respondent.

(c) The individual respondents at all times material herein were packers within the meaning of and subject to the provisions of the Act.

3. The corporate respondent, under the direction, control and management of the individual respondents, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, issued checks in purported payment for the purchase of livestock, which checks were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay the checks when presented.

4. (a) The corporate respondent, under the direction, management and control of the individual respondents, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, and also on or about the dates and in the transactions set forth in paragraph IV of the Complaint and Notice of Hearing, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of February 6, 1985, there remained unpaid a total of $214,652.72 for the livestock purchases set forth in paragraphs III and IV(a) of the Complaint and Notice of Hearing.

CONCLUSIONS

By reason of the facts found in Finding of Fact 3 herein, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)).

By reason of the facts found in Finding of Fact 4 herein, respondents have wilfully violated sections 202(a) and 409(a) of the Act (7 U.S.C. §§ 192(a), 228b(a)).

ORDER

Respondent Lawrence J. Amann, his agents or employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

This decision and order shall become final and effective without further proceedings 35 days after service hereof unless appealed to the Judicial Officer with 30 days after service (7 CFR # 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on January 21, 1986.—Ed.]

In re: OKMULGEE STOCKYARDS, INC. P&S Docket No. 6579. Decided January 21, 1986.

Violation of bonding requirements.

Peter Train, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the re-

spondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Okmulgee Stockyards, Inc., hereinafter referred to as the respondent, is a corporation existing under the laws of the State of Oklahoma with its principal place of business in Okmulgee, Oklahoma. Respondent's business mailing address is P. O. Box 1361, Okmulgee, Oklahoma 74447.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of conducting and operating the Okmulgee Stockyards, Inc., stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

2. Respondent was notified by certified mail on June 13, 1985, that the $65,000.00 surety bond which it maintained to secure the performance of its livestock obligations under the Act would terminate on July 10, 1985. Respondent was further notified that if it continued its livestock operations under the Act without providing adequate bond coverage or its equivalent, it would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a market agency selling livestock in commerce on a commission basis at the stockyard without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Okmulgee Stockyards, Inc., its officers, directors, agents and employees, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until it complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that it is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Thousand Dollars ($3,000.00).

This decision and order shall become final and effective without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on January 21, 1986.—Ed.]

In re: HILL PACKING COMPANY, INC., a corporation, and BERNICE M. LAYDEN, an individual. P&S Docket No. 6504. Decided February 4, 1986.

Violation of the P&S Act.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administra-

tion, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this matter and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Hill Packing Company, Inc., hereinafter referred to as the corporate respondent, is a corporation whose principal place of business was located in Danville, Illinois. Corporate respondent's mailing address is Box 416–F, Danville, Illinois 61832.

2. The corporate respondent, at all times material herein, was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Bernice M. Layden, hereinafter referred to as the individual respondent, is an individual whose mailing address is R.R. 3, Box 228, Hoopeston, Illinois 60942.

4. Individual respondent, at all times material herein, was:

(a) Owner, in combination with other family members, of corporate respondent's stock;

(b) Secretary of the corporate respondent; and

(c) Responsible for the direction, management and control of all business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Hill Packing Company, Inc., its officers, directors, agents, successors and assigns, and Bernice M. Layden, directly or through any corporate or other device, in connection with their business subject to the Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and

2. Failing to pay the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Bernice M. Layden is hereby assessed a civil penalty of one thousand dollars ($1,000.00).

The provisions of this order shall become effective on the first day after service of this decision on the Respondents.

Copies of this decision shall be served upon the parties.

In re: HARLLEE ROBERTS. P&S Docket No. 6527. Decided February 4, 1986.

Violation of bonding requirements.

Stephen Luparello, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harllee Roberts, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 1415, Tifton, Georgia 31794.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account, and a market agency

buying livestock buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis. Such registration has been inactive since August 1, 1971.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Harllee Roberts, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act for a period of thirty (30) days and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the thirty day period.

In accordance with Section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Thousand Dollars ($3,000.00).

The provisions of this order shall become effective upon signature by the Administrative Law Judge.

Copies of this decision shall be served upon the parties.

In re: JOHN CLAY & COMPANY, of Ogden, Utah, RAYMOND C. WILLIAMS, and LEWIS E. HARPER. P&S Docket No. 6216. Decided February 5, 1986.

Violation of the P&S Act.

Eric Paul, for complainant.
James Z. Davis, Ray, Quinney & Nebeker, Ogden, Utah, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION RE RESPONDENT HARPER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of respondent John Clay & Company of Ogden, Utah, failed to meet the financial requirements of the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) and that the respondents wilfully violated the Act and regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Harper admits the jurisdictional allegations in paragraph III of the complaint for jurisdictional purposes only and the parties hereto further agree that clause (b)(4) be amended to provide that Respondent Harper was registered with the Secretary of Agriculture as a dealer who purchased livestock for slaughter only under an individual registration that has been inactive since June 1, 1957. Respondent Harper specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further proceedings, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision. Nothing contained herein shall constitute an admission, finding, or conclusion in any other proceeding or for any other purpose.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lewis Harper, hereinafter referred to as respondent Harper, is an individual whose mailing address is 2530 East 5950 South, Ogden, Utah 84403.

2. Respondent Harper is and at all times material herein was:

(a) President and owner of 29% of the stock of the respondent Clay;

(b) Responsible for the management, direction and control of respondent Clay;

(c) A dealer and a market agency within the meaning of and subject to the Act; and

(d) Registered with the Secretary of Agriculture as a dealer to purchase livestock for slaughter only, under an individual registration that has been inactive since June 1, 1957.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, Lewis E. Harper, directly or through any corporate or other device, shall cease and desist from:

1. Issuing drafts in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such drafts when presented;

2. Failing to honor drafts, drawn and issued in payment for livestock, when presented for payment;

3. Issuing drafts which are not checks in payment for livestock without an express agreement in writing before the transaction by the seller that payment may be made by draft;

4. Failing to pay, when due, the full purchase price for livestock purchased.

Respondent Lewis E. Harper is suspended as a registrant under the Act for a period of one year *nunc pro tunc* as of January 1, 1985.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decison shall be served upon the parties.

In re: YUMA MEAT CO. INC., RICHARD LISKA, and FRED LUECK. P&S Docket No. 6636. Decided February 5, 1986.

Violation of the P&S Act.

Barbara Harris, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO YUMA MEAT CO. INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing

filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Yuma Meat Co., Inc. admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Yuma Meat Co., Inc., hereinafter referred to as the corporate respondent, is an Arizona corporation whose business mailing address is 12700 Somerton Avenue, Yuma, Arizona 85365.

2. Corporate respondent, at all times material herein, was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The corporate respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decison, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented; and

2. Failing to pay, when due, the full purchase price of livestock.

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon the respondent.

Copies of this decision shall be served upon the parties.

In re: JOHNNY HORTON and WAYNE PRUITT. P&S Docket No. 6541. Decided February 14, 1986.

Violations of the P&S Act.

Peter V. Train, for complainant.
Gerard D. Eftink, Van Hooser & Olsen, Kansas City, MO., for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Johnny Horton and Wayne Pruitt, hereinafter referred to as respondents, are partners doing business as Decatur Livestock Auction. Their business mailing address is P. O. Box 36, Decatur, Arkansas.

2. Respondents, as partners, are, and at all times material herein were:

(a) Engaged in the business of conducting and operating the Decatur Livestock Auction stockyard, a posted stockyard subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

3. Respondent Johnny Horton is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account and as a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture in his individual capacity as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock on a commission basis.

4. Respondent Wayne Pruitt is, and at all times material herein was, engaged in the business of a dealer buying and selling livestock in commerce for his own account and as a market agency buying livestock in commerce on a commission basis.

5. Respondent Wayne Pruitt is not registered with the Secretary of Agriculture as a dealer or market agency in his individual capacity.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Johnny Horton and Wayne Pruitt, individually, as partners with each other or with other persons, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock consigned to any market agency in which they have an ownership interest, or are officers or employees, for resale for their own speculative account;

2. Permitting owners, officers, agents or employees to buy livestock out of consignment for resale for their own speculative account;

3. Permitting its auctioneers, weighmasters, ringmen, or other employees performing duties of comparable responsibility in connection with the actual conduct of the auction sales, to purchase livestock out of consignment for their own account, directly or indirectly, for speculative resale or to fill orders on an agency basis; and

4. Purchasing livestock out of consignment without issuing accounts of sale or other accountings to consignors which disclose the true purchasers of the livestock and the nature of their relationship to the market agency.

Respondent Wayne Pruitt, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Act and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents shall keep accounts, records and memoranda which fully and correctly disclose all transactions involved in their operations subject to the Act, including (1) accounts of sale and purchase invoices showing the true and correct names of the purchasers and consignors of livestock; (2) records showing the disposition of livestock purchased for market support; (3) records of accounts receivable, notes receivable, accounts payable and notes payable showing the date the receivable or payable was incurred, the amount and terms of payment of the receivable or payable, and the person owing or to whom is owed the receivable or payable; (4) deposit tickets showing the names of persons whose payments were being deposited; (5) check-in or receiving tickets showing the date and the name of the consignor; (6) scale tickets showing the date and the weighmaster; (7) records showing the disposition of livestock, and (8) ledgers or other records showing assets and liabilities, income and expenses.

Respondents are suspended as registrants under the Act for a period of 28 days and shall not engage in business either individually or as partners with each other or other persons as a market agency or dealer as those terms are defined in the Act during that period.

Respondent Pruitt shall not engage in business as a dealer or market agency subject to the Act in his individual capacity for the 28 day specified period of suspension and thereafter until such time as he demonstrates that he is in full compliance with the bonding and registration requirements under the Act and the regulations.

Respondent Johnny Horton is assessed a civil penalty in the amount of Three Thousand Dollars ($3,000.00).

The provisions of this order shall become effective on the day after service of this decision on the respondents or on their attorney. In any event, the terms of this order shall be effective no later than February 21, 1986, and the suspension shall begin no later than February 21, 1986.

Copies of this decision shall be served on the parties.

In re: BOBBY JAMES PARROTT. P&S Docket No. 6651. Decided February 24, 1986.

Violation of bonding requirements.

Stephen Luparello, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Bobby James Parrott, hereinafter referred to as the respondent, is an individual whose mailing address is Route 2, Box 370, Haskell, Texas 79521.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Bobby James Parrott, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding

is required under the Packers and Stockyards Act, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Hundred and Fifty Dollars ($350.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: HORST SCHOBER, NANCY WELLS, and NORTHERN NEW YORK FARMERS' MARKETING COOPERATIVE, INC. P&S Docket No. 6182. Decided February 27, 1986.

Violation of the P&S Act.

In re the above cited, Administrative Law Judge John A. Campbell directed respondents from violating the Act and assessed a civil penalty of $5000 against respondent Schober. Schober was directed to correct records of transactions, and of accounts. Respondent Wells was prohibited for period of six months from engaging in business as a market agency; from buying/selling livestock on commission, or for her own account or as employee/agent of vendor or purchaser. Respondents had engaged in false or deceptive practices to obtain money from livestock purchasers and misrepresented to their principals manner in which livestock was acquired. They also issued false or misleading invoices and used their own livestock to fill orders without disclosure to their principal.

Barbara Harris, for complainant.
David Welch, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.), hereafter referred to as the Act, instituted by a complaint filed on August 9, 1983, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The complaint charged (1) that the respondents entered into a conspiracy which allowed respondents Wells and Schober to bill and collect from their principal on the basis of inflated weights and prices in violation of sections 312(a) and 401 of the Act (7 U.S.C.

§§ 213(a), 221), and section 201.44 of the regulations (9 CFR § 201.44); (2) that respondent Schober consigned livestock to auction markets and then repurchased it for the accounts of his principals without disclosing his prior ownership of the livestock in violation of section 312(a) of the Act, and Section 201.44 of the regulations; and (3) that respondent Schober failed to properly keep his business records in conformity with section 401 of the Act.

The respondents filed answers in which they admitted the jurisdictional allegations of the complaint and denied the remaining allegations. On April 10, 1984, a consent decision was entered with respect to respondent Northern New York Farmers' Marketing Cooperative, Inc. With respect to the remaining respondents, an oral hearing was held in Syracuse, New York on July 9 and 10, 1985. Respondents Schober and Wells were represented by David L. Welch, Esq. of Potsdam, New York. Complainant was represented by Barbara S. Harris of the Office of the General Counsel, United States Department of Agriculture. At the start of the hearing, the complaint was amended to delete and revise certain portions thereof. Thereafter at the close of the hearing, the time was fixed for the filing of briefs.

Pages 8 and 9 of respondents' brief reads in part:

> Respondents are alleged to have engaged in unfair, deceptive practices. With the exception of falsely inflating the price of beef, respondents admit the practices involved, but maintain the propriety of their actions.
>
> It is maintained that the activities in question may be improper, but only ex post facto, and that the matter has improperly or unwisely been continued beyond the imposition of a cease and desist order.
>
> Even if it is found that respondents intentionally violated the Act, the appropriate remedy at this time is an order to cease and desist.

FINDINGS OF FACT

1. (a) Respondent Horst Schober, herein referred to as Schober, is an individual whose business mailing address is R.R. 2, Potsdam, New York 13676.

(b) Respondent Schober at all times material herein was:

(1) Engaged in the business of buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

2. (a) Respondent Nancy Wells, herein referred to as Wells, is an individual whose mailing address is North R.D. 1, North Lawrence, New York 12967.

3. At all times material herein, respondent Wells was employed by Schober to buy and sell livestock on his behalf and for his account.

4. Respondent Wells, at all times material herein, was engaged in the business of buying and selling livestock in commerce as the employee or agent of the vendor or purchaser.

5. Respondent Wells, at all times material herein, was a dealer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

Increased Weights and Prices of Livestock Purchased for Principal

6. Respondents Schober and Wells regularly purchased calves at various auction markets on order for Ezra H. Good, Inc., of Denver, Pennsylvania.

7. The calves purchased by Schober and Wells on order for Ezra H. Good, Inc., were used to fill the Good order with Strauss Veal, Inc. of North Manchester, Indiana.

8. Schober's agreement with Ezra H. Good, Inc., provided that Schober purchase calves at auction markets with his own funds, truck them to a central collection point and furnish to Strauss Veal a purchase invoice showing the actual purchase weights and prices.

9. Schober did not provide Good with buyer's invoices reflecting his purchases. However, Schober was required to report the details of his purchases to Good, including the number of head purchased, the total weight of the calves and the total cost of the calves at each sale. Based upon this report, Good reimbursed Schober his reported purchase prices plus trucking, and paid him a buying commission for his services.

10. Schober's agreement with Ezra H. Good, Inc., provided that all the calves purchased for the company by Schober be purchased through the auction sale and that he turn over the calves at their original purchase weights and prices. It was not acceptable under their agreement for Schober to buy calves at one auction market, take them to a second auction market, consign them and then repurchase the calves to fill the Good order.

11. Mr. Amos Good of Ezra H. Good, Inc., testified that pursuant to an oral agreement between the parties, Schober purchased baby bob calves for Good's firm on a regular basis during 1981 and 1982

and was paid a commission for his services. Good would instruct Schober as to the number of calves needed on a given day, the weight range required and the ceiling price to be paid. It was Good's expectation that Schober would buy the best quality calves at the lowest possible price. If Schober could buy calves at less than the ceiling price quoted, he was expected to turn them over to Good at the lower price. As noted in finding 10, it was not acceptable for Schober to buy calves at one market, take them to a second market for consignment and then repurchase them to fill his order with Good. In fact, as Mr. Good testified, if Schober were discovered engaging in this practice, his services would have been terminated.

12. Complainant's exhibits for the period June 14, 1982 through September 1982, substantiate that Wells and Schober purchased calves at several auction markets such as Bast Livestock Exchange and Empire Livestock Marketing Cooperative and received invoices from the markets documenting the actual purchase weights and prices of the calves. Accounts of sale issued to Wells and buyer's invoices issued to Schober by the Northern New York market purport to show that the calves, traced by ear tag numbers, were consigned on the same day to the Northern New York Farmers' Marketing Cooperative auction where they were repurchased by Schober for Good at weights and prices which were greater than Schober's original purchase weights and prices. When taken at face value, the Northern New York records appear to document normal consignment and sales transactions by respondents. However, as Mr. Marano and Mr. Johnson of the Packers & Stockyards Administration testified, the records establish that the animals originally purchased by respondents at Bast's or Empire were never consigned by respondents to the Northern New York market, did not pass through the auction ring, and were never purchased by Schober on a competitive basis.

Instead, respondents Wells and Schober, in consultation, arbitrarily determined prices and weights for the calves purchased for Good and then arranged for the necessary paperwork to be executed to document the purported consignment to the market and the purported purchase through the auction sale by Schober. As testified to by Mrs. Meister, the former officer manager at the Northern New York Market, the mechanics of the arrangement were easy to effect. The market's office personnel were instructed by the respondents to add or "mix in" the calves to Schober's buyer's invoices at the new and falsely increased weights and prices. Schober then sent the false buyer's invoices with the arbitrarily increased prices and weights with the calves to Strauss Veal. He also reported these false prices and weights to Amos Good who reimbursed

Schober for his purchases and collected from Strauss Veal on the basis of the increased weights and prices shown on the false invoices.

13. On or about the dates and in the transactions specified below, Wells, under the direction of Schober and acting as his employee and agent, purchased calves at Bast's Livestock Exchange Market. On the same day, Wells transported the calves to the Northern New York Farmers' Marketing Cooperative stockyard where, the respondents caused to be prepared fraudulent Northern New York accounts of sale and buyer invoices which purported to show that the calves were consigned to Northern New York for sale on a commission basis by Wells and were purchased by Schober through Northern New York's auction ring on a competitive basis. In fact, however, the calves were not consigned to Northern New York for sale, did not pass through Northern New York's auction ring, and were not repurchased by Schober on a competitive basis.

Purchase Date 1982	Calf Tag No.	Purchased At	Original Purchase Price	Wrongfully Increased Price
6/14	Y858	Bast's Livestock	$ 79.38	$ 98.80
	1257	Exchange	78.40	93.60
7/12	H466	Bast's Livestock	145.00	165.00
	212W	Exchange	83.30	94.50
7/26	W601	Bast's Livestock	68.60	79.05
	W425	Exchange	62.40	85.00
	428	Bast's Livestock	58.31	75.00
	1541	Exchange	67.20	77.50
8/2	1572	Bast's Livestock	58.83	82.15
	W856	Exchange	53.90	76.50
8/9	W922	Bast's Livestock	77.42	80.58
	1003	Exchange	72.00	89.00
	1018	Bast's Livestock	57.82	74.46
	1023	Exchange	82.68	92.88
	1029	Bast's Livestock	67.62	80.08
9/13	1726	Exchange	64.32	77.50
	Y53	Bast's Livestock	73.50	84.15
	Y594	Exchange	60.76	75.00

14. On or about June 14, 1982, Schober purchased 3 calves at the Empire Livestock Marketing Cooperative, Adams, New York. On the same day, Schober transported the calves to the Northern New York stockyard, where respondents "invoiced" the calves through Northern New York records to Strauss Veal at weights and prices which were wrongfully increased over Schober's actual purchase weights and prices at the Empire Livestock Marketing Cooperative.

For the purpose of concealing the true nature of the transaction, the respondents caused to be prepared a fraudulent Northern New York account of sale and a buyer's invoice which purported to show that Schober consigned the three calves to Northern New York for sale on a commission basis through its auction ring, and repurchased them at the increased weights and prices. In fact, however, the calves were not consigned for sale, did not pass through Northern New York's auction ring, and were not repurchased by Schober on a competitive basis.

A copy of the fraudulent buyer's invoice was submitted to Strauss Veal by Schober. Copies of the fraudulent documents were retained in respondents' records. Schober reported the details of the purported purchase at Northern New York to Good, including the wrongfully increased weights and prices, and collected payment on the basis thereof.

15. On or about July 8, 1982, Schober purchased 3 calves at the Empire Livestock Marketing Cooperative, Adams, New York. On the same day, Schober transported the calves to the Northern New York stockyard, where the respondents "invoiced" the calves through Northern New York's records to Strauss Veal at weights and prices which were wrongfully increased over Schober's actual purchase weights and prices at the Empire Livestock Marketing Cooperative.

For the purpose of concealing the true nature of the transaction, the respondents caused to be prepared a fraudulent Northern New York account of sale and a buyer's invoice which purported to show that Wells consigned the three calves to Northern New York for sale on a commission basis through its auction ring, and that Schober purchased them at the increased weights and prices. In fact, however, the calves were not consigned for sale, did not pass through Northern New York's auction ring, and were not repurchased by Schober on a competitive basis.

A copy of the fraudulent buyer's invoice was submitted to Strauss Veal by Schober. Copies of the fraudulent documents were retained in respondents' records. Schober reported the details of the purported purchase at Northern New York to Good, including

the wrongfully increased weights and prices, and collected payment on the basis thereof.

Purchase of Own Livestock Without Disclosure

16. During 1981 and 1982, respondent Schober purchased livestock for Ezra H. Good, Inc. and Whitestown Packing Co. The representatives of these firms testified that Schober received a buying commission for his services and was expected to purchase all livestock for their accounts at the lowest prices available.

Frank Gerace, president of Whitestown Packing Company, testified that his firm had a policy which discouraged buyers from using their own livestock to fill orders but if, under unusual circumstances, this occurred, the buyer was required to disclose his prior ownership of the livestock to the firm. Mr. Gerace testified that Schober was aware of this company policy.

With respect to the Ezra H. Good firm, as set forth in findings 10 and 11, Amos Good's agreement with Schober did not permit Schober to buy livestock at one market, consign it to a second market, and then repurchase the livestock for Good.

17. On or about the dates and in the transactions specified below, Schober consigned his own livestock to auction markets and then repurchased the livestock from consignments for the accounts of his principals without disclosing to his principals his prior ownership of the livestock.

Date 1982	Market Livestock Consigned to by Schober	No. of own Head Purchased for Principal	Principal
7/8	Empire Livestock Marketing Cooperative	3	Strauss Veal
7/26	Northern New York Farmers' Marketing Cooperative, Inc.	2	Strauss Veal
7/31	Empire Livestock Marketing Cooperative	8	Whitestown Packing Co.
8/16	Empire Livestock Marketing Cooperative	3	Strauss Veal
8/23	Northern New York Farmers' Marketing Cooperative, Inc.	5	Strauss Veal

Accounts and Records

18. Respondent Schober, in connection with his business operations under the Act, failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions involved in his business as a market agency and dealer under the Act in that respondent failed to keep and maintain (a) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (b) a dealer purchase and sales journal; and (c) a cash receipts and disbursements journal.

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. By reason of the aforesaid findings of fact, it is concluded that respondents have violated Sections 312(a) and 401 of the Act (7 U.S.C. 213(a), 221) and Section 201.44 of the regulation (9 CFR 201.44). The order proposed by complainant is appropriate in view of the record evidence and is issued herewith.

Increased Weights and Prices

As set forth in findings of fact 6 through 15, the evidence introduced at the oral hearing establishes that during the period alleged in the complaint, respondents knowingly and falsely increased the weights and prices of calves purchased on order for Ezra H. Good, Inc., in violation of the Act and applicable regulations.

Falsely increasing prices and/or weights on livestock purchased on commission for a principal has consistently been found to be in violation of section 312(a) of the Act (7 U.S.C. § 213(a) and section 201.44 of the regulations. *In re Hageman,* 42 A.D. 531, 541 (1983); *In re Hatcher,* 41 A.D. 662, 665–66 (1982); *In re Sidney Collier,* 38 A.D. 957 (1979); *In re Burrus,* 36 A.D. 1668, 1687 (1977), *aff'd per curiam,* 575 F.2d 1258 (CA 8, 1978); *In re Fairbank,* 27 A.D. 1371, 1378–82 (1968), *aff'd,* 429 F.2d 264 (CA 9, 1970), *cert denied,* 400 U.S. 943 (1970).

Similarly, issuing invoices showing such arbitrarily increased weights is a violation of section 401 of the Act (7 U.S.C. § 221). *In re Fairbank, supra* at 1379–1382; *In re George Saylor, Jr.,* 41 A.D. 2187; *In re Hageman, supra* at 541.

In light of the above, the documentary evidence and testimony leave no doubt that respondents falsely and unlawfully increased the weights and prices to their principal in violation of the Act and regulations.

Disclosure of Own Livestock

As set forth in findings 16 and 17, the record evidence establishes that respondent Schober purchased his own livestock to fill orders for his principals without disclosing his prior ownership in the livestock in violation of the Act and regulations.

In engaging in such an unfair and deceptive practice, Schober breached his fiduciary obligations to his principals. Buying one's own livestock through an auction to fill orders for a principal without full disclosure to the principal violates section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.44 of the regulations (9 CFR § 201.44) *In re Harry Vealey*, 39 A.D. 8, 13 (1979); *In re Livestock Marketing Development Co.*, 33 A.D. 784, 807-808 (1974).

Accounts and Records

The testimony of Mr. Marano, the investigator who reviewed the records, disclosed that at the time of the investigation, respondent Schober failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions involved in his business. In particular, respondent failed to keep and maintain (a) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (b) a dealer purchase and sales journal; and (c) a cash receipts and disbursements journal.

The recordkeeping requirements of the Act are found in section 401 (7 U.S.C. 401). That section states in relevant part:

> Every . . . stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the form in which such accounts, records and memoranda shall be kept . . .

While the above-referenced journals are not listed by name in section 401, maintaining such separate accounting is necessary to facilitate compliance with the other sections of the Act and with the regulations. For example, a general ledger of accounts is necessary

to facilitate the determination of Schober's solvency under the Act, a requirement of all registrants. Similarly, the cash receipts and disbursements journal is necessary to carry out the requirements of section 201.44 of the regulations (9 CFR § 201.44, Accounting for Purchases).

Schober's failure to keep the journals and ledgers listed in the complaint prevents full disclosure of his business activities subject to the Act. Accordingly, respondent Schober is ordered, pursuant to section 401 of the Act, to maintain the specified records.

Willfulness of the Violation

1. Respondents argue (brief pp 2 and 3) that the practices they engaged in were proper and, therefore, not proscribed by the Act and regulations as alleged. In support of this view, they assert that the cited sections of the statute and regulations "are too vague to prohibit the conduct of respondent."

Respondents' argument is without merit. As the Judicial Officer noted in *In re William E. Hatcher*, 41 A.D. 662, 668:

> Respondent argues on appeal that the Act and regulations are not specific enough to be understood by non-lawyers. But that argument is frivolous as applied to the violations in this case. It does not take a lawyer to know that it is a violation of the Act and regulations for an agent to falsely increase prices and weights on livestock purchased on commission and to use counterfeit invoices to conceal the real market from which the livestock was purchased.

Although the terms "unfair", "unjustly discriminatory" and "deceptive" used in section 312(a) of the Act are not defined in the statute, it has been held that the terms are not so vague or uncertain as to be an unconstitutional delegation of legislative authority. *Farmers' Livestock Commission Co.* v. *United States*, 54 F.2d 375, 378 (E.D. Ill. 1931); *O. V. Handy Brothers Co.* v. *Wallace*, 16 F.Supp. 662, 664-66 (E.D. Pa. 1936). The meaning of the terms must be construed from the facts of each case within the purposes of the Packers and Stockyards Act. *Capitol Packing Co.* v. *United States*, 350 F.2d 67, 76 (CA 10, 1965).

2. Respondents urge that they were the victims of discriminatory enforcement of the Act by the complainant (brief pp. 3-5) because the investigation which resulted in the issuance of the complaint was, in their view, instituted by Whitestown Packing Company president, Frank Gerace.

Congress expressly authorized the Secretary to initiate formal enforcement proceedings to redress violations of section 312(a) of

the Act upon the complaint of injured parties. (See § 312(b); 7 U.S.C. § 213(b)). Whether through the Agency's own initiative or as the result of a private complaint, when formal action is taken, it is the Secretary of Agriculture or his delegated agent who is the complaining party, not the private firm or firms allegedly injured by the respondent's actions. Moreover, because formal action is not initiated to compensate private parties for their financial losses, the amount of money involved is irrelevant to a determination of whether the Secretary of Agriculture will initiate an action.

The fact that the investigation of respondents' operations may have originally resulted from a complaint lodged by Frank Gerace of Whitestown Packing Company does not support respondents' argument of discriminatory enforcement. Respondents' claim that the resources of the government were used to enforce private grievances is also without merit.

3. The practices engaged in by respondents must be characterized as wilful as they were carefully planned and executed. Deciding that there was nothing wrong with making a few extra dollars profit on each calf billed to their principal, respondents knowingly and intentionally caused false accounts of sale and buyer's invoices to be fabricated to document their transactions. This evidences a calculated and carefully implemented intention to deceive and defraud.

With respect to Schober's failure to disclose his prior ownership of the livestock sold to his principals, the evidence makes it clear that Schober was aware of his obligations and deliberately failed to live up to them.

In view of the nature of the violations demonstrated in the record, the question of wilfulness requires little discussion. A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or if the respondent acts with careless disregard of the statutory requirements. *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 185, 187 (1973); *Goodman* v. *Benson*, 286 F.2d 896, 900 (CA 7 1961); *In re Miller*, 33 A.D. 53, 83-87, *aff'd sub nom., Miller* v. *Butz*, 498 F.2d 1088 (CA 5, 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 A.D. 596, 609 (1968). The term "willful" is also often used to denote a voluntary or knowing act as distinguished from one which is accidental.

SANCTION

Complainant requests that respondent Schober be (1) ordered to cease and desist from the practices discussed above, (2) ordered to comply with the recordkeeping requirements of the Act, (3) as-

sessed a $5,000.00 civil penalty and (4) suspended as a registrant for a period of six months. With respect to respondent Wells, the complainant recommends that in addition to the entry of an appropriate cease and desist order, she be prohibited from operating subject to the Act for a period of six months.

Respondents argue (brief pp. 6-8) that the sanction sought by complainant in this case is too severe and request only the imposition of a cease and desist order. In support of their recommendation, respondents rely upon factors which they claim complainant failed to consider in seeking the $5,000 civil penalty against Mr. Schober, i.e., the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

The gravity of the offense need not include the matter of damages resulting from the offense, as respondents claim. Instead, the testimony of Reuben Johnson, at page 156, sums up the gravity of the circumstances here. Whether or not a profit is realized by the wrongful act, or the amount of the profit, is of little concern. Instead, ". . . in a case like this, it would be the fact that . . . there was false weights, false prices, and the fact that full and complete disclosure was not rendered to the principal by the agent." Such practices destroy the integrity of the regulatory program. See: *In re George W. Saylor, Jr.*, P & S Docket No. 5753, September 20, 1985, slip opinion pp. 489-495.

Questions such as, the size of respondent Schober's business or the effect of the $5,000 civil penalty on his ability to continue in business, appear to be answered at pages 318-319, 392, 401 of the record.

Respondent's business with Good amounted to almost $2 million, or anywhere from $40,000 to $80,000 per week, whereby respondent Schober paid for the livestock *from his own funds* and thereafter was reimbursed by Good. Although his net income has dropped appreciably since 1982 when his cattle sales were in excess of a million dollars, Schober's farm income has not changed. In short, there is no showing in the record that respondent is unable to pay the $5,000 penalty, or that the payment of such penalty will affect Schober's ability to continue in business. *In re Saylor, supra,* slip opinion pp. 525-526.

Complainant correctly argues, citing prior rulings, that the sanction sought is justified by the facts of this case and is consistent with past sanction policy (reply brief, pp. 4-5). Aside from prior precedents, falsely increasing the weights and prices of livestock purchased on a commission basis and failing to disclose prior own-

ership of livestock demonstrate clearly that the respondents deliberately and wilfully placed their interests ahead of their principals.

Accordingly, it is concluded that respondents have wilfully violated the Act and regulations as alleged in the complaint, and the following order is issued.

ORDER

Respondents Schober and Wells, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Engaging in any act, practice or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses;

(2) Entering into, continuing in, or cooperating in any agreement, arrangement, understanding, or course of business with any person for the purpose of aiding or assisting such person to obtain money from the purchasers of livestock by false or deceptive pretenses;

(3) Misrepresenting to their principals or to other purchasers of livestock from respondents (a) the manner in which such livestock was purchased or acquired by respondents, (b) the origin, or actual place of purchase of such livestock; (c) respondents' original purchase weights or original purchase prices for such livestock, or (d) the true nature of all charges made for their buying services;

(4) Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of sale, buyer invoices, billings, scale tickets or any other documents evidencing or prepared in connection with the purchase or sale of livestock, which show false, incorrect or misleading price or weight entries for such livestock, or which fail to disclose all facts necessary to show clearly and completely the true nature of each transaction;

(5) Collecting or aiding and assisting any person to collect from the purchasers of livestock on the basis of false, incorrect, or misleading invoices or accountings; and

(6) Using their own livestock to fill orders on a commission or agency basis without full disclosure of their interest in the livestock to their principal.

Respondent Schober shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Packers and Stockyards Act, including accounts, records and memoranda which show (1) the number of head of livestock bought and sold; (2) the date of purchase and sale; (3) the true and correct purchase and

sale prices for such livestock; (4) a complete and accurate cash receipts and disbursements journal; (5) the origin or place of purchase of such livestock; and (6) a general ledger of accounts showing assets, liabilities, income, expenses and net worth.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Schober is assessed a civil penalty in the amount of $5,000.00.

Respondent Schober is suspended as a registrant under the Act for a period of six months.

Respondent Wells is prohibited for a period of six months from engaging in business and operating subject to the Act as a market agency, buying and selling livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either for her own account or as the employee or agent of the vendor or purchaser.

The provisions of this order shall become final and effective 35 days after service of this order on respondents, unless appealed within 30 days after service. (9 CFR §§ 1.145(a) and 1.142(c)).

Copies of this decision and order shall be served upon the parties.

[The Decision and Order became final on February 27, 1986.—Ed.]

In re: FARMERS & RANCHERS LIVESTOCK AUCTION, INC., BILLY GENE DAVIS, MARY LAVONE DAVIS, JERRY MILLSPAUGH, and RANDY DAVIS d/b/a CATTLEMAN'S COMMISSION COMPANY. P&S Docket No. 6483. Decided February 27, 1986.

Custodial account—Issuing insufficient funds checks—Failing to pay—Failing to remit net proceeds to consignors when due—Exchanging checks to create false balance in checking account—Purchasing livestock out of consignments for his own speculative account—Accounts and records—Suspended as a registrant.

Judicial Officer affirmed Chief Judge Campbell's decision suspending respondent Jerry Millspaugh as a registrant for 5 years and ordering him to cease and desist from various practices, including misusing a custodial account, issuing insufficient funds checks, failing to pay for livestock, failing to remit to consignors when due the net proceeds from the sale of consigned livestock, exchanging drafts or checks to create a false "float" or balance in a checking account, and purchasing livestock out of consignments for speculation, all of which were held to be unfair practices under the Act. Respondent's records failed to meet the requirements of the Act since purchases by respondent out of consignments were not identified as such to the consignors. Respondent Millspaugh is responsible for the corporate respondent's violations since he was one-third owner, vice president, and one of the three members of the board of directors of the corporate respondent. He is also responsible for violations of Cattleman's Commission Company, which was a continuation of the corporate business. Although respondent Millspaugh's registration is inactive, it may be sus-

pended. Complainant need only prevail by a preponderance of the evidence. Respondents' failure to testify gives rise to an inference that their testimony would have been adverse. A check-kiting scheme is a serious and flagrant violation of the Act because of its pc ntial for harm. Severe sanction policy explained. That portion of the order providing that respondent Millspaugh may be employed as an auctioneer after 1 year of his 5-year suspension is authorized by the Act since it is a relaxation of the sanction that would normally be in effect. Under the regulations, a suspended registrant cannot be employed by persons subject to the Act. The P&S Act adopts by reference the rule making authority of the Federal Trade Commission. The employment regulation has the force and effect of law. Auction market operators could be required to register as market agencies or dealers.

Eric Paul, for complainant.
Keith Rutledge, Battesville, AR., for respondent Millspaugh only.

Decision by Donald A. Campbell, Judicial Officer

DECISION AND ORDER AS TO JERRY MILLSPAUGH

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on October 28, 1985, by Chief Administ ative Law Judge John A. Campbell (ALJ) suspending respondent Jerry Millspaugh as a registrant for 5 years and ordering him to cease and desist from various practices, including misusing a "Custodial Account for Shippers' Proceeds"; issuing insufficient funds checks; failing to pay for livestock; failing to remit to consignors when due the net proceeds from the sale of consigned livestock; exchanging drafts or checks to create a false "float" or balance in a checking account; and purchasing livestock out of consignment for speculation. The order also requires respondent Jerry Millspaugh to keep complete and accurate records.

On December 3, 1985, respondent Jerry Millspaugh appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On December 19, 1985, the case was referred to the Judicial Officer for decision.

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* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

Based upon a careful consideration of the record, the ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with changes too minor to itemize. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, hereafter referred to as the "Act"), instituted by a complaint filed on January 30, 1985, by the Administrator, Packers and Stockyards Administration. The complaint alleged that the financial condition of respondent Farmers & Ranchers Livestock Auction, Inc., and the financial condition of respondent Billy Gene Davis do not meet the requirements of the Act, and that the respondents have wilfully violated provisions of the Act and of the regulations promulgated thereunder.

Answers in the nature of general denials of all allegations, both jurisdictional and substantive, were duly filed. An oral hearing concerning all respondents was held in Little Rock, Arkansas, on July 30-31, and August 1, 1985. Complainant was represented by Eric Paul, Esquire, of the Office of the General Counsel, United States Department of Agriculture. Respondent Jerry Millspaugh was represented by Keith Rutledge, Esquire, of the firm of Highsmith, Gregg, Hart, Farris & Rutledge of Batesville, Arkansas. Seven of the nine witnesses called by the complainant were cross-examined on behalf of respondent Jerry Millspaugh by his counsel on July 30 and 31, 1985. Some 68 exhibits offered by complainant were received into evidence. No oral testimony was presented on behalf of any respondent nor were any exhibits offered on behalf of any respondent prior to the close of the hearing.

At the close of the hearing, the time was set for the filing of briefs in regard to respondent Millspaugh. An initial decision and order was issued on September 13, 1985, pursuant to sections 1.139 and 1.141 (e) of the rules of practice (7 CFR § 1.139, 1.141(e)) with respect to the remaining respondents. Such decision and order requires: respondents Farmers & Ranchers Livestock Auction, Inc., Billy Gene Davis and Randy Davis, d/b/a Cattleman's Commission Co., to cease and desist from various practices in violation of the Act; to comply with record keeping provisions; suspends said respondents as registrants for a period of five years; and prohibits respondent Mary Lavone Davis from engaging in business as a

market agency or dealer under the Act for a period of five years together with cease and desist and record keeping provisions.

In this phase of the proceeding, complainant seeks a decision and order imposing corresponding cease and desist, record keeping, and suspension provisions upon respondent Jerry Millspaugh.

FINDINGS OF FACT

1. Farmers & Ranchers Livestock Auction, Inc. (hereafter sometimes referred to as the "corporate respondent"), is a corporation with its principal places of business in Charlotte and Mt. View, Arkansas, and its business mailing address is P. O. Box 156, Cord, Arkansas 72524.

2. The corporate respondent, at all times material herein, was:

(a) Engaged in the business of conducting and operating the Farmers & Ranchers Livestock Auction, Inc., stockyard at Charlotte, Arkansas, and the Farmers & Ranchers Livestock Auction, Inc., stockyard at Mt. View, Arkansas, stockyards posted under and subject to the provisions of the Act;

(b) Engaged in business as a market agency, selling livestock on a commission basis at the stockyards, and as a dealer, buying and selling livestock in commerce; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce.

3. Respondent, Jerry Millspaugh is, and at all times material herein was:

(a) Vice President and Auctioneer of the corporate respondent;

(b) Owner of a 33⅓ percent interest in the corporate respondent's outstanding stock, and one of three members of the board of directors of the corporate respondent; and

(c) In combination with respondents Billy Gene Davis and Mary Lavone Davis, responsible for the direction, management and control of the operations of the corporate respondent.

4. Respondent Jerry Millspaugh, in combination with respondents Billy Gene Davis, Mary Lavone Davis and Randy Davis, is now and since August 7, 1984, has been:

(a) Engaged in the business of conducting and operating Randy Davis d/b/a Cattleman's Commission Company stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis at that stockyard;

(c) Responsible for the direction, management and control of the operations of Randy Davis d/b/a Cattleman's Commission Company; and

(d) Respondent Jerry Millspaugh is also registered individually as a market agency to sell livestock on a commission basis and as a dealer to buy and sell livestock in commerce. This registration is currently inactive.

5. In January 1984, Billy Gene Davis and Mary Lavone Davis filed a joint Chapter 11 petition in the United States Bankruptcy Court, Eastern District of Arkansas. In January 1984, the corporate respondent also filed Chapter 11 proceedings.

Farmers & Ranchers Livestock Auction, Inc.

6. The corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis, and Mary Lavone Davis, in connection with its operations as a market agency, has failed to properly maintain and use its Custodial Account for Shippers' Proceeds, hereafter referred to as the Farmers & Ranchers custodial account, thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due the owners or consignors of livestock, in that:

(a) As of December 30, 1983, the corporate respondent had issued and outstanding custodial account checks in the amount of $215,951.30, and had, to offset the outstanding checks, a balance in the custodial account of $.78 and current proceeds receivable of $28,075.86, resulting in a deficiency of $187,874.66 in funds available to pay shippers' proceeds;

(b) As of January 13, 1984, the corporate respondent had issued and outstanding custodial account checks in the amount of $357,484.21, and had, to offset the outstanding checks, a balance in the custodial account of $16.02 and current proceeds receivable of $167,335.75, resulting in a deficiency of $190,132.44 in funds available to pay shippers' proceeds;

(c) As of January 31, 1984, the corporate respondent had issued and outstanding custodial account checks in the amount of $335,007.47, and had, to offset the outstanding checks, a balance in the custodial account of $42,416.68, resulting in a deficiency of $292,590.79 in funds available to pay shippers' proceeds;

(d) As of February 16, 1984, the corporate respondent had issued and outstanding custodial account checks in the amount of $301,480.55, and had, to offset the outstanding account checks, a balance in the custodial account of $8,889.76, resulting in a deficiency of $292,590.79 in funds available to pay shippers' proceeds;

(e) As of March 23, 1984, the corporate respondent had issued and outstanding custodial account checks in the amount of $262,907.94 and an account overdraft of $29,682,85, resulting in a

deficiency of $292,590.79 in funds available to pay shippers' proceeds; and

(f) Such deficiencies were due, in part, to the misuse of funds received from the sale of consigned livestock as specified in Finding 7 below, and the failure to deposit in the custodial account within the time prescribed by the regulations an amount equal to the proceeds receivable due from the sale of consigned livestock.

7. During the period from at least January 6, 1984, through at least January 27, 1984, the corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis, and Mary Lavone Davis, in connection with its operations as a market agency, used funds received as proceeds from the sale of consigned livestock on a commission basis for purposes of its own and for purposes other than the payment of lawful marketing charges and the remittance of the net proceeds to the owners and consignors of livestock, in that funds received as proceeds from the sale of consigned livestock were regularly deposited to the corporate respondent's general account and used to repay a personal loan made to respondent Billy Gene Davis, to pay expenses of the market, and to finance livestock dealer expenses (CX 24-26; Tr. 130-144).

8. The corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis and Mary Lavone Davis, in connection with its operations as a market agency, on or about the dates and in the transactions set forth below, sold livestock on a commission basis and in purported payment of the net proceeds due the owners or consignors thereof, issued checks which were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

Date of Check (1984)	No. of Head	Check No.	Payee/Consignee	Amount of Check
1/4	1	13533	Ernest Grayson, Jr.	$370.42
1/6	2	13702	Ora Mast	609.22
1/11	68	13815	Harold Mantooth	12,362.42
1/11	7	13801	Wayne Turner	1,665.77
1/11	2	13750	Charles Harris	590.39
1/11	4	13768	Taft McSpadden	1,070.21
1/11	2	13868	William Archer	427.11
1/11	2	13717	Bobby Raney	295.77
1/11	1	13775	Earl Litaker	403.23
1/11	9	13860	Ruth Kay Lytle	2,295.15
1/11	31	13868	Robert Walker	8,264.03

Date of Check (1984)	No. of Head	Check No.	Payee/Consignee	Amount of Check
1/13	1	13926	Paul Hochstedler	291.67

9. In connection with the transactions set forth in Finding 8 above, and in numerous additional transactions during the same period of time, the corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis and Mary Lavone Davis, sold consigned livestock on a commission basis and failed to remit to the owners and consignors of such livestock, when due, the net proceeds resulting from such sales.

10. As of March 23, 1984, there remained unpaid to the owners and consignors of livestock net proceeds in the amount of $218,079.54.

11. These consignors recovered $100,160.93 upon the distribution of bonds maintained for the protection of consignors of livestock to Farmers & Ranchers Livestock Auction, Inc., pursuant to the bonding regulations promulgated by the Secretary of Agriculture.

12. The corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis and Mary Lavone Davis, in connection with its operations as a dealer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

Date of Purchase	Seller	No. of Head	Date of Check	Check No.	Amount of Check
12/9/83	Merrell C. Akin Lvsk. Co.	102	12/12/83	4229	$26,106.10
12/15/83	Merrell C. Akin Lvsk. Co.	99	12/20/83	4262	$24,062.66

Date of Purchase	Seller	No. of Head	Date of Check	Check No.	Amount of Check
12/20/83				4262	$24,062.66

13. The corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis and Mary Lavone Davis, in connection with its operations as a dealer, on or about the dates and in the transactions specified in Finding 12 above and in the transactions specified below, purchased livestock in commerce and failed to pay, when due, the full purchase price of such livestock.

Date of Purchase	Seller	No. of Head	Unpaid Purchase Amount
12/30/83	Merrell C. Akin Lvsk. Co.	97	$24,086.00
1/6/84	Merrell C. Akin Lvsk. Co.	105	$24,243.88

14. As of August 16, 1984, there remained unpaid to the livestock seller in transactions set forth in Findings 12 and 13, a total of $8,330.86.

15. Between August 26, 1983, and December 30, 1983, as more fully set forth in the schedule attached to this decision as Appendix A, Respondent Mary Lavone Davis drew twelve drafts totalling $624,132.60 on Rex White Livestock Auction and deposited such drafts to the Farmers & Ranchers general and custodial accounts for immediate credit. On or about the dates on which these twelve drafts were drawn, respondent Mary Lavone Davis issued seventeen Farmers & Ranchers general account checks totalling $563,319.15 payable to Rex White Livestock Auction. Respondent Jerry Millspaugh issued two additional checks, drawn on his own personal checking account, totalling $60,819.27, payable to Rex White Livestock Auction. Although sixteen of the nineteen checks given to Rex White Livestock Auction contained a notation to the effect that the check was for "cattle" or for a specific number of head, the Farmers & Ranchers checks and the two checks issued by respondent Jerry Millspaugh were not issued in payment for live-

stock purchases, but rather, were issued to obtain the unauthorized use of credit by means of a float caused by a timed series of withdrawals and deposits, creating an illusion of sufficient funds in the Farmers & Ranchers general and custodial accounts (CX 32-50, 64; Tr. 204-256).

16. Numerous other drafts and checks drawn by respondent Mary Lavone Davis between Farmers & Ranchers and Rex White Livestock Auction during this period could not be verified as having been issued either in connection with actual purchases and sales of livestock or in connection with further check kiting or swapping because neither respondents Farmers & Ranchers Livestock Auction, Inc., Billy Gene Davis nor Rex White Livestock Auction maintained full and complete purchase and sales invoices and trucking records that could be reconciled with the dollar amount and number of head notations on additional Farmers & Ranchers checks.

17. On January 6, 1984, a Grace and Grace check in the amount of $31,455.00 was issued by C.C. Grace payable to Farmers & Ranchers for "142 Cattle" and deposited for immediate credit in the Farmers & Ranchers general account with a deposit ticket indicating "purchase". On the same date, respondent Mary Lavone Davis issued a Farmers & Ranchers check payable to C.C. Grace in the amount of $31,455.00 bearing the false notation "83 head".

18. On January 13, 1984, a Grace and Grace check in the amount of $100,000.00 was issued by C.C. Grace payable to Farmers & Ranchers for "350 Cattle" and exchanged for two Farmers & Ranchers general account checks in the amount of $50,889.20 and $49,110.80, totalling $100,000.00. Both Farmers & Ranchers checks contained the false notation "cattle".

19. No livestock was purchased or sold by respondents Farmers & Ranchers Livestock, Auction, Inc., or Jerry Millspaugh in connection with the exchanges or swapping of checks set forth in Findings 17 and 18 above, and the purpose of such exchange operations, commonly referred to as check kiting, was the generation of a float to finance the Farmers & Ranchers operations and/or hide the true balance in the Farmers & Ranchers general and custodial accounts.

20. On January 13, 1984, respondent Mary Lavone Davis drew a draft in the amount of $32,841.52 on Bray Cattle Co., and deposited such draft to the Farmers & Ranchers general account. Although deposited with other instruments indicated as having been received in payment for "purchases", this draft was drawn with the prior agreement of Gordon Bray pending either: (1) the honoring of a Farmers & Ranchers check issued on January 13, 1984, in the amount of $27,944.11 and a Jerry Millspaugh check issued on Janu-

ary 13, 1984, in the amount of $4,897.41, totalling $32,841.52; or (2) the receipt of livestock to be purchased from the next scheduled auction sale. In either case, the exchange of draft and checks was made for the purpose of obtaining an unauthorized use of credit by means of a float and no actual purchase or sale of livestock occurred (CX 51, 54; 324-327, 350-357).

Cattleman's Commission Company

21. Respondent Jerry Millspaugh, together with the remaining individual respondents, in connection with the market agency operations being conducted under the registration Randy Davis d/b/a Cattleman's Commission Company, failed to properly maintain and use the Cattleman's Commission Company custodial account, thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due the owners or consignors of livestock, in that:

(a) As of October 31, 1984, respondent Jerry Millspaugh, in combination with the other respondents in this proceeding, had issued and oustanding Cattleman's Commission Company custodial account checks in the amount of $272,124.42, and had, to offset the outstanding checks, a balance in the custodial account of $5,443.97, deposits in transit of $80,926.47 and current proceeds receivable of $152,501.40, resulting in a deficiency of $33,252.58 in funds available to pay shippers' proceeds;

(b) As of November 30, 1984, respondent Jerry Millspaugh, in combination with the other respondents in this proceeding, had issued and outstanding Cattleman's Commission Company custodial account checks in the amount of $286,111.74, and had, to offset the outstanding checks, a balance in the custodial account of $35,394.40 and current proceeds receivable of $174,447.12, resulting in a deficiency of $76,270.22 in funds available to pay shippers' proceeds;

(c) As of December 21, 1984, respondent Jerry Millspaugh, in combination with the other respondents in this proceeding, had issued and outstanding Cattleman's Commission Company custodial account checks in the amount of $181,283.22, and had, to offset the outstanding checks, a balance in the custodial account of $26,644.17, deposits in transit of $4,068.09 and proceeds receivable of $103,461.89, resulting in a deficiency of $47,109.07 in funds available to pay shippers' proceeds;

(d) Such deficiencies were due, in part, to the failure to deposit in the custodial account before the close of the next business day an amount equal to the proceeds receivable from livestock purchases by respondents, by market employees, and by a dealer to

whom the market had extended credit and financed, one Gordon Bray.

22. Respondent Jerry Millspaugh, in combination with the remaining individual respondents, in connection with the operations of Randy Davis d/b/a Cattleman's Commission Company during the period August 8, 1984, through January 9, 1985, purchased livestock which had been consigned for sale on a commission basis for the speculative account of Randy Davis d/b/a Cattleman's Commission Company (CX 58-62, Tr. 372-377, 412-427, 470-472).

23. Respondent Jerry Millspaugh, in combination with the remaining individual respondents and in connection with the purchases of livestock consigned for sale on a commission basis in Finding 22 above, submitted accounts of sale to consignors which failed to disclose the true and correct names of the buyers and state the nature of the relationship existing between the market agency and the buyers (CX 60-62; Tr. 420-422, 425-427).

24. With respect to the financial condition and operations conducted under the name Cattleman's Commission Co., between January 1, 1985, and June 30, 1985, testimony by Regional Supervisor Jack Bellew and Auditor Kenneth Gordon of the Packers and Stockyards Administration's Memphis Regional Office (Tr. 436-444, 461-477), coupled with a Balance Sheet, Income Statement and Custodial Account analysis as of April 30, 1985 (Complainant's Exhibit 68) establish that respondent Jerry Millspaugh, in combination with the other individual respondents, continued to operate the Cattleman's Commission Co. auction market in a manner that endangers the livestock marketing public in total disregard of the custodial account and fair trade practice requirements of the Act and regulations. A continued custodial account shortage ($9,107.14 as of April 30, 1985) has been combined with a mounting operating loss ($60,348.43 between January 1, 1985, and April 30, 1985) and an insolvency of $80,367.44 (current liabilities less current assets as of April 30, 1985).

During this same period substantial purchases of consigned livestock, much of which was shipped to Amarillo, Texas, for resale on a speculative basis, have generated a company catch cattle income of $11,329.61, a figure entirely incompatible with a legitimate market support operation. Moreover, as explained by Mr. Bellew, the revenues of the Cattleman's Commission Co. operation during this period were used to pay feed expenses of $55,042.70. These feed expenditures go far beyond the amount of feed that could be used or stored at the stockyard, but are entirely appropriate for the feeding of cattle in the Bill Davis ranch operation (Tr. 464-466).

Lastly, an additional operating loss of some $13,000 was incurred between April 30, 1985, and June 30, 1985 (Tr. 467).

25. When the registration of respondent Randy Davis was accepted pursuant to the submission of the documents that have been admitted as complainant's exhibits 6–8, respondent Jerry Millspaugh was employed as auctioneer, the same position that he held in connection with the corporate respondent.

26. Respondent Jerry Millspaugh advanced $5,000.00 to respondent Randy Davis in order that a bond equivalent in the required amount of $65,000.00 could be obtained and operations commenced under the trade name Cattleman's Commission Co.

27. Respondent Randy Davis was not in possession of knowledge respecting Cattleman's Commission Co. records and was observed to perform work of a type normally handled by "yard help" during the investigation conducted by Mr. Jack Bellew and Mr. Kenneth Gordon on August 28, 1984 (Tr. 453, 459–460). This investigation, and others conducted on subsequent dates by employees of complainant, establish that respondent Randy Davis, d/b/a Cattleman's Commission Co. was, in fact, a successor or sham circumvention of the Act and not a bona fide new entity.

28. Livestock purchases made from consignment during eight weekly sales held in November and December, 1984, totalled $210,259.62, a figure equal to 14 per cent of the $1,520,456.19 in livestock that had been consigned for sale at the Cattleman's Commission Co. stockyard (CX 58).

29. Recap sheets maintained in the Cattleman's Commission Co. records for these eight sales could not be reconciled to invoices showing "company" purchases. The recap figure for "Cattleman's Commission Co." purchases was far greater and the discrepancy was not explained until a market employee, the bookkeeper, revealed that purchases by "C&L" and "Long" were, in fact, company purchases (CX 59–62; Tr. 413–427).

Additional Finding

30. The check kiting established to exist between respondents Jerry Millspaugh and Farmers & Ranchers Livestock Auction, Inc., on the one hand, and Rex White d/b/a White Auction Company on the other hand, included two checks drawn by respondent Jerry Millspaugh in the amounts of $30,747.33 on September 26, 1983, and $30,741.87 on October 3, 1983. These were the checks that could be closely matched to corresponding drafts drawn on Rex White. A total of seven personal checks had been issued by respondent Jerry Millspaugh payable to Rex White between September 7, 1983, and December 26, 1983 (CX 64). None of these could be

reliably tied to any purchase or sale of livestock shown in the corporate respondent's records or in the records of Rex White d/b/a White Auction Company. Since respondent Jerry Millspaugh failed to comply with an administrative subpoena, complainant's investigators could not conclusively establish during their investigation that no actual livestock purchases were involved. His personal involvement in this check-kiting scheme was extensive until curtailed by the refusal of his bank to accept for immediate credit after October 6, 1983, additional large checks drawn on out of town banks (CX 64, p.3).

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. By reason of the aforesaid findings of fact, it is concluded that respondent, Jerry Millspaugh, has violated the Act, as more fully explained below. The order proposed by complainant is appropriate in the light of the record evidence and is issued herewith.

Custodial Accounts, Failure to Maintain and Use Properly

Every market agency selling livestock on commission is required to establish and properly maintain a "Custodial Account for Shippers' Proceeds" (9 CFR § 201.42(b)). This is a trust account and the proceeds generated by the sale of consigned livestock are trust funds. *In re James L. Miller,* 33 A.D. 53, 61-62 (1974), *aff'd sub nom. Miller* v. *Butz,* 498 F.2d 1088 (5th Cir. 1974). The failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 is a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), as well as a violation of section 201.42 of the regulations. *In re Arab Stock Yard, Inc.,* 37 A.D. 293, 301-302, 310-311 (1978), *aff'd,* 582 F.2d 39 (5th Cir. 1978); *In re Sechrist Sales Company, Inc.,* 36 A.D. 665, 666, 671-675 (1977); *In re Hardy,* 33 A.D. 1383, 1398-1406 (1974).

Each of the custodial accounts that have been maintained for the protection of shippers who have consigned their livestock for sale at the Farmers & Ranchers Livestock Auction and Cattleman's Commission Co. stockyards have been shown to be in a state of substantial deficiency of a regularly recurring basis (Findings 6 and 21). The method used by respondent Jerry Millspaugh, in combination with the other individual respondents, to hide the shortage in the corporate respondent's custodial account was check-kiting or check swapping (Findings 15-19). The deficiencies found in the Cattleman's Commission Co. custodial account on October 31, 1984 ($33,252.58), November 30, 1984 ($76,270.22), and December 21, 1984

($47,109.07), while somewhat smaller, were created by a failure to deposit in the custodial account before the close of the next business day, an amount equal to the proceeds receivable from livestock purchases made by the respondents, including purchases hidden by the use of false or misleading buyers names or notations, and a failure to make timely deposits for purchases made by a dealer to whom the market had extended credit and financed, one Gordon Bray (Findings 21, 22). This failure on the part of respondent Jerry Millspaugh to maintain the Cattleman's Commission Co. custodial account in the required manner has continued and a deficiency continues to exist (Finding 24).

It must be concluded, therefore, that the course of conduct of respondent Jerry Millspaugh with respect to the maintenance and use of the respective custodial accounts constitutes a wilful, deliberate and flagrant violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208 and 213(a)), and of section 201.42 of the regulations.

Failure to Remit the Net Proceeds Due Owners and Consignors of Livestock

The corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis and Mary Lavone Davis, sold livestock on commission at four auction sales and failed to remit, when due, the net proceeds resulting from such sales. As of March 23, 1984, net proceeds in the amount of $218,079.54 remained unpaid (Finding No. 10). Respondent Jerry Millspaugh acted in a fiduciary capacity and was obligated to remit the net proceeds of sale with a complete and accurate accounting before the close of the next business day following the sale of consigned livestock. *In re Arab Stock Yard, Inc., supra,* 37 A.D. at 299, 301. This prompt payment of net proceeds is required by section 201.43(a) of the regulations (9 CFR § 201.43(a)). Any failure by any market agency to comply with this prompt remission requirement is an extremely serious violation of the Act.

Failures to remit net proceeds often follow failures to properly maintain custodial accounts in conformity with section 201.42 of the regulations (9 CFR § 201.42), when, as here, the market agency does not possess funds with which to make up custodial account shortages. The responsibility for properly maintaining the custodial account of respondent Farmers & Ranchers Livestock Auction, Inc., rests on its owners, officers and directors, including respondent Jerry Millspaugh, who was an officer, director, and 1/3rd owner of this closely held corporation. Respondent Jerry Millspaugh had to have actual knowledge that Billy Gene Davis has repeatedly failed to comply with these requirements, even to the extent of violating

a 1967 stipulation, a 1970 consent decision and a 1978 injunction. This pattern has continued after the January, 1984, failure of the corporate respondent in connection with a *de facto* successor, the Cattleman's Commission Co. operation (Finding No. 21).

It must be concluded that there has been a pattern of wilful and deliberate failures to comply with the requirements of section 201.43(a) of the regulations and that such actions violate section 307 and 312(a) of the Act (7 U.S.C. §§ 208 and 213(a)).

Failures to Pay for Livestock Purchases

The corporate respondent, under the direction, management and control of respondents Jerry Millspaugh, Billy Gene Davis and Mary Lavone Davis, made four purchases of livestock totalling $98,498.64 as a dealer and failed to pay the livestock seller, Merrell C. Akin Livestock Co., for such purchases (Findings 12, 13). Checks drawn in purported payment for two of these purchases were dishonored upon presentation because sufficient funds were not on deposit and available (Finding 12). These failures to pay, when due, the full purchase price of livestock constitute an unfair and deceptive practice in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. 213(a), 228b). *Lewis* v. *Butz*, 512 F.2d 681, 682-83 (8th Cir. 1975); *In re Mid-States Livestock, Inc.*, 37 A.D. 547, 561-62 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701, 704-05 (8th Cir. 1978); *Bowman* v. *U.S.D.A.*, 363 F.2d 81, 85 (5th Cir. 1966). The unpaid livestock seller in this case was fortunate to recover all but $8,330.86 of the total purchase amounts from dealer bonds required by the Secretary (Finding 14; CX 31, 31A). These actions, however, remain serious violations that call for the imposition of a substantial period of suspension.

The Issuance of NSF Checks and Check-kiting

Fourteen checks drawn on the corporate respondent's general and custodial acounts were dishonored upon presentation because of an absence of sufficient funds on deposit and available in these checking accounts (Findings 8, 12). Schedules of debts, and amendments to such schedules, which were filed by the corporate respondent in its Chapter 11 proceeding before the United States Bankruptcy Court for the Eastern District of Arkansas (CX 17) admit the issuance of many additional NSF checks that were eventually paid because they had been held too long by the corporate respondent's bank. Respondent Mary Lavone Davis drew these checks (CX 31) knowing that they could be honored upon presentation only by reason of the float produced by an extensive check-kiting or check swapping scheme (Findings 15-20). Respondent

Jerry Millspaugh actively participated in this check swapping scheme until his bank advised him of no further immediate credit on checks deposited to his personal checking account (Finding 30).

It is well established that the issuance of checks in connection with transactions under the Act which are dishonored because of insufficient funds on deposit and available in the account on which such checks are drawn is an unfair and deceptive practice that violates section 312(a) of the Act (7 U.S.C. § 213(a)). *In re Edzards*, 37 A.D. 1880, 1887 (1978); *In re Bryan*, 36 A.D. 37, 42 (1977). By issuance of the two NSF checks made payable to Merrell C. Akin, the corporate respondent and respondent Jerry Millspaugh have also wilfully violated section 409 of the Act (7 U.S.C. § 228b).

The generation of a false "float" in the corporate respondent's general and custodial bank account by the deposit of checks or drafts for immediate credit coupled with the concurrent issuance of checks in identical or similar amounts for exchange or swapping is clearly an unfair and deceptive practice in violation of section 312(a) of the Act (7 U.S.C. § 213(a)).[1] Even the misuse of a "float" generated without resort to check-kiting has been condemned in numerous cases. *In re Roseth*, 39 A.D. 28, 36 (1980), *aff'd per curiam* (unpublished), 636 F.2d 1224 (8th Cir. 1980); *In re Hardy*, 33 A.D. 1383, 1398-1406 (1974); *Bowman* v. *U.S.D.A., supra; Daniels* v. *United States*, 242 F.2d 39, 41-42 (7th Cir. 1975), *cert. denied*, 354 U.S. 939.

Incomplete Records and Records Containing False and Deceptive Entries

The records maintained by the corporate respondent fail to meet the requirement of section 401 of the Act (7 U.S.C. § 221), which provides, *inter alia*, that

> any . . . market agency, and dealer shall keep such accounts, records and memoranda as fully and correctly disclose all transactions involved in his business . . .

Drafts drawn on White Auction Company between August 26, 1983, and January 5, 1984, totalled $2,719,477.48. Checks issued payable to Rex White or White Auction Company totalled $2,243,147.35 (CX 64). Only a handful of these transactions could be tied to the legitimate purchase or sale of livestock or to an existing check-kiting arrangement because complete dealer invoices and related records were not available. At the hearing, complainant was

[1] In re Blackfoot Livestock Commission Co., Administrative Law Judge's Decision PS Docket No. 6107, Aug. 22, 1985, on appeal to Judicial Officer.

able to link over $600,000 in drafts to a corresponding total of checks by reason of identical or virtually identical amounts and dates (Finding 15; Appendix A of this decision). False notations were entered on Farmers & Ranchers checks involved in this check swapping, and on additional checks issued to a number of other livestock dealers, to the effect that such checks were for "cattle" or a specific number of head, for example, "83 hd" (Findings 17, 18). Similar false notations were entered on personal checks issued by respondent Jerry Millspaugh.

Similarly, the accountings of sale provided to livestock consignors in connection with consignments to the Cattleman's Commission Co. sale were shown to misrepresent the name of the buyer. When livestock purchased by the market agency were not shown as "Co." (the designation noted on the invoices for sale barn purchases), designations were used which were not identified to the consignors as having any relation to the respondent market agency (Finding 23; CX 59-62). There was unrefuted testimony to the effect that this practice had also prevailed at the sales conducted by the corporate respondent (Tr. 400).

The issuance of invoices that fail to disclose the true and correct name of the buyer is an unfair and deceptive practice that violates section 312(a) of the Act (7 U.S.C. § 213(a)), and the failure to maintain complete records warrants the entry of a record keeping order pursuant to section 401 of the Act (7 U.S.C. § 222).

Purchasing Out of Consignments

It is well established that market agencies selling on commission are fiduciaries that engage in an unfair and deceptive practice, in violation of section 201.56 of the regulations and section 312(a) of the Act, when they buy livestock out of consignments for speculation and when they fail to fully disclose purchases made to support the market. See 9 CFR § 201.58(c), (e); *In re Loretz*, 36 A.D. 1087 (1977); *In re Hardy*, 33 A.D. 1383 (1974); *In re Lufkin Livestock Exchange*, 27 A.D. 596, 610 (1968).

The high volume of purchases out of consignments by respondents in Cattleman's Commission Co. sales, and the profits generated from such purchases, show that this unfair practice has been a basic element of the business conducted, just as it was previously with respect to the corporate respondent's operations (CX 58; Tr. 373-377).

It must be concluded, as complainant contends, that respondent Jerry Millspaugh had full knowledge that a high volume of livestock was being purchased for speculative purposes on a regular basis in violation of the fiduciary obligation owed to livestock con-

signors under the Act. Mr. Kenneth Gordon, an auditor who is familiar with the sale of livestock at auction markets, testified as follows:

> Q. And how would you describe these transactions?
>
> A. My description of them, based on the numbers of percentages, even though the classification of market support or catch cattle was used, the volume would lend itself to be buying out of consignment for speculative purposes, in other words, buying and shipping and then expecting it to sell at a profit.
>
> Q. Now is there any way that this could have been done without Jerry Millspaugh personally knowing that these purchases were being made by the company?
>
> A. No, they were not. Him being the auctioneer, he indicated the sale of the livestock to the individual that purchased them when he accepted the final bid on the animal, the buyer was disclosed at that time, so Mr. Millspaugh had to know who the purchaser was. (Tr. 376)

The true extent of such speculative purchases was evident to respondent Jerry Millspaugh, but hidden from consignors by the use of fictitious names such as "Long" and initials and numbers that were not identified in the accountings prepared as company buying symbols (Findings 28, 29; Tr. 385-387, 392-393, 397-400).

Mr. Jack Bellew, complainant's Regional Supervisor, a CPA with 12 years experience in the observation of auction sales and the investigation of auction market operations, also testified that respondent Jerry Millspaugh would have had to be aware of market purchases exceeding five or ten percent of total consignment volume and was an integral part of the operation (Tr. 470-471).

Responsibility of Respondent Jerry Millspaugh For Violations By Farmers & Ranchers Livestock Auction, Inc., and Cattleman's Commission Co.

The position taken by respondent Jerry Millspaugh throughout the portion of the oral hearing he attended, in person and by counsel, is that his involvement in the direction, management and control of the operations of Farmers & Ranchers Livestock Auction, Inc., was strictly limited to a performance of the duties of auctioneer.

Respondent argues at page 15 of his brief:

> Respondent Jerry Millspaugh was an owner and director and Vice-President of the Corporate Respondent. His sole function was that of auctioneer. He had no direct supervisory control, management, direction, or control over the custodial accounts, general accounts, check writing, or any other management responsibilities for the Corporate Respondent. The actions taken by Jerry Millspaugh throughout his employment and connection with the other Respondents herein clearly show that Jerry Millspaugh has not in any way violated the Rules and Regulations to the Packers & Stockyards Act.

The record shows, however, that respondent Jerry Millspaugh either actively participated in violations which occurred in the course of the Farmers & Ranchers and Cattleman's Commission Co. operations, or knowingly permitted respondents Billy Gene Davis and Mary Davis to conduct the daily operations of the corporate respondent and the Randy Davis d/b/a Cattleman's Commission Co. operation in violation of the Act and regulations. In either case, he must be held fully responsible for such violations in order that the remedial purposes of the Act can be achieved.

Cease and desist orders have been repeatedly made applicable to respondents who are owner/officers of closely held family corporations despite lack of active personal participation in the practices found to violate the Act. In *In re MCM Livestock,* 39 A.D. 893, 901 (1980), the Department's Judicial Officer made such an order applicable to respondent McAninch, even though he was an absentee owner/officer who lived in Indianapolis, Indiana, and only visited the Whiteville, North Carolina, auction market facility on rare occasions and generally took no active part in the day-to-day operation of MCM. The Judicial Officer stated:

> This is not to punish respondent McAninch, but to deter him and others similarly situated from permitting such violations to occur in the future. If the president of a closely held family corporation, whose wife owns two-thirds of the firm, could avoid a cease and desist order when serious violations are committed by the corporation merely by delegating his responsibility to someone else, the remedial purposes of the Act would not be achieved.

Respondent Jerry Millspaugh's involvement was much more extensive. First, he wrote checks containing false entries as to the number of head of livestock purportedly being paid for that were issued solely in connection with a check-kiting scheme (Findings 15-20). Second, he sold livestock as auctioneer in transactions

where he could not avoid knowing that the livestock were being purchased without disclosure that these were direct or indirect company purchases for speculative purposes. This occurred on a regular basis with respect to both Farmers & Ranchers and Cattleman's Commission Company operations (Tr. 376-400). He advanced funds to respondent Randy Davis to permit a continuation of the same practices that he knew had occurred in the corporate respondent's operation (CX 12-14; Tr. 82-84). He was aware that the respective custodial accounts were not being properly maintained and that a dealer, Gordon Bray, was being allowed to pay for livestock at the following weekly sale without a prompt reimbursement of the custodial account (CX 63, Tr. 442). Lastly, he was present when records were sought by complainant's investigators during both the current and prior investigations and must have been well aware that the corporate respondent's records were being kept during 1983 and 1984 in such a manner as to fail to fully and correctly disclose all transactions involved in its business (Tr. 444, 450). He failed to produce records to support his issuance of personal checks used in a check-kiting scheme (CX 32, 64; Tr. 191, 203, 448). He was, as noted by witness Jack Bellew, an integral part of the entire operation (Tr. 470-471). Under these circumstances, a suspension order as well as a cease and desist and record keeping order is required.

SANCTION

Respondent Jerry Millspaugh was initially registered as an individual, selling livestock on a commission basis under the name Farmers & Ranchers Livestock Auction at Mt. View, Arkansas, on May 5, 1975 (CX 1, p.9). This registration was amended April 30, 1976, to add buying and selling on commission at the Montgomery Livestock Auction, Searcy, Arkansas, and a dealer operation (CX 1, pp. 7-8). On February 25, 1977, a corporate registration was issued to Farmers & Ranchers Livestock Auction, Inc., and the Mt. View operation was continued under this registration. Subsequently, the Searcy sale was replaced with a sale at Charlotte, Arkansas, after construction of a new sale barn (Tr. 32). The individual registration of respondent Millspaugh became inactive with the termination of bond coverage on March 27, 1977 (CX 1, p. 8). It is complainant's position that respondent Jerry Millspaugh remains a registrant, since it is not the policy of complainant to terminate registrations, but only to inactivate them (Tr. 254-255). Since he is an inactive registrant, he may be suspended as a registrant.

Complainant presented sanction testimony at the close of the oral hearing from Mr. Jack Bellew, and from Mr. Harold W. Davis,

Chief of the complainant's Livestock Marketing Division. Mr. Bellew reviewed the difficulties being encountered by his office in obtaining proper adherence to the Act by other registrants as a result of what was generally perceived as a continued blatant violation of the Act by respondent Billy Gene Davis through the operation being conducted under the name Randy Davis d/b/a Cattleman's Commission Co. Mr. Davis, the individual delegated primary responsibility by complainant to determine what sanctions should be sought in all cases involving market agencies and dealers, testified that a five-year suspension and standard cease and desist provisions should be made applicable to each registrant, and that a like period of prohibition and cease and desist provisions should be imposed upon the single non-registrant, respondent Mary Lavone Davis. He qualified this agency recommendation by indicating that a provision allowing the employment of respondent Jerry Millspaugh as an auctioneer only by other registrants after the completion of the first year of a five-year suspension would be agreeable to complainant. He explained that respondent Jerry Millspaugh should not be allowed employment involving the buying and selling of livestock outside the auctioneer function or the exercise of management responsibilities or control of operations requiring registration.

The requested five-year suspension of respondent Jerry Millspaugh appears reasonable in the light of the record evidence. Respondent Jerry Millspaugh has been shown to be intimately involved in numerous violations which occurred with respect to both the operations conducted under the name Farmers & Ranchers Livestock Auction, Inc., and under the name Randy Davis d/b/a Cattleman's Commission Co.

It is evident that respondent Jerry Millspaugh has wilfully participated in the violations that have occurred after the registration of Randy Davis. To insure that Jerry Millspaugh does not act as a front during the five-year period when complainant has sought to have respondents Billy Gene Davis and Mary Lavone Davis barred from operating as market agencies and dealers in the same manner as respondent Randy Davis has done since August 8, 1984, a suspension of the same duration must be imposed upon him. Recognition that he was not responsible for the earlier violations or subject to a prior order of the Secretary is provided by a provision allowing his employment by other registrants after one year exclusively as an auctioneer. The broad authority of the Secretary to impose a sanction on one respondent designed to insure that a sanction imposed on a related respondent is not circumvented has been upheld

by the United States Court of Appeals for the Seventh Circuit in *Mattes* v. *United States*, 721 F.2d 1125 (1983).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends on appeal that the ALJ's findings are not adequately supported by the record, but the record abundantly supports the ALJ's findings and conclusions. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required.[2]

Respondent Jerry Millspaugh's argument as to the evidence is primarily based on his contention that the evidence does not prove that he was personally responsible for the violations. But the evidence showing that respondent Jerry Millspaugh was vice president and one of the three directors of the corporate respondent, and that he owned one-third of the corporate respondent's outstanding stock, is sufficient to show that he was responsible for the corporate respondent's violations. The record further shows that Randy Davis d/b/a Cattleman's Commission Company was merely a continuation of the corporate respondent.

Furthermore, neither respondent Jerry Millspaugh nor any of the other respondents testified in this proceeding, notwithstanding the fact that respondent Jerry Millspaugh was present during most of the hearing. Under the settled principle that has been followed in many proceedings before this Department,[3] and which has also

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[2] *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[3] *E.g.*, *In re Grady*, 45 Agric. Dec. ___ (Jan. 31, 1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. ___ (Oct. 17, 1985); *In re Saylor*, 44 Agric. Dec. ___ (Sept. 20, 1985); *In re Petty*, 43 Agric. Dec. ___ (Oct. 31, 1984), *appeal docketed*, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ___ (Oct. 6, 1983); *In re Farrow*, 42 Agric. Dec. ___ (Sept. 21. 1983), *aff'd in part and rev'd in part*, No. 83-2548 (8th Cir. Apr. 24, 1985) (merits affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd* (unpublished), 742 F.2d 1462 (9th Cir. 1984); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37

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been followed in many judicial proceedings,[4] I infer that Jerry Millspaugh's testimony would have been adverse to his position here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Manfield, in *Blatch* v. *Archer,* Cowp. 66, quoted with approval in Wigmore, *Evidence* (3d ed. 1940), § 285.

In addition, the record shows that respondent Jerry Millspaugh personally participated in the check-kiting scheme. For example, on September 26, 1983, respondent corporation drew a draft on Rex White for $43,331.92. On the same date, September 26, 1983, the corporate respondent issued a check to Rex White for $12,585, and respondent Jerry Millspaugh issued a check from his personal account to Rex White for $30,747.33. The total amount of the two checks issued by the corporate respondent and Jerry Millspaugh to Rex White on September 26, 1983, is $43,332.33, i.e., a difference of only 41¢ between the draft drawn by the corporate respondent on Rex White on September 26, 1983, and the two checks issued by the corporate respondent and Jerry Millspaugh on the same day to Rex White.

Similarly, on October 4, 1983, the corporate respondent drew a draft on Rex White in the amount of $56,811. On the same day, the

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Agric. Dec. 1659, 1666–67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586–87 (1977), *aff'd* 570 F.2d 724 (8th Cir.) (2–1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305 *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1668, 1686–87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637–38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2–1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100–01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929–30 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1571–72 (1974); *Ir re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Speight*, 33 Agric. Dec. 280, 300–01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

[4] 2 Wigmore, *Evidence* §§ 285–91 (3d ed. 1940); *United States* v. *Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit* v. *United States*, 306 U.S. 208, 225–27 (1939); *Kirby* v. *Tallmadge*, 160 U.S. 379, 383 (1896); *Karavos Compania, Etc.* v. *Atlantica Export Corporation*, 588 F.2d 1, 9–10 (2d Cir. 1978); *International Union* v. *NLRB*, 455 F.2d 1357, 1362–70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co.* v. *Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cromling* v. *Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148–49 (3d Cir. 1963); *Hoffman* v. *CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co.* v. *Staples*, 272 F.2d 829, 834–35 (8th Cir. 1959); *Neidhoefer* v. *Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270–71 (7th Cir. 1950); *Bowles* v. *Lentin*, 151 F.2d 615, 619 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co.* v. *Ratcliff*, 108 F.2d 253, 256–57 (C.C. P.A. 1939); *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 867–68 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

corporate respondent issued a check to Rex White for $26,070, and on the preceding day, October 3, 1983, respondent Jerry Millspaugh issued a check from his personal account to Rex White for $30,741.87. The two checks to Rex White totalled $56,811.87, i.e., just 87¢ more than the draft drawn by the corporate respondent on Rex White.

In the absence of any testimony by respondent Jerry Millspaugh or any of the other respondents, this evidence, together with the other evidence relating to the check-kiting scheme, gives rise to the strong inference that Jerry Millspaugh was personally writing checks on his own checking account as part of the check-kiting scheme.

It should be noted that a check-kiting scheme is a serious and flagrant violation of the Act not because of the actual loss that may have occurred as a result of the arrangement, but, rather, because a check-kiting arrangement of the size involved here over an extended period of time has the *potential* for great harm.[5] Such check-kiting schemes are very easy for livestock firms to engage in without detection by banking officials. Accordingly, severe sanctions must be imposed where any respondent engages in a check-kiting scheme in connection with its livestock activities subject to the Act.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),[6] which is set forth as Appendix B to this decision.[7]

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[5] For example, in *In re Blackfoot Livestock Commission Co.*, P&S Docket No. 6107, presently before the Judicial Officer, when a check-kiting scheme engaged in by two livestock firms was suddenly ended by one of the firms, the other firm's bank was left holding three dishonored drafts totalling almost $900,000 (for which it had already given credit). In addition, livestock sellers lost nearly $200,000.

[6] The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[7] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per*

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In view of the serious, flagrant and repeated violations by the corporate respondent, for which respondent Jerry Millspaugh is responsible, the 5-year suspension imposed by the ALJ as to respondent Jerry Millspaugh is appropriate, irrespective of the additional violations by Randy Davis d/b/a Cattleman's Commission Company, and irrespective of the desirability of preventing Billy Gene Davis and Mary Lavone Davis from continuing operations during their 5-year suspension period. Nonetheless, the ALJ properly considered the violations by Randy Davis d/b/a Cattleman's Commission Company (since it was merely a continuation of the corporate respondent's business), and the desirability of having the sanction as to respondent Jerry Millspaugh coincide with the 5-year suspensions applicable to respondents Billy Gene Davis and Mary Lavone Davis (see *In re Farmers & Ranchers Livestock Auction, Inc.*, 44 Agric. Dec. ____ (Sept. 13, 1985) (decision as to the respondents other than Jerry Millspaugh)).

Respondent Jerry Millspaugh challenges that part of the order relating to a restriction on his employment, i.e., providing that his suspension "shall not constitute a bar on his employment by any other registrant under the Act in the capacity of a salaried or hourly wage auctioneer after the completion of the first year of his five-year period of suspension." However, that provision is actually a *relaxation* of the sanction that would normally be in effect. The regulations prohibit a stockyard owner, packer, market agency, or dealer from employing any suspended registrant to perform activities in connection with livestock transactions subject to the Act

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curiam (unpublished), 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362–63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330–32, 337–52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549–51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133–34 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31–32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145–60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913–14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539–50 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64–80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

during a suspension period. Specifically, the regulations provide (9 CFR § 201.81):

> § 201.81. *Suspended registrants.*
>
> No stockyard owner, packer, market agency, or dealer shall employ any person who has been suspended as a registrant to perform activities in connection with livestock transactions subject to the jurisdiction of the Secretary under the Act during the period of such suspension: *Provided,* That the provisions of this section shall not be construed to prohibit the employment of any person who has been suspended as a registrant until such time as the person demonstrates solvency or obtains the bond required under the Act and regulations. No such person shall be employed, however, until after the expiration of any specified period of suspension contained in the order of suspension.[8]

Authority to issue regulations under the Packers and Stockyards Act is contained in § 402 of the Act (7 U.S.C. § 222), which adopts by reference the authority of the Federal Trade Commission to issue regulations (15 U.S.C. § 46(g)), and in § 407 of the Act (7 U.S.C. § 228(a)). Many of the Packers and Stockyards Act regulations are merely advisory, but others have the force and effect of law.[9] The regulation just quoted is obviously one of the regulations having the force and effect of law. The regulation is necessary to carry out the provisions of the Act, and is within the statutory authority of the Secretary (see, e.g., 7 U.S.C. §§ 192, 208, 213).

In addition, the regulation is necessary to prevent evasion of suspension orders issued under 7 U.S.C. § 204. If a suspended registrant could be employed by a stockyard owner, packer, market agency, or dealer to perform activities subject to the Act during the period of a suspension, the suspension power would be an ineffective regulatory tool.

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[8] The current provisions were added in 1984 (49 Fed. Reg. 37,371, 37,374-75 (1984)), but similar provisions were previously in effect (19 Fed. Reg. 4522, 4532 (1954); 24 Fed. Reg. 3182, 3184 (1959); 44 Fed. Reg. 45,359, 45,361 (1979)).

[9] See, *e.g., First State Bank of Miami* v. *Gotham Provision Co.,* 669 F.2d 1000, 1007 n.7 (5th Cir.), *cert. denied,* 103 S. Ct. 129 (1982); *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672, 673-98 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974); *In re Frosty Morn Meats, Inc.,* BK 77-31707, slip op. at 34-35 (Bankr. Ct. M.D. Tenn. Oct. 2, 1978) ("exact language" specified in the regulations required as to packer purchases of livestock on credit), *aff'd,* 7 BR 988 (M.D. Tenn. 1980), *appeal dismissed,* No. 81-5158 (6th Cir. Apr. 23, 1981).

The same goal achieved by the regulation (9 CFR § 201.81) could be achieved by requiring all employees of a registrant who are actually engaged in buying or selling livestock to register separately from their employer. That is, such employees could themselves be required to register as market agencies or dealers. The Act defines "market agency" and "dealer" as follows (7 U.S.C. § 201(c), (d)):

> (c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and
>
> (d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.[10]

The term "stockyard services" is defined as (7 U.S.C. § 201(b)):

> (b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, or livestock.

Livestock auctioneers fit the definitions of a market agency and a dealer and, therefore, the Secretary could require their individual registration. The regulation prohibiting their employment while suspended merely accomplishes the same purpose in a more economical manner. It is clearly within the Secretary's authority under the Act.

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent Jerry Millspaugh, his agents and employees, directly or through any corporate or other device (including Randy Davis d/b/a Cattleman's Commission Company), in connection with his business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in any Custodial Account for Shippers' Proceeds which he is required to establish and maintain under the Act and regulations, within the time prescribed by section 201.42 of

[10] During the early years of administration of the Act, the Secretary went much farther than he presently does in requiring the individual registration of persons involved in buying or selling livestock for a firm.

the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

2. Failing to otherwise maintain any Custodial Account for Shippers' Proceeds which he is required to establish and maintain under the Act and regulations in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of his own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;

4. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

5. Failing to remit to the owners and consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock;

6. Purchasing livestock consigned for sale on a commission basis for his own speculative accounts, or for the speculative account of any market agency selling on commission in which he is a part owner;

7. Submitting accounts of sale to consignors that fail to disclose the true and correct names of the purchasers and the nature of the relationship, if any, between the market agency selling on commission;

8. Financing the purchases by any dealer or market agency of livestock consigned to respondent for sale on a commission basis;

9. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

10. Failing to pay, when due, the full purchase price of livestock;

11. Failing to pay the full purchase price of livestock; and

12. Exchanging or "swapping" drafts or checks with any person for the purpose or with the effect of concealing the true amount of funds available in any checking or other bank account, or of creating a false "float" or balance in any such account.

Respondent Jerry Millspaugh shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Packers and Stockyards Act including the following:

1. A general ledger of accounts showing assets, liabilities, income, expenses and net worth. This ledger shall be posted on a current basis. All entries shall be supported by appropriate documentation and all such documentation shall be maintained for a period of at least 2 years.

2. A complete and accurate subsidiary ledger for notes payable and notes receivable. This subsidiary ledger shall show the original date and amount, name of person or firm payable to or receivable from, interest rate, payment and maturity terms, dates and amounts of payments and balance.

3. A complete and accurate subsidiary ledger for accounts receivable and accounts payable. This subsidiary ledger shall show the name of the person or firm receivable from or payable to, date and amount of debit and credit entries and the balance.

4. Copies of all purchase and sales invoices documenting livestock dealer transactions, and copies of all checks or drafts, check stubs, bank statements, deposit slips or similar bank documents which relate to such dealer transactions, and any other records which are necessary to show for each transaction the true name of the buyer and seller, the number of head, weight, price, and other material conditions of the purchase or sale, the date and place of the purchase or sale, and the date payment was made or received.

5. Copies of all accounts of sale and accounts of purchase evidencing the sale of livestock on a commission basis by respondent Jerry Millspaugh and deposit slips, or similar bank documents, scale tickets, receiving tickets, and load-out sheets which relate to the sale of livestock on a commission basis, and any other records which are necessary to show for each transaction, the true and complete name of the consignor, owner or shipper of the livestock, the number of head, weight and price received for such livestock, the date consigned, the date sold, the true and complete name of the buyer of such livestock, the date payment was received, and the date payment was deposited to the custodial account.

6. Monthly reconciliations of the custodial account required of market agencies selling on commission to include a complete and accurate listing, by date, of all receivables due from the sale of livestock on a commission basis and a complete and accurate listing of all outstanding custodial account checks.

7. Monthly reconciliations of other bank accounts used in connection with transactions subject to the Act to include a complete and accurate listing of outstanding checks drawn on such accounts.

8. A complete and accurate market support journal showing all purchases for market support, the price paid therefor, the date such livestock was disposed of and the price received.

Respondent Jerry Millspaugh is suspended as a registrant under the Act for a period of 5 years.

The suspension of respondent Jerry Millspaugh shall not constitute a bar on his employment by any other registrant under the Act in the capacity of a salaried or hourly wage auctioneer after the completion of the first year of his 5-year period of suspension.

The cease and desist and record keeping provisions of this order shall become effective on the day after service of this order. The suspension provisions of this order shall become effective on the 30th day after service of this order.

APPENDIX A

Farmers & Ranchers Livestock Auction, Inc./ Rex White d/b/a White Auction Company

Schedule of Checks/Drafts Traded Between Parties

Date of Draft	Draft Drawn On	Drawn By	Amount	Date of Deposit	Amount Deposited To	Date Draft Paid	Notation of L/S Involved	Date of Check	Issued By	Issued To	Check Numbers	Amount	Date of Deposit	Account Deposited To	Notation of L/S Involved
8-26-83	Rex White	Farmers & Ranchers	39087.46	8-26-83	F&R Gen	9-2-83	No	8-31-83	F&R	Rex White	4101	57518.12	9-1	General	No
8-26	Rex White	Farmers & Ranchers	35936.40	8-26-83	F&R Cust.	9-2-83	No	8-31-83	F&R	Rex White	4103	30098.04	9-7	General	No
8-31	Rex White	Farmers & Ranchers	52688.19	8-31-83	F&R Cust.	9-8-83	No	8-31-83	F&R	Rex White	4104	57217.93	9-6	General	146 Steer
8-31	Rex White	Farmers & Ranchers	34627.78	8-31-83	F&R Gen	9-8-83	No	9-1-83	F&R	Rex White	4102	17505.83	9-2	General	No
			[1] 162339.83									162339.83			
9-15	Rex White	Farmers & Ranchers	43118.07	9-15-83	F&R Gen	9-21-83	No	9-16-83	F&R	Rex White	4091	43120.00	9-19	General	92 hd.

9-21	Rex White	Farmers & Ranchers	51007.48	9-21-83	F&R Gen	9-27	No	9-22-83	F&R	Rex White	4126	23440.10	9-26	General	Cattle	
								9-25-83	F&R	Rex White	4127	27569.00	9-26	General	Cattle	
												51009.10				
9-26	Rex White	Farmers & Ranchers	43331.92	9-26-83	F&R Gen	9-30	No	9-26-83	Millspaugh	Rex White	1059	30747.83	9-28	General	77 hd.	
								9-26-83	F&R	Rex White	3716	12585.00	9-28	General	30 hd.	
												43332.33				
10-4	Rex White	Farmers & Ranchers	56811.00	10-4-83	F&R Cust	10-12	No	10-3-83	Millspaugh	Rex White	1042	30741.87	10-7	General	92 hd.	
								10-4-83	F&R	Rex White	3767	26070.00	10-7	General	93 hd.	
												56811.87				
11-4	Rex White	Farmers & Ranchers	56943.38	11-4-83	F&R Gen	11-15	No	11-4-83	F&R	Rex White	3983	30077.40	11-8	General	107 hd.	
								11-8-83	F&R	Rex White	3984	26866.00	11-9	General	92 hd.	
												56943.40				

Farmers & Ranchers Livestock Auction, Inc./ Rex White d/b/a White Auction Company—Continued

Schedule of Checks/Drafts Traded Between Parties

Date of Draft	Draft Drawn On	Drawn By	Amount	Date of Deposit	Amount Deposited To	Date Draft Paid	Notation of L/S Involved	Date of Check	Issued By	Issued To	Check Numbers	Amount	Date of Deposit	Account Deposited To	Notation of L/S Involved
11-28	Rex White	Farmers & Ranchers	[1] 731193.41	11-28-83	F&R Cust	12-2	No	11-28-83	F&R	Rex White	4149	30111.47	12-1	General	76 hd.
								11-29-83	F&R	Rex White	4150	43081.94	11-30	General	167 hd.
												73193.41			
11-29	Rex White	Farmers & Ranchers	[1] 61744.29	11-29-83	F&R Cust	12-5	No	11-30-83	F&R	Rex White	4162	30700.00	12-1	General	97 hd.
								11-30-95	F&R	Rex White	4163	31044.29	12-2	General	103 hd.
												61744.29			
12-30	Rex White	Farmers & Ranchers	75643.22	12-30-83	F&R Gen	1-9-84	No	1-3-84	F&R	Rex White	4365	40629.19	1-4-84	General	91 hd.
								1-3-84	F&R	Rex White	4366	35015.00	1-5-84	General	77 hd.
												75644.19			

[1] Amount of funds traced between parties are exact same amounts.

APPENDIX B

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. Sanction Policy

[Excerpt omitted.—Ed.]

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: HARLLEE ROBERTS. P&S Docket No. 6527. Decided February 18, 1986.

Stephen Luparello, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On February 4, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended the respondent as a registrant under the Act for a period of thirty days and thereafter until he obtained an adequate bond or its equivalent.

Complainant has requested that the suspension order be modified, at the expiration of the thirty day period, to allow the respondent to operate as an employee of another registrant under the Act. Therefore,

IT IS HEREBY ORDERED that the order issued on February 4, 1986, is modified to permit the respondent to operate as an employee of another registrant under the Act, after the expiration of the thirty day period of suspension. The order shall remain in full force and effect in all other respects.

In re: JAMES E. SUHR. P&S Docket No. 6528. Decided February 19, 1986.

Jory Hochberg, P&S Div. OGC, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On January, 6, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he filed and maintained an ade-

quate surety bond or its equivalent as required by the Act and the regulations.

Respondent has now filed an adequate bond or its equivalent as required by the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued January 6, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: JAMES E. CHAPMAN. P&S Docket No. 6604. Decided February 21, 1986.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On January 2, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued January 2, 1986, is terminated. The order shall remain in full force and effect in all other respects.

REPARATION DECISIONS

In re: 14 CASES AGAINST B.J. HOLMES SALES INTERNATIONAL, INC., GARY W. HUNT d/b/a COASTAL CATTLE COMPANY, and DAVID R. MONELL d/b/a DAMONE SALES & SERVICE. P&S Docket No. 6299. Decided January 28, 1986.

Complainant, *pro se.*
Respondent, *pro se.*
Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL AS TO RESPONDENT MONELL

These are reparation proceedings under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by complaints received on various dates in early 1983, alleging in substance failure to pay for livestock purchased.

Copies of each complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in each proceeding pursuant to the Rules of Practice, were duly served on each respondent. A copy of the respective investigation report was duly served on each complainant.

In some of the cases Mr. Monell cross claimed against the Holmes firm, and in some of them the Holmes firm cross claimed against Mr. Monell.

Respondents Holmes and Hunt subsequently entered bankruptcy. Accordingly these proceedings are stayed under 11 U.S.C. 362(a)(1) as to them. The cross claims of the Holmes firm are in abeyance. The proceedings went forward only as to the claims of the complainants against Mr. Monell.

A total of 65 related cases including these were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur2d *Actions* §§ 156 et seq. The oral hearing was held on May 20, 1985 in Syracuse, New York before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Six witnesses testified. No exhibits were received. No brief was received.

At the hearing, complainants in the proceedings identified on the attached list, although duly notified, did not appear in person or by counsel or other representative, and no evidence was offered or received in support of their claims. Mr. Monell testified that, in all purchases of livestock made by him and involved in the 65 cases, he was acting as agent for Mr. Hunt and he disclosed this to the sellers. His testimony was credible and the record contains no evidence to the contrary. He is not liable for the unpaid price of any

of such livestock on that basis. *Sweeney* v. *Herman Management, Inc.*, 85 App. Div. 2d 34, 447 N.Y.S. 2d 164 (2 Dept. 1982).

On possible liability in court under his surety bond see *United States Fid. & G. Co.* v. *Clover Creek Cattle Co.*, 92 Idaho 889, 452 P. 2d 993 (1969) and *Arnold Livestock Sales Company, Inc.* v. *Pearson*, 383 F. Supp. 1319 (D. Nebr. 1974).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order see 5 U.S.C. 702–3 and *United States* v. *I.C.C.*, 337 U.S. 426.

All claims of the complainants in the proceedings identified in the attached list are dismissed as to Mr. Monell.

Copies hereof shall be served on the complainants and Mr. Monell.

LIST OF CASES

P&S Docket No. 6334
Roland H. Bean v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6312
Russell D. Emerson v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6305
Handy Farms, Inc. v. *B. J. Holmes Sales Internationl, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6308
R. Timothy Hommel v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6299
Gerald R. Hyatt v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6351
David Leach v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6309
Wayne N. Lind v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6310
Donald Osborne and Kaye F. Osborne v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6311
Glen W. Raym v. *B. J. Holmes International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6369
Joseph E. Sventek v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6302
Ralph Tanner v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6318
Jan Ten Pas Jr. v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6359
Richard T. Triumpho v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

P&S Docket No. 6370
Van Cleef Farms, Inc. v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, and David R. Monell d/b/a Damone Sales & Service*

EARL CHESBRO and MARY ELLEN CHESBRO *v.* GARY W. HUNT d/b/a COASTAL CATTLE CO., and DAVID R. MONELL d/b/a DAMONE SALES & SERVICE *v.* B.J. HOLMES SALES INTERNATIONAL INC., GERALD YOUNG, STUART YOUNG, and DOUGLAS YOUNG d/b/a SPRUCE-EDEN FARMS *v.* B.J. HOLMES SALES INTERNATIONAL, INC., GARY W. HUNT d/b/a COASTAL CATTLE CO., and DAVID R. MONELL d/b/a DAMONE SALES AND SERVICE. P&S Docket No. 6313 & 6348. Decided January 28, 1986.

Complainant, pro se.
Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL AS TO RESPONDENT MONELL

These are reparation proceedings under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by complaints received in early 1983, alleging in substance failure to pay for livestock purchased.

In each proceeding, copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in the proceeding pursuant to the Rules of Practice, were duly served on each respondent, and a copy of the respective investigation report was duly served on complainants.

Respondents Holmes and Hunt subsequently entered bankruptcy. Accordingly the proceedings are stayed under 11 U.S.C. 362(a)(1) as to them. The cross claims of the Holmes firm are in abeyance. The proceedings went forward only as to the claims of the above-named complainants against Mr. Monell.

A total of 65 related cases including these were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur2d *Actions* §§ 156 et seq. The oral hearing was held on May 20, 1985 in Syracuse, New York before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Six witnesses testified, including Mr. & Mrs. Chesbro, Mr. Stuart Young, and Mr. Monell. No exhibits were received. No brief was received.

Between the complainants and Mr. Monell, it is undisputed that the latter, in the purchases of livestock made by him and involved in these two cases, was acting as agent for Mr. Hunt and disclosed this to the sellers. He is not liable for the unpaid price of any of such livestock on that basis. *Sweeney* v. *Herman Management, Inc.*, 85 App. Div. 2d 34, 447 N.Y.S. 2d 164 (2 Dept. 1982).

On possible liability in court under his surety bond see *United States Fid. & G. Co.* v. *Clover Creek Cattle Co.*, 92 Idaho 889, 452 P. 2d 993 (1969) and *Arnold Livestock Sales Company, Inc.* v. *Pearson*, 383 F. Supp. 1319 (D. Nebr. 1974).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order see 5 U.S.C. 702–3 and *United States* v. *I.C.C.*, 337 U.S. 426.

The claims of Mr. & Mrs. Chesbro, and of Messrs. Young, in these proceedings, are dismissed as to respondent Monell.

Copies hereof shall be served on the complainants and Mr. Monell.

CLIFTON CATTLE COMPANY, INC., *v.* SIOUX CITY LIVESTOCK MARKETING, INC., AND WESTERN IOWA FARMS COMPANY. P&S Docket No. 6192. Decided February 10, 1986.

Violation of the P&S Act.

In re P&S Docket No. 6192, Clifton Cattle Company, Inc. complainant, v. Sioux City Livestock & Marketing, Inc., and Western Iowa Farms Company, respondents; Presiding officer John J. Casey ruled in favor of Clifton Cattle Company. Findings showed that complainant and respondent, Western Iowa, had in early February, 1983, separately placed cattle at a Nebraska feed lot, whose operator mixed 21 steers of complainant with 39 of Western Iowa. On February 4 a large death loss occurred at the feed lot. On that day Western Iowa moved surviving steers to another pen. Next day complainant's agent went to move his cattle but found not only they were fewer than the number originally placed there, but fewer than he had counted the day before. Western Iowa, later sold the steers it had removed on the Sioux City Stockyards. Some of the steers sold belonged to complainant. Western Iowa knew this but never troubled to sort out which ones belonged to complainant, who received nothing on account of such steers. Because Western Iowa, sold all surviving steers moved from the original pen, knowing that some belonged to complainant, but without ascertaining how many, it was no longer possible to identify which of the surviving steers belonged to which of the parties. By mathematical calculation of the total number of cattle of both parties involved, Presiding Officer Casey determined, consequently, that of the net proceeds obtained by Western Iowa in the sale of the surviving cattle, a 21/59 quota was to go to complainant. He thus ordered Western Iowa to pay complainant, Clifton Cattle Co., Inc., $5,883.48 with 13% interest until paid, the amount representing 21/59 of the $16,529.77 net proceeds ob-

tained by Western Iowa. The complainant as to Sioux City Livestock Marketing, Inc., was dismissed by the Presiding Officer.

John D. Hartigan, Jr., Omaha, Neb., for complainant.
Victor J. Lich, Jr., Lich, Herold & Mackiewicz, Omaha, Neb., for respondent Sioux City only.
Respondent, *pro se* (Western Iowa).
John J. Casey, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, begun by a written complaint received on March 29, 1983, alleging in substance conversion of certain livestock. The amount claimed was $17,786.21.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondents on June 17, 1983. A copy of the investigation report was served on complainant on the same day. Respondents filed an answer and request for oral hearing on June 27, which was served on complainant on July 25.

An oral hearing was held on November 30, 1983 in Omaha, Nebraska, before John J. Casey of the Office of the General Counsel of this Department. Complainant was represented by John D. Hartigan, Jr., Esq., and respondents were represented by Victor J. Lich, Jr., Esq., both of Omaha. Six witnesses testified. Nine exhibits were received. Thereafter testimony of Gerald A. Lutjens was taken by deposition and made a part of the record by agreement of the parties. Both sides filed briefs.

FINDINGS OF FACT

1. Complainant Clifton Cattle Company, Inc., a corporation, at all times material herein was engaged in business as a market agency buying livestock on commission, and as a dealer buying and selling livestock for its own account, in commerce, with a principal place of business at Clifton, Texas, and so registered with the Secretary under the Act.

2. Respondent Sioux City Livestock Marketing, Inc., a corporation, at all times material herein was engaged in business as a market agency buying and selling livestock on commission, operating on the Sioux City Stockyards, Sioux City, Iowa, a posted stockyard subject to the Act, thus in commerce, and so registered with the Secretary under the Act.

3. Respondent Western Iowa Farms Company, a corporation, at all times material herein was engaged in business as a market agency and dealer buying and selling livestock on commission and for its own account, operating on locations including the Union Stock Yards, Omaha, Nebraska, a posted stockyard subject to the Act, thus in commerce, and so registered with the Secretary under the Act.

4. Prior to February 4, 1983, complainant and respondent Western Iowa had separately placed cattle for feeding at a feedlot near Platte Center, Nebraska. The feedlot operator, in what was called Pen 6, had commingled 21 steers of complainant with 38 steers and certain heifers of Western Iowa. In the following months a large death loss occurred at the feedlot, of which the operator did not keep the parties informed.

5. On February 4, 1983, respondent Western Iowa by agent removed all the then surviving steers from Pen 6, as well as the other animals of Western Iowa, and transported them to another feedlot where they remained until on or about March 2.

6. On dates as follows, respondent Western Iowa caused the then surviving steers which had been removed on February 4 from Pen 6 to be sold on the Sioux City Stockyards, for proceeds as follows:

Date	Steers	Gross Proceeds	Expenses of Sale	Net Proceeds
March 2	1	$268.45	$11.52	$256.93
March 2	31	12,270.62	357.12	11,913.50
March 2	12	4,205.92	138.24	4,067.68
March 30	1	298.76	7.10	291.66
Total:	45			$16,529.77

Some of the steers belonged to complainant, and Western Iowa by agents knew this, but never either sorted them out, identified which ones, or even ascertained how many. Complainant has received nothing on account of such steers.

7. The complaint was filed within 90 days of accrual of the cause of action alleged therein.

CONCLUSIONS

In the Fall of 1982 complainant and respondent Western Iowa separately placed cattle in a certain commercial feedlot near Platte Center, Nebraska, operated by Gerald A. Lutjens, not a party

herein. Complainant placed 619 steers. Western Iowa placed 359 larger heifers, 271 smaller heifers, and 38 steers. No other animals were there. In the following months a large death loss occurred there, at least 327 animals, of which the feedlot operator did not keep the parties informed. In early February of 1983, shortly before the feedlot operator became bankrupt, each of such parties learned that the condition of its cattle had deteriorated and determined to move them elsewhere. On Friday, February 4, Western Iowa by agent removed cattle, fewer than it had placed there. The next day, Saturday, Febraury 5, complainant's agent went there to remove its cattle and found, not only fewer than complainant had placed there, but fewer than complainant's agents had counted there the day before. Of the animals removed by Western Iowa, and later sold at Sioux City by Western Iowa, it is undisputed that some belonged to complainant and Western Iowa knew this. The question is how many and of what value.

On Friday morning, February 4, complainant's agent Gordon Reisinger went to the Lutjens feedlot. Mr. Alan Larsen, who operated another commercial feedlot, went with him. Both got into three pens assigned to complainant, and counted the steers by running them between themselves. Their respective counts varied by a very few animals but were approximately 380. The feedlot operator, Mr. Lutjens, was present and told them there were others belonging to complainant in another place, called Pen 6, commingled with the smaller heifers and the steers belonging to Western Iowa. The number he told them was 21 but it is clear that this was the number of complainant's animals originally commingled with Western Iowa's and not necessarily the number then surviving. All three men then departed together to transact other business in Leigh and Columbus, Nebraska. They parted company in Columbus. Mr. Larsen arranged for trucks to remove complainant's animals and take them to Mr. Larsen's feedlot the next morning.

Mr. Lutjens returned to his feedlot about 5:00 that afternoon and found a number of trucks, and Western Iowa's agent Charles Leonard loading cattle from Pen 6, in which 21 steers of complainant had been commingled with the smaller heifers and the 38 steers of Western Iowa. At least one truck had already departed. That departed truck must have contained animals from Pen 6, based on Mr. Leonard's testimony (Tr. 53) that he loaded the animals from that pen before loading any of the animals, called the "Dose cattle," from the other pen assigned to Western Iowa. Mr. Lutjens observed some of complainant's animals being loaded (the ear tags were of a different design) and told Mr. Leonard this. The latter said in substance that that would have to be taken care of later as

sorting was impossible under the circumstances. Western Iowa had brought a total of 668 animals to the Lutjens feedlot, of which 38 were steers, but that day it removed a total of 566, of which 45 were steers. Western Iowa's agents denied that they removed any animals from the three pens assigned to complainant, in which Messrs. Reisinger and Larsen had earlier that day counted the animals. However they acknowledged an obligation to complainant for seven, the difference between 38 and 45; for this to be correct the death loss at the feedlot would have had to included none of Western Iowa's steers.

That evening Mr. Lutjens phoned Mr. Reisinger and told him that Western Iowa had removed some of complainant's cattle from the Lutjens feedlot that day.

The next morning, Saturday, February 5, the truckers hired by Mr. Larsen arrived at the Lutjens feedlot and began loading complainant's animals before Mr. Larsen arrived there. Mr. Reisinger did not go there that day.

Also that Saturday morning Mr. Leonard returned to see if there were any more Western Iowa cattle there. He found none. While he was there, Mr. Reisinger phoned the Lutjens home to inquire about the loading of complainant's cattle. Mrs. Lutjens told him that some had been removed by Western Iowa the night before, and that Mr. Leonard was there. Mr. Reisinger asked to speak to Mr. Leonard, and Mrs. Lutjens tried to summon him. Mr. Leonard testified (Tr. 55):

> Q. Did Mr. and Mrs. Lutjens come out and tell you that Gordon Reisinger's on the the phone, he wants to talk to you?
>
> A. Mrs. Lutjens came out, was crying, wanted me to come to the house to use the phone. And I told her I wanted to leave before the snowstorm got any worse. She went back to the house and then came back and said Gordon Reisinger's on the phone. And I told her to tell Gordon we'd talk to him later.
>
> Q. Did she tell you why he was calling?
>
> A. No, she did not.

Mr. Lutjens testified (Deposition 10), "Mr. Leonard was with me in my pickup, and my wife called us on the radio, and he says he didn't want to talk to him." Mr. Reisinger testified (Tr. 26):

> Mr. Lutjens told me that our cattle were transported out by Western. Mrs. Lutjens told me on Saturday morning,

> and I asked her if I could speak to Chuck Leonard and if she would call him. And she came back to the phone and said he didn't want to talk to me.

Mr. Reisinger then phoned Mr. Hugh "Scotty" Mactier, President of both respondent corporations, and told him of his information that the latter had some of complainant's cattle. Mr. Mactier promised to check it out and call him back.

Mr. Mactier then directed Mr. Leonard to go to the feedlot where Western Iowa had taken the animals which it had removed, and count the steers, but without getting any of the animals up because they were in bad condition. Mr. Mactier testified (Tr. 62):

> So Charlie [Leonard] went out and walked through the pen, called me back, and he said he thought he counted about 35 cattle. And so I called Gordon [Reisinger] back approximately 11:00 or thereabouts; and I said we walked through the cattle, we think we've got 35 steers in there and we want 38; and so as of this moment I don't know that we have any of your cattle.

Mr. Mactier also testified that in this second phone call he told Mr. Reisinger where Western Iowa had taken the animals, Ruser's. "I may have said Ruser's at Valley instead of at Venice, but I told him they were at Ruser's." Mr. Reisinger testified that he was told that Western Iowa had taken the animals to Valley, and had no cattle belonging to complainant. By the time Mr. Reisinger understood where Western Iowa had taken the animals, about a month later, they had been moved again, this time to Sioux City for sale there.

Complainant had brought 619 steers to the Lutjens feedlot, and on Friday, February 4, Messrs. Reisinger and Larsen had counted approximately 380 in the three pens assigned to complainant, but on Saturday, February 5, the number removed by complainant's truckers from the same pens was only 353. About the cause of the difference between the 380 and the 353, the record does not support a finding.

Of the 566 animals removed by Western Iowa from the Lutjens feedlot on Friday, February 4, 331 were all heifers and belonged to another for whom it was acting as agent, leaving 235 others including 45 steers. Of the latter, some heifers died at Ruser's. The remaining heifers, and the steers, were taken to Sioux City, Iowa at the beginning of March and sold as set forth in the Findings of Fact above.

Western Iowa offered complainant seven times the average price obtained for the 45 steers. It made no effort to sort out the steers

belonging to complainant and either return them or sell them separately, or even to ascertain how many there were.

The investigation report, complainant's evidence and the Lutjens deposition show clearly that 21 steers of complainant had been commingled with 38 steers of Western Iowa in the Lutjens Pen 6, that Western Iowa removed all the surviving steers from that pen, and that Western Iowa later sold all surviving steers from that pen, knowing that some belonged to complainant but without ascertaining how many. Thus Western Iowa could have identified how many of those survivors belonged to which of the parties, but did not, and made it impossible for this to be done. Under the circumstances the burden of proof of the latter fact is on Western Iowa. *Campbell* v. *United States,* 365 U.S. 85, 96 (1961); *Old Ben Corp.* v. *Interior Bd. of Mine Op. App.,* 523 F.2d 25 (7 C. 1975); *Fleming* v. *Harrison,* 162 F.2d 789 (8 C. 1947); *Trans-American Van Service, Inc.* v. *United States,* 421 F. Supp. 308, 330–1 (N.D. Tex., Ft. Worth Div., 1976); *United States* v. *Bull Steamship Line,* 146 F. Supp. 210 (S.D.N.Y.), aff'd., 274 F.2d 877 (2 C. 1960); AmJur2d *Evidence* § 131; and C.J.S. *Evidence* § 113.

On that basis, Western Iowa will be ordered to pay complainant the value of complainant's animals removed from Pen 6 and later sold, determined in the only way possible from the evidence in the record, that is, the proportion of animals of the parties first put into Pen 6. There were a total of 59, 21 of complainant and 38 of Western Iowa. Western Iowa will be ordered to pay to complainant 21/59 of the net proceeds of sale of the surviving steers at Sioux City on that basis. "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate." *Eastman Co.* v. *Southern Photo Co.,* 273 U.S. 359, 379.

Investigation Report Exhibits B, C, and D show the gross proceeds of sale of the 45 steers in question, and the expenses of sale of those steers plus certain heifers not involved herein. We determine the net proceeds of sale of the steers sold on March 1 by dividing the expenses of sale ($1,416.90 plus $368.77) by the number of animals sold (155) which produces the expenses per animal ($11.52), then multiplying, then subtracting. Thus, as shown above in the Findings of Fact, $16,529.77 net proceeds were obtained for the 45 steers; 21/59 of that would be $5,883.48.

Respondents contended that we have no subject-matter jurisdiction in the case. If we do not have jurisdiction over the action at the Lutjens feedlot on February 4, we certainly have jurisdiction over the action of Western Iowa on the posted stockyard at Sioux

City in March, selling animals belonging to complainant, and the disposition of the proceeds thereof. *United States* v. *Donahue Bros.*, 59 F.2d 1019 (8 C. 1932).

Mr. Mactier testified (Tr. 95-6) credibly that respondent Sioux City Livestock had nothing to do with the transactions in dispute.

On the jurisdiction to issue a reparation order on the basis of a single transaction see *Rowse* v. *Platte Valley Livestock, Inc.*, 597 F. Supp. 1055, 604 F. Supp. 1463, ___ Ag. Dec. ___ (D. Nebr. 1985) and *Mid-South Order Buyers, Inc.* v. *Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W. 2d 229, 41 Ag. Dec. 48 (1982).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 Ed., appendix p. 764. It constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. 210(f), which provides for enforcement of such orders by court action.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D. C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D. C. 20250.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a respondent's right to judicial review of such an order, see *Maly Livestock Commission* v. *Hardin et al.*, 446 F.2d 4, 30 Ag. Dec. 1063 (8 Cir., 1971) and *Fort Scott Sale Co., Inc.* v. *Hardy*, 570 F. Supp. 1144 (D. Kan. 1983). On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States* v. *ICC*, 337 U.S. 426 (1949).

ORDER

Within 30 days of the date of this order, respondent Western Iowa Farms Company shall pay to complainant Clifton Cattle Company, Inc., with interest thereon at the rate of 13% per annum from April 1, 1983 until paid, $5,883.48.

The complaint is dismissed as to respondent Sioux City Livestock Marketing, Inc.

Copies hereof shall be served upon the parties.

SAMUEL I. MORGAN *v.* PRODUCERS MARKETING ASSOCIATION, INC.
P&S Docket No. 6258. Decided February 10, 1986.

Preparation Proceedings under P&S Act.

In re Producers Marketing Association, Inc., P&S Docket No. 6258, Presiding Officer John J. Casey ruled in favor of complainant, Samuel I. Morgan. It was shown that complainant shipped certain animals to respondent for an agreed price. Respondent did not reject any of the animals but complained they were not as agreed-upon. So respondent deducted $1000 in payment to complainant. Presiding Officer determined that to do that one has to have a burden of proof and such a burden was not carried in this case. Presiding Officer consequently ordered respondent, Producer Marketing Association, Inc., to pay complainant, Samuel I. Morgan, $1000 with 13% interest until paid, with respondent's counter claim dismissed.

Complainant, *pro se.*
John L. Whittinger, Indianapolis, Indiana, for respondent.

Decision by John J. Casey, Presiding Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, begun by a written complaint received on May 16, 1983, alleging in substance failure to pay in full for livestock purchased. The amount claimed was $1,000.00.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent on July 15, 1983. A copy of the investigation report was served on complainant on July 14. Respondent filed an answer and counterclaim on August 5, which was served on complainant on August 13. Complainant filed a reply on September 8 which was served on respondent on September 16.

Since neither party requested an oral hearing, a written hearing was held as provided in the Rules of Practice. John J. Casey of the Office of the General Counsel of this Department acted as presiding officer. Complainant was not represented by counsel. Respondent was represented by John L. Whitinger, Esq., Indianapolis, Indiana. Complainant presented no evidence in response to the notice of opportunity to do so. Respondent presented an affidavit only of damages in support of the counterclaim. No brief was received.

FINDINGS OF FACT

1. Complainant Samuel I. Morgan at all times material herein was engaged in business as a dealer buying and selling livestock for his own account in commerce, with a principal place of business at Ronceverte, West Virginia, and so registered with the Secretary under the Act.

2. Respondent Producers Marketing Association, Inc., a corporation, at all times material herein was engaged in business as a market agency buying livestock on commission and a dealer buying and selling livestock for its own account, in commerce, with a principal place of business at Indianapolis, Indiana, and so registered with the Secretary under the Act.

3. On or about March 14, 1983 complainant caused to be shipped, from a place in West Virginia to another place in Indiana designated by respondent, certain animals for an agreed price. Respondent communicated no timely rejection of them, but expressed a complaint about them and transmitted $1,000.00 less than the agreed price.

4. The complaint was filed within 90 days of accrual of the cause of action alleged therein.

CONCLUSIONS

It is undisputed that complainant caused to be shipped certain animals to the place designated by respondent for an agreed price, and that respondent paid $1,000.00 less than that price. It is further undisputed that respondent did not communicate any rejection of the animals, but complained that they were not what had been agreed-on.

The sort of animals agreed-on, the sort shipped, or the substance of respondent's customer's complaint about them, cannot be identified from the evidence in the record, or from the unsworn correspondence.

Under U.C.C. § 2-602(1) rejection of goods must be within a reasonable time after their delivery or tender and is ineffective unless the buyer seasonably notifies the seller. Under § 2-606(b) acceptance of goods occurs when the buyer fails to make an effective rejection but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them. Under § 2-607(1) and (4) the buyer must pay at the contract rate for any goods accepted, and the burden is on the buyer to establish any breach with respect to goods accepted.

So far as the record shows, respondent's customer was unhappy with the animals so respondent deducted $1,000.00 when it paid

complainant. Anyone doing that has a burden of proof, and such a burden was not carried in this case.

On failure to pay in full for livestock purchased as an unfair or unjust practice within the meaning of the Act, see Section 409, 7 U.S.C. 228b, and *Vance* v. *Reed*, 495 F. Supp. 852, 39 Ag. Dec. 1117 (M.D. Tenn., Nashville Div., 1980).

Section 309 of the Act provides for reparation orders against market agencies and dealers for violation of certain provisions including Section 307 which includes a prohibition against unjust practices. See discussion, *Rice* v. *Wilcox*, 630 F.2d 586, 39 Ag. Dec. 883 (8 C. 1980).

On the jurisdiction to issue a reparation order on the basis of a single transaction see *Hays Livestk. Com'n. Co., Inc.* v. *Maly Livestk. Com'n. Co., Inc.*, 498 F.2d 925, 33 Ag. Dec. 1122 (10 C. 1974); *Rice, supra; Rowse* v. *Platte Valley Livestock, Inc.*, 597 F. Supp. 1055, 604 F. Supp. 1463, ___ Ag. Dec. ___ (D. Nebr. 1985) and *Mid-South Order Buyers, Inc.* v. *Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W. 2d 229, 41 Ag. Dec. 48 (1982).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 Ed., appendix p. 764. It constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. 210(f), which provides for enforcement of such an order by court action instituted by complainant.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D. C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D. C. 20250.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a respondent's right to judicial review of such an order, see *Maly Livestock Commission* v. *Hardin et al.*, 446 F.2d 4, 30 Ag. Dec. 1063 (8 Cir., 1971) and *Fort Scott Sale Co., Inc.* v. *Hardy*, 570 F. Supp. 1144 (D. Kan. 1983).

ORDER

Within 30 days of the date of this order, respondent Producers Marketing Association, Inc. shall pay to complainant Samuel I.

Morgan, with interest thereon at the rate of 13% per annum from May 1, 1983 until paid, $1,000.00.

Respondent's counterclaim is hereby dismissed.

Copies hereof shall be served upon the parties.

In re: AUGUST BATTAGLIA COMPANY, INC., PACA Docket No. 2-7048.
Decided January 22, 1986.

Failure to make full payment for fruit purchases.

In re August Battaglia Company, Inc., PACA Docket No. 2-7048, complainant shows respondent failed to account properly and make full payment for six lots of fruit from five shippers and underreporting and underpaying its principals an amount totaling $50,901.54. Full restitution has now been made to all shippers by respondent, whose license was suspended for 45 days by Administrative Law Judge John A. Campbell.

Edward Silverstein, for complainant.
Roy W. Gudgeon, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a complaint filed on December 26, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period September 1983 through November 1984, Respondent received on consignment, in interstate commerce, six lots of fruit from five shippers, but failed to account truly and correctly and to make full payment promptly to the shippers of the net proceeds realized from the sale of this fruit, in the total amount of $50,901.54. A copy of the Complaint was served upon Respondent. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. August Battaglia Company, Inc., (hereinafter "Respondent"), is an Illinois corporation whose mailing address is 2545 South Ashland Avenue, Chicago, Illinois 60605.

2. Pursuant to the licensing provisions of the Act, license number 106488 was issued to Respondent on March 27, 1947. This license has been renewed annually, and is next subject to renewal on or before March 27, 1986.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period September 1983 through November 1984, Respondent failed to account truly and correctly and make full payment promptly to five shippers of the net proceeds realized from the sale of fruit, all being perishable agricultural commodities, received and accepted in interstate commerce. Respondent underreported and underpaid its principals an amount totaling $50,901.54.

5. Respondent has made full restitution to the shippers of the amounts due with respect to the consignment transactions set forth in Finding of Fact 4.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order below is issued.

ORDER

Respondent's license is suspended for 45 days.
This order shall become effective January 22, 1986.
Copies hereof shall be served upon the parties.

In re: TRI-COUNTY WHOLESALE PRODUCE CO., INC. PACA Docket No. 2-6300. Decided January 17, 1986.

Employment violation of the Act.

The Judicial Officer reversed Judge Baker's order requiring respondent to cease and desist from permitting Robert Ferwerda from being in respondent's office or performing other duties for respondent. The Judicial Officer revoked respondent's license for continuing to employ Robert Ferwerda after respondent was advised that he could only be employed if an appropriate bond were filed (since Robert Ferwerda failed to pay reparation awards). Interpretation and legislative history of employment restrictions discussed. The harsh "employment" restrictions are consistent with the general pattern of imposing severe sanctions against persons who fail to pay for produce, irrespective of what excuses they offer. The Judicial Officer gives great weight to ALJ findings, but has reversed as to the facts, where appropriate. The word "any" is a broad and comprehensive term. Complainant need only prevail by a preponderance of the evidence. There is no showing that the Secretary unreasonably delayed in setting the amount of the bond, but that would not be a good defense in any event. Respondent cannot collaterally attack the determination as to the amount of the bond by way of defense in a disciplinary proceeding. The failure to publish the bond determination factors in the Federal Register would not be a valid defense, but even if the issue could be raised here, the factors considered in determining a bond are not substantive rules of general applicability or statements of general policy and, therefore, they are not required to be published. Actual notice of the bond determination factors would preclude reliance on any failure to comply

with publication requirements, even if publication were required. Respondent's violations were willful, but willfulness is not required since respondent had received a warning letter. The definition of willful in *TWA* v. *Thurston* is inapplicable in our Department's disciplinary proceedings. The ALJ's cease and desist order is unlawful since there is no statutory authority in PACA for a cease and desist order, and, also, the statutory restriction as to employment of a restricted person is applicable only within 2 years after the issuance of a reparation award. Respondent's petition to reopen the hearing to take further evidence with respect to the meaning of "employment" and as to the determination of respondent's bond is denied.

Dennis Becker, for complainant.
Stephen P. McCarron, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),[1] in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on August 2, 1985, ordering respondent to cease and desist from permitting Robert Ferwerda from being in respondent's office, answering respondent's telephone or engaging in conversations on the telephone or elsewhere relating to respondent's business, acting as agent on behalf of others relating to respondent, and hauling produce for respondent. The ALJ's order applies unless respondent has an appropriate employment bond as to Robert Ferwerda approved by the Secretary, and suspends respondent's license for 6 months if it violates the order.

On August 13, 1985, complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[2] On August 28, 1985, respondent filed a cross-appeal and a motion to reopen the hearing.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inas-

[1] *See generally* Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

[2] The position of the Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

much as the issues are not complex, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

The principal issue in this case is whether Robert Ferwerda was "employed" by respondent after March 22, 1982, which is 30 days after respondent was notified by the Department that it could not employ Robert Ferwerda without an employment bond approved by the Secretary. Employment is defined as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment" (7 U.S.C. § 499a(10)). For the reasons set forth below, I have found and concluded that Robert Ferwerda was employed by respondent from August of 1981 to the date of the oral hearing in this case (February 13-15, 1984), and that respondent's license should be revoked.

FINDINGS OF FACT

1. Respondent, Tri-County Wholesale Produce Co., Inc. (hereinafter Tri-County), has a business address of 1202 Hammondville Road, Office No. 15, Pompano Beach, Florida 33060.

2. Respondent was first licensed on September 8, 1981. Its license has been renewed annually, and is next subject to renewal on or before September 8, 1986.

3. On November 23, 1979, a license to do business under the PACA was issued to Robert A. Ferwerda, doing business as Four Seasons Wholesale Produce (hereinafter Four Seasons). This license was renewed annually, but terminated on November 23, 1981, when that firm failed to pay the annual license fee.

4. Robert A. Ferwerda was the sole owner of Four Seasons.

5. Six reparation awards were issued against Robert A. Ferwerda, doing business as Four Seasons, between December 16, 1981, and August 6, 1982. All of these awards have remained unpaid to date.

6. On January 21, 1982, the Department wrote a letter to Robert A. Ferwerda advising him that the reparation awards had not been paid and stating:

> The purpose of this letter is to call your attention to the fact that until these awards are satisfied, you are not eligible to obtain a license under the Act. Furthermore, you cannot be employed by or affiliated in any capacity with any other licensee under the Act for a period of two years from the date of the orders without the approval of the Department.

7. The business address of Four Seasons during the time it was doing business was 1202 Hammondville Road, Office No. 15, Pom-

pano Beach, Florida 33060. It ceased doing business in July 1981. In August 1981, Tri-County began doing business at the same address. When Tri-County began to do business, it took over most of the better accounts of Four Seasons. Robert A. Ferwerda became an employee of Tri-County with many responsibilities with respect to the daily management of that organization. The only function which he did not perform which he had performed as the owner of Four Seasons was making the final financial decisions as to dealing with the accounts payable and accounts receivable. He was responsible for the purchase and sale of produce, including determining the price at which goods would be purchased and sold. He was responsible for the hiring and firing of employees. He supervised all of the employees in respondent firm. He made decisions with respect to the transportation of commodities. He managed the physical receipt and disposition of produce at the business location. He also performed such other managerial tasks as were necessary for the proper carrying on of the day to day business of respondent.

8. Robert A. Ferwerda was not, however, an officer, director, or owner of any stock in Tri-County. Rather, his father, Arend Ferwerda, was the owner, president, and a director of respondent. In addition, Sheila Quick, a bookkeeper with respondent, was secretary-treasurer and a director.

9. In a letter dated February 16, 1982, which was received by Tri-County on February 19, 1982, the Secretary of Agriculture notified respondent that Robert A. Ferwerda was not eligible to be employed by respondent unless there were posted an employment bond in an amount satisfactory to the Secretary to assure that respondent would meet its obligations under the PACA. The letter requested certain information from respondent so that the Secretary could determine an appropriate amount of bond. It also provided a notice that if Robert A. Ferwerda continued to be employed by respondent after 30 days from the receipt of the letter without the posting of a required bond and getting the approval of the Secretary, the license of respondent could be in danger. The letter stated:

> Gentlemen:
>
> According to the records of the Department, there have been several reparation awards issued under the Perishable Agricultural Commodities Act against Four Seasons Wholesale Produce, Pompano Beach, Florida. These awards have not been satisfied.

The records of the Department show that Robert A. Ferwerda was the individual owner of Four Seasons Wholesale Produce. It is our understanding that Mr. Robert A. Ferwerda is currently employed by you.

Section 8(b) of the Act provides that when a reparation order is issued against a person and remains unpaid, no licensee can employ any such person for a period of two years from the date of such order except with the approval of the Secretary.

Before the Department will approve of the continued affiliation with the firm, it will be necessary for you to furnish a surety bond in an amount satisfactory to the Secretary. In order to determine the amount of bond to be posted, the following information should be furnished:

1. Approximate value of your produce transactions in fresh or frozen fruits and vegetables during an average month;
2. The percentage of business that is handled on consignment or joint account;
3. The amount of credit that is incurred;
4. A detailed description of the duties and responsibilities performed by Mr. Ferwerda in conducting your business.

   In this description, advise if he will perform his duties only at your headquarters' office. If not, state the extent of time he will be at other locations;
5. The extent of supervision he will receive and under whose supervision he will perform his duties at any location;
6. The title or position he holds;
7. The salary or compensation he will receive.

Pursuant to Section 8(b) of the Act, notice is hereby given that after thirty days from the receipt of this letter, you cannot continue the employment unless the approval of the Department has been obtained. To continue such employment after that date without posting the required bond and obtaining the approval of the Department could endanger your license.

> Please let us know what you intend to do about the continued employment of Mr. Ferwerda by February 26, 1982.

10. (a) In an attempt to obtain a bond, respondent furnished the requested information to the Department by a letter dated February 25, 1982, which was received March 2, 1982. On April 15, 1982, a PACA employee telephoned Arend Ferwerda and advised that a bond in the neighborhood of $100,000 would be required. Arend Ferwerda seemed shocked at the amount of the bond, and stated that Robert was not currently working for him. Arend Ferwerda further explained that Robert's reparation complaints might be satisfied within 3 months. Arend Ferwerda asked for a listing of the reparation awards and pending complaints against Robert Ferwerda.

(b) A letter listing the complaints and reparation awards against Robert Ferwerda was sent to Tri-County on April 15, 1982, the same day as the telephone conversation, and the Department's letter of April 15 concluded "Please keep us advised of your intentions." That letter was received by respondent on April 19, 1982. When respondent failed to keep the Department advised of his intentions, as requested in the Department's letter of April 15, 1982, the Department again wrote respondent on May 19, 1982, referring to the April 15 letter and stating "To date, we have not received a reply and again call this matter to your attention."

(c) On June 4, 1982, Arend Ferwerda wrote to the Department stating that he had not "received any definite amount of the employment bond," and asking questions as to the exact amount and nature of the required bond. In his letter of June 4, 1982, Arend Ferwerda stated:

> Robert Ferwerda is not employed by us at this time. His last check for working was the week of March 25, 1982.
>
> As soon as we can secure the above information and are able to obtain the bond we would like to re-employ him.

(d) On September 24, 1982, the Department wrote a letter to Arend Ferwerda advising him that a surety bond in the amount of $125,000 is required to cover the employment of Robert Ferwerda. The letter enclosed a bond form and gave respondent additional information as to the nature of the bond. The letter concluded: "To employ Mr. Robert Ferwerda without meeting these requirements could endanger your license."

11. However, respondent did not file a bond and did not in fact terminate the "employment" of Robert A. Ferwerda prior to the hearing in this case. Instead, it kept Robert A. Ferwerda in its

best copy available

"employ" under changed circumstances after March 25, 1982. Prior to March 25, 1982, Robert Ferwerda was receiving $300 per week salary from respondent. Subsequently, his affiliation with respondent changed somewhat. He was no longer in charge of the hiring and firing of employees. However, he continued to make produce purchases on behalf of respondent up to the morning of the hearing (February 14, 1984). He steered accounts to Tri-County. He was given the function of managing a complex of offices, owned by his father, Arend Ferwerda, including the business space occupied by respondent. He was furnished an office upstairs from the actual space occupied by respondent, but Robert spent a great deal of his time in respondent's office. He often received produce during the early hours of the morning. He consulted with respect to special packaging needs of respondent, negotiated price adjustments, and made decisions as to whether produce should be accepted or rejected. He and his family continued to enjoy coverage under the group health insurance policy of respondent, and he was, indeed, the most heavily covered person under the group life insurance portion of the policy of Tri-County.

12. Around March 25, 1982, in consultation with his father, Arend Ferwerda, Robert Ferwerda incorporated a trucking business, Bob's Transfer Service. Under the name of Bob's Transfer Service, Robert Ferwerda picked up produce to be delivered from the local area around Pompano Beach to respondent. He delivered such produce to respondent. He frequently used trucks belonging to Tri-County for this purpose. He drew from Tri-County $300 a week as an advance on the money he was earning for performing a pickup and delivery service of produce. Such amount was raised to $500 per week approximately January 1, 1983. The $300 amount was, of course, the same amount as he received as salary prior to March 25, 1982.

CONCLUSIONS

I.

A.

Section 8(b) of the Perishable Agricultural Commodities Act authorizes the Secretary to suspend or revoke the license of any licensee who, after notice, continues to "employ" any person against whom there is an unpaid reparation award issued within 2 years without furnishing and maintaining a surety bond satisfactory to the Secretary. Specifically, § 8(b) of the Act provides (7 U.S.C. § 499h(b), emphasis added):

(b) *Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties*

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) *against whom there is an unpaid reparation award issued within two years,* subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, *if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards,* subject to its right of appeal under section 499g(c) of this title, *which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportu-*

> *nity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.*

The terms "employ" and "employment" were defined by an amendment to the Act approved October 1, 1962, as follows (7 U.S.C. § 499a(10)):

> (10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

The legislative history of the amendatory legislation adding those definitions states (H.R. Rep. No. 1546, 87th Cong., 2d Sess. 4 (1962)):

> This section of the bill adds to the first section of the Perishable Agricultural Commodities Act definitions of "responsibility connected" and "employ" or "employment." These new definitions are necessary by reason of the rewriting of the provisions relating to sections 4(b), 4(c), and 8(b) of the act. These terms, although heretofore used in the act, were not defined. Their definition will give them specific meaning, thus avoiding possible confusion as to interpretations. The defining of "employ" and "employment" to include ownership or self-employment makes it clear that the provisions of section 8(b), as amended, apply to owners, as well as others employed in the business. To fail to include owners would defeat the whole purpose of this provision of the act. Heretofore the phrase used in connection with § 8(b) was "employ in a responsible position" and considerable difficulty has been encountered in delineating what constituted a responsible position.

B.

The Perishable Agricultural Commodities Act, as originally enacted in 1930, contained no provisions restricting the employment of a person whose license was suspended or revoked, or who failed to pay a reparation award. The first employment restrictions were added by an amendment adding § 8(b) approved August 20, 1937, which prohibited the employment "in a responsible position" of a person whose license was revoked or who was responsibly connected with a firm whose license was revoked. After 1 year following the revocation, such employment was permissible if a satisfactory bond was filed. The 1937 amendment provided (50 Stat. 725, 730 (1937)):

"(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ in any responsible position any individual whose license was revoked or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked. Employment of such individual by a licensee in any responsible position after one year following the revocation of any such license shall be conditioned upon the filing by the employing licensee of a bond, in such reasonable sum as may be fixed by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act;

In 1956, the employment restriction was made applicable to a person whose license is suspended, or who was responsibly connected with a firm whose license is under suspension. The 1956 amendment to § 8(b) of the Act is as follows (70 Stat. 726, 727 (1956)):

"(b) The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ in any responsible position any individual whose license has been revoked or is under suspension or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension. Employment of an individual whose license has been revoked or is under suspension for failure to pay a reparation award or who was responsibly connected with any firm, partnership, association, or corporationwhose license has been revoked or is under suspension for failure to pay a reparation award after one year following the revocation or suspension of any such license may be permitted by the Secretary upon the filing by the employing licensee of a bond, of such nature and amount as may be determined by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act;"

Since the Act had previously been amended in 1934 to provide for the automatic suspension of the license of a licensee who failed to pay a reparation award or file an appeal for judicial review (48 Stat. 584, 588 (1934); 7 U.S.C. § 499g(d)), the 1956 amendment made the Act more restrictive than the 1937 amendment, discussed

above, as to the employment of a person who had not paid a reparation award.

The legislative history of the 1956 amendatory legislation states (S. Rep. No. 2507, 84th Cong., 2d Sess. 4 (1956)):

> Section 8(b) would authorize the Secretary to suspend the license of a person who employs in any responsible position an individual whose license is under suspension. In effect, this would place restrictions on suspended licensees comparable to those now in effect for revocations, and it would serve to eliminate the effectiveness of dummy organizations and other such devices that might be set up to circumvent the suspension penalty.

In 1962, § 8(b) of the Act was amended to contain the provisions presently in effect, which are set forth in § I(A) of these conclusions (76 Stat. 673, 675–76 (1962); 7 U.S.C. § 499h(b)). The 1962 amendment makes the Act much more harsh, in one respect, with respect to the employment of a person who fails to pay a reparation award. Under the 1962 amendment, such a person cannot be employed in any capacity, without a bond, whereas the previous restrictions were applicable only to employment "in any responsible position." Moreover, at the same time that the employment restrictions were made more harsh, in this respect, the definitions of "employ" and "employment," discussed above, were added, defining employment as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment" (7 U.S.C. § 499a(10)).[3]

The legislative history of the 1962 amendatory legislation, which enacted the provisions of § 8(b) presently in effect, states (H.R. Rep. No. 1546, 87th Cong., 2d Sess. 8 (1962)):

> Section 11 amends section 8(b) of the act to clarify and make more effective the provisions of the act with respect to employment by licensees of persons who have been found to have violated the act or failed to pay reparation awards under the act, as well as persons responsibly connected with such persons. It prohibits the employment of these persons by a licensee without the approval of the Secretary and prescribes standards with respect to the conditions for such approval, authorizing the approval of such employment upon the furnishing and maintaining of a

[3] In another respect, the 1962 amendment realized the employment restrictions as to a person who failed to pay a reparation award since it eliminated the 1-year waiting period.

surety bond satisfactory to the Secretary as assurance that the licensee's business will be conducted in conformance with the act and all reparation awards paid. Employment under such conditions may be approved, with respect to unpaid reparation awards, at any time and, with respect to persons found guilty of flagrant or repeated violations of the act, after 1 year, with authority in the Secretary to approve employment of the latter persons without a surety bond after the expiration of 2 years. It is further provided that the Secretary may increase the amount of bond required and that failure to comply with his order in that regard shall result in automatic termination of approval. Any licensee hiring a person without the approval of the Secretary in violation of this provision, after notice and opportunity for hearing, may have his license suspended or revoked. At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee. Under the present provisions of the act the restrictions against employment are directed specifically to persons whose licenses had been revoked or suspended and persons responsibly connected therewith. The bill extends such restrictions to persons whose licenses could have been revoked or suspended if they had had active licenses. As amended, section 8(b) would prohibit employment of persons covered by it unless such employment is approved by the Secretary; whereas at present it prohibits such employment only after notice by the Secretary.

From the foregoing, it is clear that Congress regarded a person who fails to pay a reparation award as a defiled person who is likely to contaminate any licensee whose business operations he becomes affiliated with in any manner, with or without compensation, including ownership or self-employment. Congress prohibited any affiliation (with or without compensation) of such a defiled person with a licensee unless (i) the affiliation is approved by the Secretary, and (ii) the licensee furnishes a bond in form and amount satisfactory to the Secretary.

C.

The harsh "employment" (i.e., affiliation) restrictions involving a person who fails to pay a reparation award, discussed in §§ I(A) and

(B), *supra*, are consistent with the general pattern of the Perishable Agricultural Commodities Act regulatory program. Severe sanctions are imposed against persons who fail to pay for produce, irrespective of what excuses they offer.

Failure to pay for produce is a very serious violation of the Perishable Agricultural Commodities Act which results in an order revoking the license of the offender [4] since it is the "goal [of the Perishable Agricultural Commodities Act] that only financially responsible persons should be engaged in the perishable agricultural commodities industry," [5] and it is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators.[6] This policy has been followed in all of the Department's disciplinary proceedings in recent years.

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[4] *E.g., In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985); *In re Farm Market Service Inc.*, 44 Agric. Dec. ___ (Jan 8, 1985); *In re Clarence Miller Co.*, 43 Agric. Dec. ___ (Apr. 18, 1984); *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ___ (Jan. 27, 1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ___ (Oct. 6, 1983); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 410 (1983); *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 272 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1126 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1156-59 (1981), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 401-02 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 414-16 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 811-12 (1978); *In re Solt*, 35 Agric. Dec. 721, 723, 726 (1976); *In re Catanzaro*, 35 Agric. Dec. 26, 30-36 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *accord In re Kafcsak*, 39 Agric. Dec. 683, 686-87 (1980), *aff'd* (unpublished), 673 F.2d 1329 (6th Cir. 1981), *reprinted in* 41 Agric. Dec. 88 (1982).

[5] *Marvin Tragash Co.* v. *USDA*, 524 F.2d 1255, 1257 (5th Cir. 1975); *accord Chidsey* v. *Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick* v. *Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112, (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982).

[6] Section 8(a) of the Act provides (7 U.S.C. § 499h(a)):

§ 499h. *Grounds for suspension or revocation of license*

(a) *Authority of Secretary*

Continued

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974),[7] which is set forth as an appendix to this decision.[8] The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624–65 (1979).

"Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. 'On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee.' This could have serious repercussions to producers, licensees and consumers." [9]

Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

[7] The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263–64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64–80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[8] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971–72 (1979), *aff'd per curiam* (unpublished), 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I & S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362–63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330–32, 337–52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549–51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133–34 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31–32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd* 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145–60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913–14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539–50 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64–80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

[9] *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *accord In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981). Although the Act is primarily to protect producers, it "is also 'for the protection of consumers'

Continued

If the violator who fails to pay for produce does not have a license in effect, an order is issued finding that the person has engaged in repeated or flagrant violations of the Act,[10] which has the same effect on the violator and on persons responsibly connected with the violator as a license revocation.[11]

Specifically, as a result of a finding that a firm has committed flagrant and repeated violations of the Act, the firm cannot again become licensed under the Act for 2 years after the effective date of the Order issued in the case (7 U.S.C. § 499d(b); see, also, 7 U.S.C. § 499d(c)). Similarly, the persons "responsibly connected" with the firm cannot be licensed under the Act for 2 years (7 U.S.C. § 499d(b); see, also, 7 U.S.C. § 499d(c)); and they cannot work for another licensee under the Act for 1 year (7 U.S.C. § 499h(b)). After 1 year, the Secretary may approve their employment by another licensee if the licensee furnishes a satisfactory bond; after 2 years, the Secretary may approve their employment by another licensee without a bond (7 U.S.C. § 499h(b)).

(H.R. Rep. No. 1196, 84th Cong., 1st Sess. p. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

[10] *E.g.*, *In re Reeves Produce, Inc.*, 44 Agric. Dec. ___ (Aug. 26, 1985); *In re Veg-Mix, Inc.*, 44 Agric. Dec. ___ (Aug. 21, 1985), *appeal docketed*, No. 85-1771 (D.C. Cir. Nov. 22, 1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. ___ (Aug. 21, 1985), *appeal docketed*, No. 85-1590 (D.C. Cir. Sept. 19, 1985); *In re Food Marketers, Inc.*, 44 Agric. Dec. ___ (Aug. 20, 1985); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. ___ (Aug. 31, 1983); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168-92 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133-34, 1151 (1981); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961, 968-71 (1981), *aff'd mem.*, 681 F.2d 804 (3rd Cir. 1982), *cert. denied*, 103 S.Ct. 70 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 686-87 (1980), *aff'd* (unpublished), 673 F.2d 1329 (6th Cir. 1981), *reprinted in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-21 (1978); *In re Pappas Produce, Inc.*, 36 Agric. Dec. 684, 694-96 (1977); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643-45 (1976), *aff'd per curiam* (unpublished), 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1885-89 (1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 748-52 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1896-1914 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 253, 266-70 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

[11] *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748-49 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1151-52 (1981); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-15 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750-51 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 920 (1977).

In *Finer Foods Sales Co.* v. *Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983), the court held that the Judicial Officer properly interpreted the Act in refusing to consider excuses for failure to pay in determining whether payment violations occurred or whether they were willful, stating:

> The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according to it, should have been viewed as excusing its failure to pay its debts. These include the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were wilful since 'the Act calls for payment—not excuses.' " *Quoting In re Kafcsak*, 39 Agric. Dec. 683, 686 (1980). *See also In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982).

The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. § 499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S.Rep. No. 2507, 84th Cong., 2d Sess. (*citing* H.Rep. No. 1196, 84th Cong., 1st Sess.), *reprinted in* 1956 U.S. Code Cong. & Ad.News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.* 41 Agric. Dec. 89 (D.C. Cir. No. 81-1446, Jan. 19, 1982):

> > Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers.
>
> *Quoting In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 720 (1978).

> In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick* v. *Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967) *quoted in Marvin Tragash Co.* v. *United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).
>
> The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

In a Congressional report as to the 1962 amendments to the Act, discussed above in § I(B), it is stated (H.R. Rep. No. 1546, 87th Cong., 2d Sess. 3 (1962)):

> Testimony of the shippers, brokers, wholesalers, and other elements of the trade in fresh and frozen fruits and vegetables who have been operating under this act is enthusiastically and almost unanimously in its support. It has brought a high degree of stability and responsibility to an industry which had frequently been beset by instability and irresponsibility. It is regarded as one of our most successful regulatory programs.[12]

Congress further recognized the peculiar vulnerability of producers of perishable agricultural commodities, and the importance of the Department's regulatory programs to assure payment for these commodities, in the recent 1978 Bankruptcy Act amendments, in which it is provided that disciplinary sanctions may be issued under the Perishable Agricultural Commodities Act for failing to pay for produce where there has been a bankruptcy. The Bankruptcy Act provides (11 U.S.C. § 525):

> § 525. *Protection against discriminatory treatment*
>
> Except as provided in Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Ag-

[12] *Accord Birkenfield* v. *United States*, 369 F.2d 491, 494 (3d Cir. 1966); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982).

riculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204),[13] a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

II.

It is the consistent practice of the Judicial Officer to give great weight to the findings by Administrative Law Judges since they have the opportunity to see and hear the witnesses testify.[14] However, in some circumstances, the Judicial Officer has reversed as to the facts, particularly where documentary evidence or inferences to be drawn from the facts are involved.[15]

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[13] This is an Act supplementing the Packers and Stockyards Act.

[14] *E.g., In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Thornton*, 38 Agric. Dec. 1425, 1426-28 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of complaint where she accepted the testimony of respondent's wife, respondent's employee, and respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (remand order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

[15] *E.g., In re Gold Bell-I & S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1347 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 753-56 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977). also, *see, FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 364-65 (1955); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-97 (1951); *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266,

Continued

In the present case, it is not necessary to squarely disagree with the ALJ's findings since she found and concluded that Robert Ferwerda's "activities do indicate a minimum association or affiliation with the Respondent corporation, but not of the flagrant or deliberate type" (Initial Decision at 35). That is all that is necessary to constitute "employment," as defined in the Act. "Employment" includes "*any* affiliation of any person with the business operations of a licensee, with or without compensation" (see § I(A), *supra*, emphasis added). The word "any" is a broad and comprehensive term (*United States* v. *Rosenwasser*, 323 U.S. 360, 362-63 (1945); *FDIC* v. *Winton*, 131 F.2d 780, 782 (6th Cir. 1974); *Kuhlman* v. *W.A. Fletcher Co.*, 20 F.2d 465, 468 (3d Cir. 1927)) that includes *all* kinds of affiliation—whether minimum or maximum; whether deliberate or not.

The ALJ further found (Initial Decision at 22):

> 58. Unknowingly, the Respondent violated the Act, as interpreted and administered by the Complainant, but this was not wilfull, and was caused more by the actions of Bob Ferwerda, rather than the Respondent.

Since complainant interprets the Act in accordance with the statutory definition referred to in § I(A), *supra*, the ALJ's findings and conclusions actually support my findings and conclusions that respondent continued to "employ" Robert Ferwerda after respondent received notice that to continue such employment after March 21, 1982, could endanger its license.

The admissions of Robert Ferwerda and the testimony of five trade witnesses prove conclusively that respondent continued to "employ" Robert Ferwerda after receiving the Department's notice.[16] For example, Mark Levigne testifed that he sold mushrooms to respondent for Florida Mushroom, and that "Bob Ferwerda" (i.e., Robert Ferwerda) was the only person at Tri-County who gave him the orders, or who decided whether the quantity or quality was acceptable. Specifically, he testified (Tr. 437-41):

285-86 (1933); *Southern Nat'l Mfg. Co.*, v. *EPA*, 470 F.2d 194, 197 (8th Cir. 1972); *Retail, Wholesale & Dep't Store Union* v. *NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972); *OKC Corp.* v. *FTC*, 455 F.2d 1159, 1162-63 (10th Cir. 1972); *Nix* v. *NLRB*, 418 F.2d 1001, 1008 (5th Cir. 1969); *Joy Silk Mills, Inc.* v. *NLRB*, 185 F.2d 732, 742 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); Davis, *Administrative Law Treatise*, § 10.04 (1958 & 1970 Supp.).

[16] Complainant need only prevail by a preponderance of the evidence. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I & S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

Q. August, 1983, to the present, you've been with Florida Mushroom; is that not true?

A. Yes.

Q. What are your duties with Florida Mushroom?

A. There again, I'm a truck driver. I have all the same duties. I might be going in as office manager in a few weeks.

Q. Do you, in fact, still sell mushrooms to customers?

A. Yes, I still do all the same things.

Q. Have you had occasion to call Tri-County?

A. Every day.

Q. Every day you've called Tri-County?

A. Yes.

Q. Are you the representative who calls Tri-County for Florida Mushroom? Does anybody else?

A. When I'm out sick or I'm on the road, somebody else will do it.

Q. When you call Tri-County, who will you talk to?

A. Bob.

Q. Is that Bob Ferwerda?

A. Yes.

Q. And do you talk to anybody else?

A. Well, I try . . . Well, nobody else gives an order. I talk to other people but nobody else gives an order.

Q. If you try to give an order to somebody else what happens?

A. Well, if I try to give one, nobody else really knows.

Q. Do they, then call someone else to call you back?

A. Well, Bob calls me back.

Q. Bob calls you back? And do you deliver any mushroom to Florida Mushroom?

A. I work for Florida Mushroom.

Q. Excuse me, Tri-County?

A. Yes.

Q. How many times?

A. Between four and six times a week.

Q. Almost every day?

A. Yes.

Q. You're the primary deliverer?

A. In Broward County.

Q. And do you unload the truck yourself?

A. Myself.

Q. And what time do you do that?

A. 5:00, quarter to 5:00. 5:30 o'clock in the morning.

Q. Is that right? And who do you see?

A. Again, the receivers on the dock.

Q. Is Bob ever there?

A. Yes, Bob's there.

Q. Every day?

A. Yes, every day.

Q. And what happens with the questions in respect to quantity or quality?

A. Again, it's up to Bob what they keep or send back.

Q. Do you have discussion with him?

A. Yes.

Q. And when is the last time you saw Bob at Tri-County?

A. I'd say this morning. This morning I was late. I'd say 5:30 o'clock.

Q. 5:30 o'clock this morning? Did you talk with Bob?

A. No, this morning I didn't.

Q. There were no problems?

A. No problems.

Q. When is the time before that you saw him?

A. Yesterday morning.

Q. And did you talk to him yesterday morning?

A. Yes.

Q. What did you talk to him about?

A. It was a quarter to 5:00 o'clock when I got there. He was the only one there and so he asked me to leave the mushrooms there and he couldn't sign the ticket.

Q. What? He couldn't sign the ticket?

A. That's what he said.

Q. Did you ask him?

A. He said: You can leave the mushrooms here but I couldn't sign the ticket. So in that case I signed it.

Q. What do you mean, you signed it?

A. I signed it to show that they were delivered.

Q. You mean that you signed it to show that you had delivered it? Does that happen frequently?

A. Yes. A lot of my stops . . .

Q. Have you had any other instances when you stopped at Tri-County when nobody has been there but Bob?

A. Yes.

Q. How often does that happen?

A. Not too often.

Q. And when it does, what happens with respect to the invoices or sales tickets.

A. I sign it.

Q. Now, normally when you go to Tri-County and somebody other than Bob is there to receive it, is the sales ticket signed by those people?

A. Yes.

Mark Levigne further testified that Robert Ferwerda's activities for Tri-County were the same when Mark Levigne previously

worked for New Garden Supply and C&G Mushroom (Tr. 429–37). He testified (Tr. 435):

> Q. What if there were a disagreement [at Tri-County] as to the quantity of the mushrooms. What would happen?
>
> A. Well, that's happened a couple of times.
>
> There was a disagreement about the quality or the quantity then the receiver would always go get Bob [i.e., Robert Ferwerda] to either reject it, tell me something about it, or something to that nature.
>
> Q. So you talked to Bob about it if there was a discrepancy?
>
> A. Yes.

Similar testimony was given by Terrance Polcyn, who worked for C&G Mushroom and New Garden Supply. He testified that he talked to Robert (Bob) Ferwerda as to respondent's orders for mushrooms, and that Robert Ferwerda would resolve any discrepancies as to mushrooms (Tr. 355–425). Mr. Polcyn testified (Tr. 364–67, 423):

> Q. Now, during the period June, 1982, through December, 1982, did you have occasion to sell mushrooms to C&G. Sorry, beg your pardon, to Tri-County Wholesale Produce Company?
>
> A. Yeah, we dealt with Tri-County.
>
> Q. Did you initiate phone calls to Tri-County?
>
> A. Yes, sir.
>
> Q. Did Tri-County initiate phone calls to you?
>
> A. Yes, sir.
>
> Q. Were the phone calls initiated by Tri-County to you for the purpose of purchasing mushrooms?
>
> A. Yes, sir.
>
> Q. Who called you?
>
> A. Bob Ferwerda.
>
> Q. How do you know it was Bob Ferwerda?

A. Since the initial meeting and contact over the long period of time. I know his voice on the phone and I know him personally.

Q. And how many times were you called during that six months period, approximately?

A. I couldn't even say. It was numerous conversations. Whether I would initiate the call or Mr. Ferwerda. Mainly I would initiate calls to that office.

Q. Approximately how many sales a week did C&G Mushroom make to Tri-County.

A. Probably two or three. We would go into the market at least five times a week.

Q. Two or three sales of mushrooms a week?

A. Yes.

Q. In that respect, sir, did you ever deal with anybody else in the sale of mushrooms to Tri-County from June, 1982, through December, 1982, other than Bob Ferwerda.

A. I had talked to other people, the girls, the secretary in regard to orders and things like this, the yes or no would come from Bob Ferwerda.

Q. When you talked to other people in the business, what happened?

A. Well, they would—if Mr. Ferwerda wasn't in, I'd call back, or he would return my call.

Q. And if he were in, what would they do?

A. I'd talk to him.

Q. Did they refer you to him?

A. Yes, sir.

Q. I see. Did you go down to the place of business at Tri-County from June, 1982 to December, 1982?

A. Yes.

Q. And who did you see when you were there?

A. Bob Ferwerda.

Q. What time of the day, sir?

A. Various times, early morning. I'd generally try to get there before 11:00 o'clock.

Q. And what would Bob Ferwerda be doing?

A. Just working.

Q. What do you mean by just working? Describe specifically.

A. Sitting at the desk or answering the phone.

Q. Sitting at what desk? Can you describe the place of business?

A. Yes. Well, you have your loading platform. Facing the building off to the left is a small office.

Q. Is that in the front or the back of the building?

A. The front of the building.

Q. Is that where he was sitting? In that office?

A. Yeah. It was an office with a couple of chairs and one desk. Maybe two desks, but there would be one desk facing the door, which is where he sat.

Q. I see. If you had any problems who did you talk to?

A. Mr. Ferwerda.

Q. If you had problems with respect to quantity of mushrooms delivered; with whom did you speak?

A. Mr. Ferwerda.

Q. If you had problems with respect to quality of mushrooms; with whom did you speak?

A. Mr. Ferwerda. In regard to exchange of mushrooms or any monetary difference or anything it would be—other people would maybe call and say the product's not as good or this or that, but basically, in regard to getting a business decision, it would be Mr. Ferwerda.

Q. And when you say Mr. Ferwerda, you mean Bob; do you not? You do not mean Arend Ferwerda?

A. No, sir.

Q. Do you know Arend Ferwerda?

A. I know that's the gentleman over there. I believe I met him one time.

Q. Did you ever deal with Arend Ferwerda?

A. No, sir.

* * * * * * *

A. The only—on payment, if there was a discrepancy in regard to—a controversy on how many were ordered and how many were delivered or quality or price cutting, it would have to go and be initialed by Bob before the bookkeeper would pay it. In other words he would have the say so into whether it would be paid as invoiced or as lower.

Harold Brick, sales manager for Central American Produce Company, signed an affidavit written in his own handwriting on March 15, 1983, in which he states that "I have been selling Tri County produce thru Bob Ferwerda from December 1982 to March 1983 melons from Central America" (CX 1). His testimony supports his affidavit (Tr. 13-30). He testified (Tr. 14-15):

Q. I ask you to reflect upon the period of time from January, 1982, through December, 1982. Did your business have occasion to sell goods to a company known as Tri-County Wholesale Produce, Incorporated?

A. The dates I don't remember but we did do business with Tri-County.

Q. In 1982, sir?

A. I really don't remember the dates, the years.

Q. I'd like to show you a document that you signed and ask if this will refresh your recollection?

A. If I made a statement and signed it, then it was the fact then.

* * * * * * *

Q. Have you read the statement that you've been handed, sir?

A. Yes, I have.

Q. Do you recognize it?

A. Yes.

Q. And what is it?

A. It's a statement of December 12, '82 to March, '83.

Q. And does that refresh your recollection with regard to sales to Tri-County Produce?

A. Yes. If I signed that, and I did, then that was the case at the time. That was over a year ago.

Q. Now, sir, with whom did you deal in Tri-County?

A. Bob Ferwerda.

Q. And do you recognize Bob Ferwerda when you see him?

A. Yes, I do.

* * * * * * *

Mr. McCarron: We'll stipulate as to Bob Ferwerda. It is the Bob Ferwerda that we're here about.

Frederick Rohlfing, owner of Jet Fresh Produce, signed an affidavit on March 23, 1983, written in his own handwriting in which he states that he sold produce to Tri-County Produce which was ordered by "Bob" (Cx 3). His testimony supports his affidavit (Tr. 46–56). He testified (Tr. 48–49):

Q. Think back in your dealing with Tri-County Produce. Who did you talk to in that business, that place of business?

A. The person who would call me for the order.

Q. Did somebody call you?

A. Well, sometimes call or . . .

Q. Sometimes he called you? Or sometimes you?

A. No, I never called him.

Q. Who would that person be?

A. I had Bob Ferwerda call me.

Q. How do you know it was Bob Ferwerda?

A. Well, I've met him before.

Mr. Becker: Will counsel stipulate that it was Bob Ferwerda?

Mr. McCarron: Yes.

BY MR. BECKER:

Q. Did you sell to Tri-County Wholesale Produce Company in 1983?

A. In the beginning of the year.

Q. And with whom did you deal?

A. With Bob.

Q. With Bob Ferwerda?

A. Yes.

Q. How do you know it was Bob Ferwerda?

A. Well, he was there in person.

Q. Okay. How about from July 1st, 1982 to December 31, 1982, with whom did you deal?

A. In '82 with Bob Ferwerda.

Q. How about January 1, 1982 through June 30, 1982?

A. I'm sorry.

Q. January of '82 through June of '82?

A. Yeah. June of '82. I started doing business in May of '82 so before then—it couldn't have been before May.

Q. It couldn't have been before May?

A. Yes, it couldn't have been.

Q. Did you ever deal with anybody else from Tri-County Wholesale other than Bob Ferwerda?

A. Sometimes a driver would come by and pick up an order.

Q. How about on the telephone, in terms of selling things to that company?

A. Did anybody else besides Bob call me?

Q. Yes, sir.

A. I don't believe so. Maybe the driver would have called me somewhere in the market and told me to save some-

thing for him, something like that. I get a call from the driver or from him telling me to hold it.

On March 22, 1983, Guy Romagni, a salesman for International A&G Produce Company, signed an affidavit written in his own handwriting stating that during the past 2 years to the present, he sold fresh fruits and vegetables to Tri-County through Robert Ferwerda (CX 2). At first his testimony fully supported his affidavit (Tr. 32–33), but he then had a lapse of memory as to the exact times when these transactions took place (Tr. 34–42).

Robert Ferwerda's testimony was quite evasive and contradictory, but along with his denials that he bought for Tri-County after March 25, 1982, were significant admissions that, in fact, he did deal with a number of suppliers on behalf of Tri-County in purchasing produce for Tri-County from the suppliers. In addition, he admitted that he gave his opinion to Roger, Tri-County's dock man, as to whether produce was of acceptable quality for retention by Tri-County. However, he stated that he was merely relaying orders from Roger or someone else to the suppliers, and that Roger made the actual decisions as to what produce should be kept by Tri-County. Examples of Robert Ferwerda's significant admissions are as follows:

[Tr. 107] Q. Have you ever had occasion to engage in the purchase or sell of produce in the year 1983 for Tri-County Wholesale Produce?

A. I don't understand exactly what you mean. Do you mean like buying a dozen bunches of dill when I was picking something else up?

Q. Did you pick up the telephone and call a produce house and say: Hi, this is Bob from Tri-County. I'd like to purchase whatever, or words to that effect?

A. What I would tell them when I would call them, I would say: This is Bob calling for Tri-County to pick up and I'd go down, look at the stuff and inspect it and bring it back.

* * * * * * *

[Tr. 109] Q. Did you ever make a purchase on behalf of Tri-County, on behalf of——

A. I told you: Yes, I did, sir. I bought dill for them. I might have bought coleslaw for them if they ran short of coleslaw or something like that.

* * * * * * *

[Tr. 111-13] Q. Did you ever while in the offices of Tri-County in 1983, did you ever receive calls from suppliers that were made to Tri-County?

A. I don't understand what you mean.

* * * * * * *

Q. Did you ever negotiate a purchase on behalf of Tri-County?

A. Back then I did. I can't say I didn't because I did. I know I've done it. I know I've bought coleslaw.

* * * * * * *

A. Yes, sir. Oh, no, back again for odds and ends. I want to be honest completely if I can; do you understand what I mean? And I have bought odds and ends.

Q. Did you ever talk with Harold Brick of Central American Produce with regard—with respect to the purchase and sale of produce in 1982?

A. Yes, sir.

* * * * * * *

Q. How about Guy Romagni?

A. Who?

Q. Of International A and G.

A. What is his name?

Q. I guess it's Guy Romagni.

A. Oh, yes. I know Guy very well and I have picked up a lot of stuff for Tri-County up and through—I'm a hauler for Tri-County now.

Q. But you never negotiated a sale?

A. I have told them the stuff was no good. I wouldn't put it on the truck.

Q. You made that decision when you picked it up?

A. Because I wasn't going to haul it back to Pompano and have to haul it back to Miami for nothing.

* * * * * * *

[Tr. 122-23] Q. All right. And you say you didn't do any purchasing and selling other than an occasional purchase or sell after March 25th, 1982; isn't that true?

A. I said I didn't do any sales. I said I purchased occasional, like your coleslaw or dill or odd item that they didn't have ready, lined up. I just knew where it was and it's always the same.

* * * * * * *

[Tr. 582-87] A. When I was told I couldn't work for my father anymore. Terry [Polcyn] and I are fairly good friends. Mark [Levigne], I know well enough. When he was having a baby I got to know him that way. His wife was having a baby. And so we got to talking about it on a personal basis, then on a last [first; sec Tr. 568] name basis because the first time I heard his [last] name is when you mentioned it to me. But he asked me, he said, Bob, as long as you're not going to be with Tri-County and so on there are good accounts that pay all their bills on time. It's really a pleasure dealing with them. I would hate to take the chance on losing them. Would you represent me to your father and make sure we get the mushroom business. And I said I would do it, and I would talk to him and make sure that they got the business. I owe him a moral obligation. I owe the man. I don't owe him money legally, but I owe him $31,000.

Q. So you would talk to your father. How often did you talk to your father about C & G Mushroom?

A. Primarily I talked to my father about C & G Mushroom just one time. And he said, Bob, he said, as long as you owe him a moral obligation do whatever you need to do to make sure that Terry is right, not right, but taken care of.

Q. Well, during the period March, 1982, to December, 1982, did Terry call you seeking business orders?

A. Yes, sir. He would call me up on the phone—well, it was either him or Mark would call me on the telephone almost every day. In fact it was, I would say it was every day. And I would tell them hold on. You know, he'd call up and ask for me on the phone. And I was there most of the time, so they would page me. I would talk to them and say, hey, how are you doing, Mark. How are you doing, Terry. What's going on today, and so on and so forth. And I'd put them on hold. I'd walk out on the dock. I'd say, Roger, it's C & G on the phone, which is the dock man over there. Said he'd like to know how many mushrooms that you need. And Roger would tell me what it was. I'd say, Terry, Mark, they need that many.

* * * * * * *

Q. And this was done on a regular basis, is that correct?

A. Yes, sir, I'd say at least five days a week, if not more.

Q. Now, there's testimony as to, from both Mr. Lavigne and Mr. Polcyn, that on, after C & G Mushroom ceased to exist it actually kind of became New Garden, and that was physically in December, 1982, and August, 1983. Did that same practice continue?

A. Yes, sir.

* * * * * * *

Q. Did you ever receive mushroom messages that either Terry or Mark would call you, and please call back?

A. Upon occasion, yes, sir.

Q. Did you ever make phone calls to either of those two individuals with respect to the mushrooms?

A. Yes, sir.

Q. Why?

A. Because they asked me to call them. And I thought it could be something for the flea market or they might want an order or something else.

Q. They might want an order? For whom?

A. For Tri-County.

Q. For Tri-County.

A. In other words, I was taking Tri-County's order to give it to Terry, to make sure it got placed where it was supposed to do, like he had asked me to do. It had become a habit over the years. I still talk to Mark on the phone now. If I'm there he'll call up and ask for Bob. And I'll say, how are you doing, Mark? What's going on today? What kind of mushrooms do you need? I'll say, I'll find out what Tri-County needs. And I walked out, asked Roger, Roger, how many mushrooms do you need? Walked back in, Mark, they need this many mushrooms. It really sounds dumb. And I didn't think I was doing anything wrong for doing this.

* * * * * * *

A. The secretary always answered the phone.

Q. And would that secretary then seek to find you so that you could talk with either Mark or Terry?

A. They have a page system. And let's put it this way, the secretary is aware that I know Mark and Terry and we've been friends, and I enjoy talking to them.

Q. Now, eventually apparently Mr. Polcyn seeked [ceased] to work with mushrooms, but Mr. Lavigne went on working for Florida Mushroom Company. And I have found dates of August, 1983, to the present.

A. That's correct.

Q. Have you been dealing with Mark Lavigne since that time?

A. Yes, sir. Yes, sir, I have.

Q. And have you been entering into the same kind of arrangement with respect to the purchase of mushrooms by Tri-County by talking to him?

A. Yes.

Q. And do you see him on the dock in the mornings when he's delivering things?

A. Yes, sir.

Q. Do you ever have occasion to have a sales ticket or invoice handed to you?

A. Yes, sir. He handed it to me on several occasions. I said, Mark, you know I don't work for Tri-County; I'm not authorized to sign any tickets. And if you want to drop them put your ticket in the box of mushrooms. And when Roger gets here I'll tell him where it's at.

Q. Would you tell him you'd keep an eye on it.

A. Yes, sir.

* * * * * * *

[Tr. 593-96] Q. In dealing with Mark Lavigne on Florida Mushroom since August of 1983, or approximately that time, have you ever had occasion to be consulted by Mr. Lavigne or anybody affiliated with Tri-County concerning the quality of the mushrooms that were delivered?

A. I don't understand what you mean. In other words—rephrase that. I can't understand that.

Q. Let me try again. Remember since August of 1983 to whenever you stopped, or maybe to the present actually, and Mark Lavigne comes and delivers the mushrooms to Tri-County?

A. Yes, sir.

Q. Have questions ever been asked of you concerning whether they are acceptable because of quality problems?

A. Roger [Tri-County's dock man] would ask me at times, sir, yes, sir. And I'd look at him and I'd say, ah, Rog, come on. They ain't that bad. Go ahead and use them.

Q. Ah, Rog, come on. They look terrible, and you better tell him to take them back.

A. I tell you what, you don't tell Roger anything. When he makes up his mind it goes back.

Q. Did he ever say, hey, I got problems with these; what do you think, stuff like that?

A. Yes, sir. He did ask me. He asked my opinion.

Q. And you'd give him your opinion, would you not?

A. Yes.

Q. And was that also true with respect to both Mr. Polcyn and Mr. Lavigne with New Garden Supply from time to time?

A. Do you mean sending something back or whatever? Yeah, yeah. Giving your opinion as it goes to quality, yes, sir.

Q. And how about the C & G Mushroom, with respect to both Mr. Polcyn and Mr. Lavigne and whoever delivered?

A. The particular C & G, just the end of it, just before they were going out of business their quality was getting absolutely atrocious. In fact, I called Terry on a couple of occasions. I, I said, Terry, I can't recommend you anymore if you don't pick up this quality. I'm going to have to recommend to Roger that he go somewhere else because I can't put my reputation on the line for you sending garbage into this place.

* * * * * * *

The COURT: Just a moment, please, sir.

Mr. Ferwerda, if you were representing the individual whom we'll call Terry in these transactions to obtain his disposition of his mushrooms why would you be concerned with whether they were good mushrooms or not good mushrooms, inasmuch as if you represented Terry in an—why should you care whether Tri-County got some bad mushrooms?

The WITNESS: Because it's my father's business. I look after my father even more than I would Terry.[17]

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[17] Robert Ferwerda was clearly acting for Tri-County—not the suppliers—in ordering produce (or, as Robert contends, relaying orders for produce). Robert testified (Tr. 75) that when Tri-County started business on August 1, 1981—

> The first thing that I did was explain to the customers that we wanted to keep that Four Seasons was no longer in business. It was now—had become Tri-County Produce. Also explained to the people that I was buying for [from] that I was no longer buying for Four Seasons, Four Seasons was out of business. And explained to them I would try to pay them as quick as I could and if I could and so on, but I would be buying for Tri-County to help my father and so on.

Robert Ferwerda's admissions prove that he continued to buy for Tri-County after March 26, 1982.

In view of Robert Ferwerda's strong bias in this case (i.e., he is the son of respondent's owner), I give more weight to the testimony of the trade witnesses than to that of Robert Ferwerda, notwithstanding the fact that the ALJ stated that Robert Ferwerda was a credible witness. But even if I were to accept Robert Ferwerda's version that he merely relayed information between Roger (Tri-County's dock man) and the suppliers as to Tri-County's produce needs, and that he merely gave his opinion to Roger as to what produce should be rejected, that would be sufficient affiliation with respondent's business operations to constitute "employment," as defined in the Act (see § I(A), *supra*).

In addition, Robert Ferwerda's admitted trucking activities for respondent's business operations are sufficient, by themselves, to constitute "employment," as defined in the Act. Part of respondent's produce was delivered by the suppliers to respondent's place of business, but other produce was bought f.o.b. the suppliers' dock, making it respondent's responsibility to pick up the produce and deliver it to respondent's dock. About 20% to 35% of respondent's hauling was done by Robert Ferwerda, i.e., Bob's Transfer Service, under an arrangement with Arend Ferwerda (Tr. 646–47). About 70% to 75% of Bob's Transfer Service's trucking activities were for respondent (Tr. 100–01). Even though Bob's Transfer Service was an independent contractor in these transactions, this continuous, daily affiliation with respondent's business operations constitutes "employment," as defined in the Act.[18]

For the foregoing reasons, it is quite clear that respondent continued to "employ" Robert Ferwerda after he was notified that such employment without a bond could lead to the loss of respondent's license, and that such employment continued after the formal complaint was issued in this case—even up to the time of the hearing in this proceeding!

III.

Respondent contends that no sanction can be imposed in this case because the administrative officials delayed too long in setting the exact amount of the required bond, and arbitrarily and capriciously set the bond at too high a level. This defense is an afterthought raised by respondent's present attorney. Respondent's original attorney filed an Answer and Affirmative Defenses on

[18] We need not decide here whether a licensee that utilized Bob's Transfer Service on an occasional basis would be regarded as violating the "employment" restrictions. It is enough to decide here that the continuous, daily use of the trucking service of a restricted individual is sufficient "affiliation" with respondent's "business operations" to constitute "employment."

June 29, 1983, in which a number of affirmative defenses are set forth, but nothing is said with respect to respondent's bond.

Respondent challenged the amount of the bond and the procedure in setting the bond for the first time in a prehearing statement filed November 8, 1983, by respondent's present attorney. Respondent's present attorney moved to amend the answer to incorporate affirmative defenses relating to the bond on January 18, 1984, and the motion was granted on January 26, 1984, less than 3 weeks before the hearing.

Even if respondent's criticism as to the bond were correct, they would not be a defense here.

First, as to the alleged delay in setting the bond amount, although the bond matter was first mentioned in the Department's letter of February 16, 1982, and was not concluded until 7 months later, September 24, 1982, there are many intervening circumstances that explain much of the delay. In a telephone conversation on April 15, 1982, Arend Ferwerda stated that Robert was not currently working for him, and that the reparation complaints against Robert might be satisfied within 3 months (which would make a bond unnecessary). The Department wrote to respondent on April 15, 1982, requesting respondent to "Please keep us advised of your intentions," but respondent failed to do so. After the Department reminded respondent on May 19, 1982, that it had not received a reply to the April 15, letter, Arend Ferwerda replied on June 4, 1982, that he would like to reemploy Robert as soon as he secured the additional information as to the bond and was able to obtain a bond. Hence half of the elapsed time period can be attributed to respondent's uncertainties as to whether the reparation awards would be paid and delay in advising the Department of its intentions. In addition, at no time did respondent press the Department for a quicker determination.

Even if the failure to exercise due diligence in setting a bond were a defense in a disciplinary action (which is not the case, since there is nothing in the Act to suggest that the employment restrictions can be ignored if the Secretary is dilatory in setting the amount of the bond), the record here shows no unreasonable delay that would constitute a good defense. (And even if it did, and even if a delay were a valid defense, the defense would not be applicable to the time period after September 24, 1982, when the bond amount was set.)

As to the amount of the bond, the ALJ correctly concluded that it "cannot be determined from the evidence in this proceeding whether the $125,000.00 for the amount of the bond requested is arbitrary, capricious and unreasonable, agency action" (Initial Deci-

sion at 23). Although Arend Ferwerda seemed shocked at the estimated $100,000 bond figure, he did not complain at any time to any Department official or to any court as to the final bond determination.

No opinion is expressed in this decision as to whether the Secretary's bond determination is judicially reviewable if the issue is raised before a violation occurs. The Act states that the bond shall be "in form and amount satisfactory to the Secretary" (7 U.S.C. § 499h(b)). Assuming, without deciding, that arbitrary action could be set aside, the obvious remedy is to complain either to the administrative officials or to the appropriate court—not to ignore the statutory restrictions and continue to employ a restricted individual without obtaining a bond. There is nothing in the Act to support respondent's attorney's "afterthought" that respondent can violate the statutory restrictions and collaterally attack the bond determination by way of defense in a disciplinary proceeding.

Respondent also complains that the factors considered in setting the amount of the bond are not published in the Federal Register, but, here again, that issue is not a defense here. Even if that issue could appropriately be raised here, publication of the bond determination factors is not required. The factors considered in determining a bond are not "substantive rules of general applicability adopted as authorized by law," or "statements of general policy or interpretations of general applicability formulated by the agency" (5 U.S.C. § 552(a)(1)(D)), and, therefore, they are not required to be published in the Federal Register.

Even if the bond determination factors were required to be published, respondent received actual notice in the Department's letter of February 16, 1982, as to the significant factors that are considered in determining a bond, and respondent received actual notice of the Department's internal instructions relating to bond determinations at the hearing in this case (RX C and D). Respondent's actual notice of the factors would preclude reliance on any failure to comply with publication requirements. *Giles Lowery Stockyards, Inc.* v. *USDA*, 565 F.2d 321 (1977), *cert. denied*, 436 U.S. 957 (1978).

IV.

Respondent's conduct in continuing to "employ" Robert Ferwerda after notice completely thwarted the congressional purpose to provide assurance that respondent's business would be conducted in accordance with the Act and that respondent would pay all reparation awards, notwithstanding its potential contamination from Robert Ferwerda's affiliation with the firm.

Arend Ferwerda advised the Department orally and in writing that Robert Ferwerda's employment ended the week of March 25, 1982. If the Department had not heard rumors from the trade that Robert Ferwerda's employment continued during the restricted period, the Department would probably have not learned that the congressional purpose had been defeated. Hence advertently or inadvertently, Arend Ferwerda misled the Department as to an important matter.

Respondent's violation of the employment restrictions is a very serious violation of the Act that could have caused great damage to the industry irrespective of whether Arend Ferwerda knew that Robert Ferwerda's affiliation with respondent constituted "employment," within the meaning of the Act. Although the ALJ concluded that Arend Ferwerda did not intentionally violate the Act, he knew, or should have known, that he was operating dangerously close to the borderline of illegality. It would not be a mitigating circumstance even if Arend Ferwerda did not know that he had overstepped the borderline.

Arend Ferwerda had been a licensee under the Act for many years. It was his duty to know the statutory requirements. He was operating in an industry subject to pervasive federal regulation because of its great national importance. The definition of "employment" in the Act is very clear, even to a layman. If Arend Ferwerda did not want to bother to read the Act, he could easily have asked any PACA employee as to whether Robert Ferwerda's affiliation with respondent constituted "employment." [19]

If we were to reduce the sanction in this case on the ground that Arend Ferwerda did not actually know that he was violating the Act, it would place a premium on maintaining ignorance as to the statutory requirements. That policy would defeat the congressional purpose, and will not be followed here.

Since respondent committed a very serious violation of the Act continually during a period of approximately 2 years, respondent's license should be revoked to serve as an effective deterrent not only to respondent but to other potential violators (see § I(C), *supra*).

Under the Administrative Procedure Act, a revocation or suspension order cannot be issued unless the violations were willful or a prior warning letter was sent. Specifically, the Act provides (5 U.S.C. § 558(c)):

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[19] It would have been better practice for the Department to have quoted the definition of employment in the letter of February 16, 1982. But it is respondent's duty to know the law, or, if not, to ask questions of the administrative officials.

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

In the present case, respondent received a prior warning letter, with an opportunity to achieve compliance with all lawful requirements. Hence it is not necessary to show that the violations were willful.

But even if it were necessary to show that the violations were willful, respondent's violations were willful, within the meaning of that term in the Administrative Procedure Act. *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975). "Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *American Fruit Purveyors, Inc.* v. *United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*. 450 U.S. 997 (1981); *accord Finer Foods Sales Co.* v. *Block*, 708 F.2d 774, 778 (1983).[20]

It should be noted in passing that the ALJ's cease and desist order is unlawful in two respects. First, there is no statutory authority in the Perishable Agricultural Commodities Act for the issuance of a cease and desist order. Second, the statutory restriction as to the employment of a person against whom there is an unpaid reparation award is applicable only "within two years" after the issuance of the award (7 U.S.C. § 499h(b)(3)). Accordingly, the ALJ's order could not have been issued in this case, even if such a mild sanction were appropriate for the serious violations found here.

V.

Respondent seeks to reopen the hearing to take further evidence with respect to the meaning of "employment," and as to the determination of respondent's bond. The meaning of "employment" is a matter of statutory interpretation—not evidence—and, as set forth

[20] The definition of willful in *TWA* v. *Thurston*, 105 S. Ct. 613, 624-26 (1985), is based on the legislative history of the Age Discrimination Employment Act, which is quite different from the legislative history of the term willful under the Administrative Procedure Act. Accordingly, the Court's holding in *Thurston* as to the meaning of "wilful" is not appropriate for use in our Department's disciplinary proceedings.

above, the bond issue is not an appropriate issue in this disciplinary proceeding. Hence the petition to reopen is denied.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's license is revoked.

The facts and circumstances as set forth herein shall be published.

This order shall take effect on the 30th day after service thereof on respondent.

APPENDIX

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. Sanction Policy

[Excerpt omitted.—Ed.]

In re: TOP QUALITY FRUIT & PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-6910. Decided January 27, 1986.

Failure to pay—Revocation of license.

The Judicial Officer affirmed Administrative Law Judge Weber's order revoking respondent's license for failure to pay for produce. Respondent's admitted failures to make payment constitute willful, flagrant and repeated violations of the Act.

Andrew Stanton, for complainant.
Robert B. McLeaish, for respondent.
William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),[1] in which Administrative Law Judge William J. Weber (ALJ) filed an initial Decision and Order on November 8, 1985, revoking respondent's license for failure to pay 20 sellers $86,847.18 for 55 lots of produce purchased and accepted in interstate commerce from June 1984 through December 1984.

[1] *See generally* Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

On December 10, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[2] On December 31, 1985, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

FINDINGS OF FACT

1. Respondent, Top Quality Fruit & Produce Distributors, Inc., is a Texas corporation whose address is P.O. Box 6208, McAllen, Texas.

2. Pursuant to the licensing provisions of the PACA, license number 831550 was issued to respondent on September 16, 1982. This license has been renewed annually and was subject to renewal on or before September 16, 1985. The Department has, to date, not received a renewal application from the respondent.

3. The Secretary has jurisdiction in this proceeding.

4. As more fully set forth in complainant's Motion for Decision on the Pleadings and Supporting Memorandum, during the period June 1984 through December 1984, respondent purchased from 20 sellers and accepted, in interstate and foreign commerce, 55 lots of perishable agricultural commodities, but failed to make any payment of the agreed purchase prices, which total $86,847.18.

CONCLUSIONS

Respondent has admitted in its answer that it failed to make payment for the produce alleged in the complaint. Respondent's admitted failures to make payment constitute willful, flagrant and repeated violations of § 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re B. G. Sales Co., Inc.*, 44 Agric. Dec. ____ (Oct. 9, 1985), a copy of which is attached as an appendix to this decision. Accordingly, the following order is issued.

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[2] The position of the Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ORDER

Respondent's license is revoked.

Respondent has committed repeated and flagrant violations of § 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

The facts and circumstances set forth above should be published.

This order shall become effective on the 30th day after service on respondent.

APPENDIX

In re B. G. Sales Co., 44 Agric. Dec. ____ (Oct. 9, 1985).
[Excerpt omitted.—Ed.]

In re: EAST TENNESSEE PRODUCE, INC. PACA Docket No. 2-6966. Decided December 19, 1985.

Edward Silverstein, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 26, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June through December 1984, respondent purchased, received, and accepted, in interstate commerce, from 36 sellers, 160 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $283,497.91.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, East Tennessee Produce, Inc., is a corporation, whose address is 2221 Forest Avenue, Knoxville, Tennessee 37916.

2. Pursuant to the licensing provisions of the Act, license number 821694 was issued to respondent on August 10, 1982. This license was renewed annually, but terminated on August 10, 1985, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period June through December 1984, respondent purchased, received, and accepted in interstate commerce, from 36 sellers, 160 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $283,497.91.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 160 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[The Decision and Order became final on January 31, 1986.—Ed.]

In re: FONSECA FOODS DISTRIBUTORS, INC. PACA Docket No. 2-6826.
Decided December 17, 1985.

Eric Paul, for complainant.
Alan Ross, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a combined show cause and disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter the "PACA", the regulations promulgated pursuant to the PACA (7 CFR 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 CFR 1.130 through 1.151), hereinafter the "Rules of Practice". The proceeding was instituted by a Notice to Show Cause and a complaint filed on May 15, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the Notice to Show Cause and complaint that Fonseca Foods Distributors, Inc., hereinafter "respondent", violated Section 2(4) of the PACA (7 U.S.C. 499b(4)) during the period July 1984 through November 1984, by failing to make full payment promptly of the agreed purchase price of 120 lots of perishable agricultural commodities which it purchased and received in interstate and foreign commerce from five sellers of perishable agricultural commodities, in the total amount of $229,661.80. It was further alleged that respondent's license terminated on January 31, 1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when respondent failed to pay the required annual license fee; and that respondent should be denied a license sought pursuant to an application received April 15, 1985, because it has engaged in practices of the character prohibited by the PACA. Complainant duly withheld the issuance of this license pursuant to Section 4(d) of the PACA, which requires that respondent be given an opportunity for hearing within sixty days of the date of the application.

An oral hearing was set for June 4, 1985. Respondent filed an answer on May 30, 1985, in which it admitted the jurisdictional allegations of the complaint and the filing of a voluntary petition on November 8, 1984, pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. 1101 *et seq.*); denied that its license had terminated on January 31, 1985; and denied, in part, the failure to make full payment promptly allegation. Respondent affirmatively asserted that

its actions did not constitute wilful, flagrant and/or repeated violations of section 2(4) of the PACA, and that it was acting in conformity with various provisions of the Bankruptcy Code with the agreement of the perishable agricultural produce sellers named in the complaint. Respondent requested that the oral hearing set for June 4, 1985, be continued to July 3, 1985.

A rescheduled oral hearing was held on July 2, 1985, before the undersigned in Los Angeles, California. Complainant was represented by Eric Paul, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250-1400. Respondent was represented by Alan Ross, Esq., Los Angeles, California 90012. Complainant presented two witnesses and nine exhibits which were received into evidence. Respondent cross-examined complainant's witnesses but presented no testimony or exhibits. The parties were provided opportunity to submit simultaneous briefs by August 23, 1985, however, only complainant took advantage of submitting such brief. Reference to complainant's exhibits and to specific pages in the transcript will hereafter be by the prefix "Ex." and the prefix "Tr.", respectively.

DISCUSSION AND CONCLUSIONS

The evidence adduced at hearing showed that respondent failed to pay five produce firms $229,661.80 owed with respect to 120 lots of tropical fruits purchased in interstate or foreign commerce. It does not appear that the financial condition of respondent, as set forth in its bankruptcy filings, is such as will permit the full payment for these purchases at any time in the future and operations are now being conducted without a PACA license in effect, although an application for a PACA license has been filed. It is the position of complainant that this case presents nothing more than a normal disciplinary proceeding brought against a produce debtor that has failed to pay for produce purchased and received in interstate or foreign commerce and a normal show cause proceeding with respect to an applicant that is unfit to be licensed by virtue of having engaged in conduct of a character that is prohibited by the PACA. The commencement of a Chapter 11 proceeding in bankruptcy does not excuse such flagrant and repeated violations of the PACA as have been established, and the appropriate sanction, in accordance with sections 4 and 8 of the PACA (7 U.S.C. §§ 499d, 499h) and the sanction policy of this Department, is the issuance and publication of findings that respondent has engaged in flagrant and repeated violations and is unfit to be licensed under the PACA.

Respondent has totally failed to pay for perishable agricultural commodities worth $229,661.80. Failure to pay for produce is a very

serious violation of the PACA which requires revocation of the license of the offender, whenever a valid license is in effect. See *In re Bananas, Inc.*, 42 Agric. Dec. 588, 590 (1983). In the present case no license remains in effect to be revoked since the respondent's former license terminated on January 31, 1985.

No attempt had been made by respondent to renew this license. Rather, an inadequate fee was tendered in connection with the submission of an application for the issuance of an entirely new license on November 29, 1984. Even assuming that this submission could have been handled as a payment of an annual license renewal fee, it would not have effected a renewal since section 4(a) of the PACA (7 U.S.C. § 499 d(a)) and section 46.6 of the regulations (7 CFR § 46.6) require payment of the prescribed fee and set the amount of such fee at $180.00, respectively. The correct amount was not submitted until March 21, 1985, a date well beyond the thirty day statutory limit set for a late filing of the prescribed annual license fee (7 U.S.C. 499d(a)).

Complainant, therefore, has sought publication of a finding that respondent has engaged in repeated and flagrant violations of the Act. Such a finding has the same effect on respondent and on those responsibly connected with respondent as revocation of a license under the PACA. *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748-49 (1982); *In re Pappas Produce, Inc.*, 36 Agric. Dec. 684, 695 (1977). Respondent's failures to make full payment promptly with respect to the 120 designated transactions clearly constitute repeated and flagrant violations of section 2 of the PACA (7 U.S.C. § 499b). The large number of transactions alone establishes that the violations were repeated. *Reese Sales Co.* v. *Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *Zwick* v. *Freeman*, 373 F.2d 110, 115 (2d Cir.), *cert denied*, 389 U.S. 835 (1967); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 593 (1983). Respondent's violations were also flagrant. In the *Bananas* case, which involved 26 sellers and $54,045.43, the Department's Judicial Officer concluded that the number of transactions and the large amount involved made the violations flagrant. They were also found to be flagrant because, just as in the present case, the respondent continued to make new purchases over a period of several months, without being able to make payment for produce purchased earlier. *Id.* Also see *Wayne Cusimano, Inc.* v. *Block*, 692 F.2d 1025, 1029 (5th Cir. 1982); *George Steinberg & Son, Inc.* v. *Butz*, 491 F.2d 988, 994 (2d Cir. 1973) *cert denied*, 419 U.S. 830 (1974). The 120 transactions in the present case called for full payments to be made on numerous dates falling within a four month period, July 9, 1984 through November 6, 1984, as scheduled in paragraph 6 of the complaint (Ex. 9; Tr. 31). Each of these transactions required

payment prior to respondent's filing for relief under Chapter 11 of the Bankruptcy Code on November 8, 1984.

Accordingly, respondent's plead defense that the five sellers named in paragraph 6 of the complaint had received substantial payments since July 1984, and had consented to the payment of current purchases first in accord with required Chapter 11 procedure would not have been relevant, even had respondent submitted supporting evidence. Moreover, even if payments had not been due prior to the filing of the Chapter 11 petition, the violations would not have been either excused or mitigated. All excuses, including bankruptcy, are routinely rejected in disciplinary proceedings involving payment violations since "the Act calls for payments not excuses." *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) affirmed *Melvin Beene Produce Company* v. *Agricultural Marketing Service*, 728 F.2d 347 (6th Cir. 1984).

It was alleged and denied that these violations were wilful. A violation of the PACA is wilful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by the statute or a person carelessly disregards the requirements of the statute. *Finer Foods Sales Co., Inc.* v. *Block* (708 F.2d 774, 778 (D.C. Cir. 1983); *American Fruit Purveyors, Inc.* v. *United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert denied*, 450 U.S. 997 (1981); *In re Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *In re G. Steinberg & Sons, Inc.*, 32 Agric. Dec. 236, 263-269 (1973) *aff'd sub nom., George Steinberg and Sons, Inc.* v. *Butz*, 491 F.2d 988 (2d Cir.); *cert denied*, 419 U.S. 830 (1974). Respondent's violations were clearly wilful. However, no finding to this effect need be made since there is no license to be revoked. See *Fava & Company, Inc.*, 43 Agric. Dec. ___ (PACA Docket No. 2-6547, December 4, 1984) (Ruling on Certified Question); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 594 (1983).

A finding that respondent is unfit to be licensed under the PACA in that it has engaged in practices of a character prohibited by the PACA is required. Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides, *inter alia*, that the Secretary may refuse to issue a license when, after hearing, the Secretary finds that the applicant "prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . ." The repeated and flagrant failures of respondent to make full payment promptly constitute a practice expressly prohibited by section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Pappas Produce*, 36 Agric. Dec. 684, 691 (1977); *In re Ludwig Casca*, 34 Agric. Dec. 1917 (1975). As a direct consequence of respondent's engaging in this prohibited practice

produce purchases in the total amount of $229,661.80 remain unpaid as of the date of hearing.

It has been recognized by respondent that its status as a debtor in possession under Chapter 11 of the Bankruptcy Code does not affect the jurisdiction of the Secretary to enter the requested finding and deny issuance of a new license (Respondent's Answer, paragraph 9; 11 U.S.C. § 525). Moreover, as Mr. James R. Frazier, head of the trade practice section of the PACA branch, Agricultural Marketing Service, explained in connection with the presentation of sanction testimony supporting the entry of finding of repeated and flagrant violations and denial of a license:

> It would make no difference to us whether the firm was in bankruptcy or not in bankruptcy. As a matter of fact for us not to take an action against a firm first because they filed bankruptcy, would be to discriminate against firms which don't file bankruptcy . . . .(Tr. 20-21)

The Department has consistently enforced the PACA in an even-handed manner to insure that only financially responsible persons should be engaged in businesses subject to the Act even when, as herein, the respondent is a debtor seeking to reorganize in bankruptcy. *In re Veg-Mix, Inc.*, PACA Docket No. 2-6612, 44 Agric. Dec. ____ (August 21, 1985). *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2433-40 (1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1176-82 (1982) *aff'd*, 708 F.2d 774, 782 (D.C. Cir. 1983); *Zwick* v. *Freeman*, 373 F.2d 110, 117 (2d Cir.). *cert denied*, 389 U.S. 835.

A finding should be published as to the respondent's violations as authorized by section 8a of the PACA (7 U.S.C. § 499h(a)) in order to serve as an effective deterrent to future similar violations by respondent or other potential violators. *In re Pappas Produce, Inc.*, 36 Agric. Dec. 684, 695 (1977).

FINDINGS OF FACT

1. Respondent is a California corporation whose sole officers, directors and shareholders are Jose Fonseca, Carmen Fonseca and Javier Fonseca.

2. Respondent's mailing address is 1308 East 7th Street, Los Angeles, California 90021 (Respondent's Answer, paragraph 1).

3. Pursuant to the licensing provision of the PACA, license number 840644 was issued to respondent on January 31, 1984. This license terminated on January 31, 1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when respondent failed to pay the required annual license fee (Ex. 1, 5; Tr. 10-13).

4. On November 8, 1984, respondent filed a petition seeking relief pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.*), in the United States Bankruptcy Court for the Central District of California, Case No. LA 84 422325 (Respondent's Answer, paragraph 1, Ex. 8).

5. On November 29, 1984, respondent applied for the issuance of a new license and enclosed a check in the amount of $108.00 (Ex. 3; Tr. 10).

6. This application was returned on March 4, 1985, after efforts made by telephone to obtain the proper license fee, $180.00, had proved fruitless. Respondent was advised that the incorrect fee submitted was being refunded and that it could reapply for a license (Ex. 4; Tr. 11-12).

7. On March 15, 1985, a notice was served on respondent that its license under the PACA had terminated on January 31, 1985 (Ex. 5; Tr. 12).

8. On March 21, 1985, a license application accompanied by the proper fee was received (Ex. 6; Tr. 13).

9. On April 1, 1985, this application was returned for additional information relevant to the determination of the amount of surety bond that was posted because of the bankruptcy and for a completion of the application form with respect to the bankruptcy (Ex. 7; Tr. 13-14).

10. A resubmitted application to which a copy of the Chapter 11 petition was attached was received on April 15, 1985 (Ex. 8; Tr. 14).

11. The Notice to Show Cause why this April 15, 1985, license application should not be denied was filed with the Hearing Clerk on May 15, 1985, within the thirty day period required by section 4(d) of the PACA (7 U.S.C. § 499d).

12. An oral hearing set for June 4, 1985, within the sixty days required by section 4(d) of the PACA (7 U.S.C. § 499d) was continued to July 2, 1985, after respondent had waived its right to early hearing by motion filed May 30, 1985.

13. An investigation was ordered performed to determine whether the respondent was in violation of section 2 of the PACA (7 U.S.C. § 499b) by reason of failures to make full payment promptly with respect to purchases of perishable agricultural commodities after it had been determined that the respondent's bankruptcy schedules listed debts in excess of $400,000.00 owed to creditors that were known to be produce companies (Ex. 8; Tr. 16-19).

14. Mr. Barry Flick, a marketing specialist employed by the complainant examined respondent's unpaid invoices on May 2, 1985 (Tr. 27-28).

15. Respondent's Vice-President, Carmen Fonseca, provided Mr. Flick with five folders containing unpaid invoices received from the five produce sellers named in paragraph 6 of complaint (Tr. 28-29).

16. Mr. Flick excluded all unpaid invoices that pertained to perishable agricultural commodities that could have been intrastate in origin, leaving invoices covering 120 lots of bananas, mangoes and pineapples—fruits subject to the PACA that are not grown commercially in California and, therefore, were of foreign origin (Tr. 29-31).

17. The 120 lots of perishable agricultural commodities scheduled in paragraph 6 of the complaint were received with invoices that appear in complainant's Exhibit 9, marked as to lot, Transaction 1-Transaction 120A. Although payments totalling $229,661.80 were due on these purchases prior to respondent's filing of it's Chapter 11 petition on November 8, 1984, they remained unpaid as of the date of the investigation, May 2, 1985 (Tr. 31-32).

ORDER

1. Respondent, Fonseca Foods Distributors, Inc., has committed flagrant and repeated violations of section 2 (4) of the PACA (7 U.S.C. § 499b(4)).

2. Respondent is unfit to be licensed under the PACA in that it has engaged in practices of the character prohibited by the PACA.

3. Respondent's application for a license is denied.

4. The facts and circumstances of such violations shall be published.

This Order shall take effect on the 11th day after the Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR § 1.145).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on January 31, 1986.—Ed.]

In re: MAX KAUFMAN, INC. PACA Docket No. 2-6929. Decided November 29, 1985.

Stephen Luparello, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on August 12, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February, 1984, through August, 1984, respondent purchased and accepted, in interstate and foreign commerce, from 13 sellers, 66 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $403,790.52.

A copy of the complaint was served upon respondent on August 24, 1985, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Max Kaufman, Inc., is a corporation whose address is 750 South Central Avenue, Los Angeles, California.

2. Pursuant to the licensing provisions of the Act, license number 681818 was issued to respondent on April 19, 1968. This license was renewed annually, but terminated April 19, 1985, when respondent failed to renew it.

3. As more fully set forth in paragraph 5 of the complaint, during the period February, 1984, through August, 1984, respondent purchased and accepted in interstate and foreign commerce from 13 sellers, 66 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $403,790.52.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 66 transactions set forth in Finding of Fact No. 3 above, con-

stitutes wilful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed wilful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this decision becomes final.

Pursuant to the Rules of Practice governing proceedings under the Act, this decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served upon parties.

[The Decision and Order became final on February 4, 1986.—Ed.]

In re: PERFECT POTATO PACKERS, INC. PACA Docket No. 2-6553. Decided February 14, 1986.

Revocation of license—False and misleading application for license.

The Judicial Officer affirmed Administrative Law Judge Weber's decision revoking respondent's license because the application for the license was false and misleading. Complainant need only prevail by a preponderance of the evidence. The ALJ, who saw and heard the witnesses testify, was in the best position to resolve conflicts in testimony. The Judicial Officer may, when necessary, take official notice of a license on file in the Department. The corporate veil may be pierced when one person is the beneficial owner of 100% of the stock of the corporation. A license which has been allowed to expire can, nonetheless, be revoked or suspended.

Edward Silverstein, for complainant.
Stephen P. McCarron, for respondent.
William J. Weber, Administrative Law Judge.

Decisions by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),*

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* *See generally* Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

in which Administrative Law Judge William J. Weber (ALJ) filed an initial Decision and Order on Reconsideration on October 17, 1985, revoking respondent's license because the application for the license was false and misleading.

On November 20, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On December 16, 1985, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record, the initial Decision and Order on Reconsideration is adopted as the final Decision and Order in this case (with a few trivial changes), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

DECISION AND ORDER ON RECONSIDERATION [a]

Phillip R. Weller ("Weller") operated a number of business entities,[1] some in Canada. He held a Perishable Agricultural Commodities Act handler's license for a number of years and was one of the larger dealers in potatoes.

In January 1984, Weller allowed his Perishable Agricultural Commodities Act license to expire by his failure to renew it.

Weller agreed to entry of an administrative disciplinary decision in August 1984, finding that between October 1981 and August 1983, Weller had "failed to make full payment promptly (for pota-

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 405c-405g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

[a] Respondent filed a motion to reconsider the decision and order. It mainly focuses on two points: first, what respondent characterizes as "the basis of the decision"—finding of fact #35, page 15—and secondly, a partially exculpatory comment on the lack of criminal intent to cheat and defraud those whom Weller owed money (decision and order, page 26).

Respondent isolates these two points from the clear context in which they are imbedded, and misconstrues them.

The basic decision remains the same except for supplemental material added in footnotes [a] (page 1),[35] (page 15), and [b] (page 26).

[1] These included trucking, potato dealing, solar "research" and heating.

toes he purchased) . . . in the total amount of $823,611.38 * * * [in] repeated and flagrant [violation] . . . of the Perishable Agricultural Commodities Act." Complainant's Exhibit 19, pages 2 and 3.

Weller's businesses and financial status faced serious cash flow problems and threats of litigation by May 1983. Three reparation complaints were pending against him under the Perishable Agricultural Commodities reparation procedures for failure to promptly pay.

Weller, in May 1983, seized upon the idea of forming a new corporation—Perfect Potato Packers, Inc.—using some of his loyal and dedicated employees as the incorporators, directors, officers and stockholders through which he could continue potato operations and insulate some funds from growing financial delinquencies.

An application for a Perishable Agricultural Commodities license was filed by Perfect Potato Packers, Inc., in May 1983, listing employees of various Weller controlled entities as the directors, officers and stockholders of Perfect Potato Packers, Inc. ("PPP") No mention was made of Weller in any capacity with the corporation. Nothing indicated Weller's relationship to the applicant corporation, its reported directors, officers or shareholders.

That application of PPP, on its face, appeared to be proper. There was no apparent reason to raise suspicions or doubts. It was approved and a license was issued.

Complainant now seeks to revoke that license on the grounds that it was fraudulently obtained through false and misleading statements in willful violation of sections 3 and 8(c) of the PACA (7 USC §§ 499c and 499h(c)) and section 46.4 of the Regulations (7 CFR § 46.4).

Respondent denied any violation of the Act or Regulations.

Trial of the issues took place November 14, 15, 1984 in Hartford, Connecticut. The last brief was filed April 5 1985. Much of this decision is taken from complainant's detailed, annotated record-supported brief. Generally, the testimony of witnesses Myrna Sterin, Philip Tatoian, Marc Benoit, and Salvatore Julian was persuasive, sincere and worthy of controlling probative value concerning disputed operative facts here.

Complainant clearly has presented reliable, probative, persuasive, credible evidence in support of the Complaint allegations.

While only a preponderance of the evidence is necessary to support the Complaint allegations, in many instances here, the evidence is clear and convincing that the operations of the central figure here, Phillip R. Weller ("Weller"), were dominated by him with little regard for legal distinctions between his various enter-

prises and activities. Many of his businesses were administratively supported by a central corps of clerical personnel who were a seminal pool to be utilized for the various businesses as needed. This basic concept is key to evaluating the evidence here.

Respondent also argues, *inter alia,* that Complainant never established that respondent PPP held a PACA license. The evidence here establishes a *prima facie* case that respondent PPP did hold a PACA license at all material times here. Respondent, in fact, does not actually deny it was licensed, as alleged in the Complaint (it neither admits nor denies that allegation based on its claimed lack of knowledge).

Several witnesses testified concerning the license and much of their testimony was premised on the existence of a license. If respondent had not been licensed at the time of the incidents described in the testimony, then much of the evidence from both complainant and respondent would be utterly without basis or foundation. All of respondent's behavior, statements and position during the investigation is premised on the respondent holding a current, active PACA license.

There can be no question whatsoever on this record that respondent corporation held the PACA license that it applied for during the events covered by this record.

* * * * * * *

1. Respondent is a Connecticut corporation whose mailing address is P. O. Box 408, East Windsor, Connecticut 06088, and whose business address is North Road, East Windsor, Connecticut 06088.[1]

2. On May 19 1983, respondent submitted a completed application for license under the PACA in which Marc G. Benoit (hereinafter "Benoit") was reported as its president, director and 100% stockholder. The application also listed Francis Sedar (hereinafter "Sedar") as the respondent's vice president and secretary, and Charles Frascona (hereinafter "Frascona") as its treasurer. This application was signed by Benoit, Sedar, and Frascona, each of whom certified that the information contained therein was true.[2]

3. Based on the information provided in respondent's application for license under the PACA and pursuant to the licensing provisions of the PACA, license no. 831032 was routinely issued to re-

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[1] Complaint ¶¶ 1 and 2; Answer ¶ 2.

[2] Complaint ¶ 3; Answer ¶ 3; Hearing Transcript pages 11-12; Complainant's Exhibit No. 1.

spondent on May 26 1983 and was next subject to renewal on or before May 26 1984.[3]

4. Although respondent's PACA license application reflected that Benoit was its president and a director, that Sedar was its vice president and secretary, and that Frascona was its treasurer, no organizational meetings were ever held, and no directors or officers were ever elected.[4]

5. From at least January 29 1973 through January 29 1984, one Phillip R. Weller, who sometimes traded as Richard Weller, was a potato dealer licensed under the PACA. During May 1983, Weller told Benoit, who was one of his employees, that he wished to start a new company because of problems which his (Weller's) then existing business entities were having. This new entity, first called "Windsor Potato Company, Inc.," eventually became the respondent corporation, Perfect Potato Packers, Inc.[5]

6. The paperwork creating the respondent corporation was prepared by Philip E. Tatoian, Jr., Esq., an attorney who, at least during the period January 1 1983 through December 31 1983, represented Weller. Mr. Tatoian performed the legal services at Weller's request. As noted above, Weller was in the business of buying and selling potatoes. During 1982 and 1983, Weller found himself suffering from a cash shortage, and was being pressed by his creditors for payment. In order to prevent his creditors' actions from impeding his business operations, Weller formed respondent, and caused respondent to secure a PACA license, to allow him to continue to conduct his potato business. Respondent merely was an extension of Weller's previous business activities, and he was in sole control of its operations. Neither Benoit nor Sedar gave Mr. Tatoian directions with regard to forming the new corporation, and had no say in its formation.[6]

7. Benoit was never asked by Weller or anyone else to have a financial interest in the new company, and never contributed capital towards it. Moreover, although respondent's license application reflected that Benoit owned 100% of the corporation's stock, no stock was ever issued to him, nor to anyone else. However, Weller owned

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[3] Complaint ¶ 4; Hearing Transcript pages 9-18, 21-22, 352-55; Complainant's Exhibits Nos. 1 and 2.

[4] Complaint ¶¶ 3, 4, and 10; Hearing Transcript pages 11-12, 117-120. Complainant's Exhibit No. 1.

[5] Hearing Transcript pages 27, 40-41, 51-52, 137-138, 140; Complainant's Exhibits Nos. 1, 4, 13, and 19.

[6] Complaint ¶ 8; Hearing Transcript pages 12-13, 27, 40-41, 51-52, and 110-117, 213, 218, and 335-339; Complainant's Exhibits Nos. 2, 4, 8, 13, 16 and 17.

a beneficial interest in 100% of the corporate stock, and at all times controlled the entities' business affairs.[7]

8. During at least the period January 1971 through August 1983, Benoit was employed by Weller directly or indirectly through a company owned by Weller. He was employed as a truckdriver, a potato salesman, and also helped operate Weller's trucking business.[8]

9. Benoit was chosen to be "president" of respondent by Weller and Frascona.[9]

10. During the period 1979 to the date of the hearing, Frascona was continually employed by Weller, or by a company which Weller controlled. Frascona also assisted Weller in operating companies in which he (Frascona) was not employed. In all instances he served Weller's interests.[10]

11. Although Frascona was its treasurer, he received no remuneration, in any form, from Perfect Potato Packers. During the time he worked on matters on behalf of PPP, he was on Weller's payroll.[11]

12. Frascona owned no stock in Perfect Potato Packers.[12]

13. Frascona invested no capital into Perfect Potato Packers.[13]

14. During the period 1964 through the present, Sedar was employed by one of the Weller companies. At various times he worked for Dick Weller, Inc., Nurserymen's and Farmer's Shipping Association, and/or Action Brokerage.[14]

15. Although he was listed on the application for its PACA license as the vice president and secretary of Perfect Potato Packers, Sedar was not aware that he held such offices; he was never paid by or performed any significant services for PPP.[15]

16. Perfect Potato Packers used space in a building owned by Weller as its place of business. No lease agreement was ever signed, nor was any payment ever made for this use.[16]

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[7] Complaint ¶ 9; Answer ¶ 9; Hearing Transcript pages 9-18, 27, 40-41, 51-52, and 119-120, 130, 138-140 and 337-339; Complainant's Exhibits Nos. 1, 2, 4, 13 and 17.

[8] Hearing Transcript page 134-135, 150-152; Complainant's Exhibits Nos. 2 and 4.

[9] Hearing Transcript pages 27, 40-41, 51-52, and 149-150; Complainant's Exhibits Nos. 4 and 13.

[10] Hearing Transcript pages 184-185, 205-207.

[11] Hearing Transcript pages 196, and 204-207; Complainant's Exhibit No. 1.

[12] Hearing Transcript page 195.

[13] Hearing Transcript page 195.

[14] Hearing Transcript pages 328-331. For a partial listing of the entities through which Weller operated see Finding of Fact No. 26, below.

[15] Hearing Transcript pages 11-12, and 332; Complainant's Exhibit No. 1.

[16] Hearing Transcript pages 146, 193.

17. In order to repack potatoes, Perfect Potato Packers used equipment owned by Weller, but no lease agreement was signed nor was any payment made to Weller for the use of this equipment. Moreover, the persons who operated the machinery were Weller employees.[17]

18. Perfect Potato Packers had no telephone of its own, but used Weller's telephones. No payment was made for this use.[18]

19. Weller's office was located in the same room as respondent's in Weller's building.[19]

20. Weller maintained one clerical staff, operating under the name Nurserymen's and Farmer's Shipping Association, in order to provide the clerical requirements for his various entities (including Perfect Potato Packers) through which he operated, such as payroll, insurance, etc. Thus, respondent's "employees" were paid for their work by Nurserymen's and Farmer's Shipping Association.[20]

21. Perfect Potato Packers did not have its own payroll.[21]

22. At Weller's direction, Perfect Potato Packers paid Weller for the potatoes by bank cashier's check payable to Weller.[22]

23. Payment by cashier's check was done to allow Weller to "selectively" pay obligations and favor his solar heating businesses.[23]

24. Weller had opened two solar heating companies; Northeast Solar Resources (also operated out of Weller's office facilities on Shoham Road, East Windsor, Connecticut) and New York Solar Resources.[24]

25. Creditors of Weller were sometimes paid directly by Perfect Potato Packers through the use of its corporate checks.[25]

26. The Weller potato operation included at least the following companies in addition to Perfect Potato Packers: Weller International (sole stockholder was Weller's wife, Patricia); Weller Potatoes, 1982, Inc. (stockholders were Benoit and Sedar); Nurserymen's and Farmer's Shipping Association (a nonstock corporation whose directors were Weller, R. S. Vanderbourn, and Russell Kellum); Weller Farms, Inc. (Weller is sole stockholder); Dick Weller, Inc.

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[17] Hearing Transcript pages 146, 165–166, 190–191, 194–195, and 298–299.

[18] Hearing Transcript pages 146–147, 221–222, and 299.

[19] Hearing Transcript pages 148–149.

[20] Hearing Transcript pages 167–169, 197, 203–204, 222–223, and 295–296. Also see Finding of Fact No. 26, below.

[21] Hearing Transcript page 189.

[22] Hearing Transcript pages 36–51, 207–210; Complainant's Exhibits Nos. 7, 10, 11 and 12.

[23] Hearing Transcript pages 209–210.

[24] Hearing Transcript pages 272–274, 295 and 337–339; Complainant's Exhibit No. 17.

[25] Hearing Transcript pages 264–272, 299–300, and 311.

(Weller is sole stockholder); Brokerage Services, Inc. (Weller is sole stockholder); Weller Potatoes (Canada) Ltd. (Weller is sole stockholder); Idaho Company (Weller is sole stockholder); Weller Import-Export Ltd. (stockholders are Thomas Hand and Francis DiPietro); Dick Weller (Ontario) Ltd. (David Black is sole stockholder).[26]

27. All but the Canadian companies were physically located in the facility owned by Weller at Shoham Road in East Windsor, Connecticut.[27]

28. As cash flow or other circumstances required, money was shuffled back and forth among the several businesses, credits to one company assigned to another, or debts of one company directly paid by another.[28]

29. Perfect Potato Packers paid Weller for the potatoes it purchased from him.[29]

30. Weller gave a creditor of Perfect Potato Packers (Jerome Distributors) a personal note to cover the corporation's indebtedness of $76,347.75.[30]

31. Northeast Solar Resources paid a debt on behalf of Perfect Potato Packers in the amount of $5,300.00. When the amount was repaid to Northeast Solar Resources, it was repaid in the amount of $10,000.00. Respondent's books reflect that $5,300.00 was credited to the debt owed Northeast Solar Resources, and $4,700.00 was credited to its Weller account.[31]

32. Weller was issued a PACA license on January 29 1973. This license terminated on January 29 1984, when Weller failed to renew it in accordance with the requirements of section 4(a) of the PACA (7 USC 499d(a)). By a Consent Decision filed August 28 1984, (*In re Phillip R. Weller d/b/a Richard Weller*, PACA #2-6604) a finding was made that Weller committed willful, flagrant and repeated violations of the PACA by failing, during the period October 1981 through August 1983, to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $823,611.38 for 387 lots of potatoes purchased, received, and accepted in interstate and foreign commerce.[32]

33. On May 19 1983, three reparation complaints under the PACA, including one for $275,000, were pending against Weller.[33]

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[26] Hearing Transcript pages 180, 199-203, 293-295, and 333-339.
[27] Hearing Transcript pages 296-297.
[28] Hearing Transcript pages 300, 315-319.
[29] Hearing Transcript pages 322 and 337-339; Complainant's Exhibit No. 17.
[30] Hearing Transcript pages 312-313.
[31] Hearing Transcript pages 314-317.
[32] Hearing Transcript pages 353-354; Complainant's Exhibit No. 19.
[33] Complaint ¶ 11; Hearing Transcript pages 351-352; Complainant's Exhibit No. 18.

34. Respondent corporation's PACA license would not have been issued had complainant known or suspected Weller's control of respondent's business affairs, funds and personnel.[34]

35. The statements by Benoit, Sedar, and Frascona on respondent's PACA license application concerning their ownership and control of respondent corporation were false and misleading in the sense that they concealed Weller's dominating control of all aspects of the various businesses, including PPP, Inc.[35]

36. The acts of Benoit, Sedar, and Frascona in making false and misleading statements on respondent's application for a PACA license, and Weller's act of soliciting such false and misleading statements, are willful violations of sections 3 and 8(c) of the PACA (7 USC §§ 499c and 499h(c)) and section 46.4 of the Regulations (7 CFR § 46.4)

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[34] Complaint ¶ 12; Hearing Transcript pages 352-356; Complainant's Exhibit No. 19.

[35] Complaint ¶ 13; Hearing Transcript pages 9-18, 27, 40-41, 51-52, 133-150, 165-169, and 176-177; Complainant's Exhibits Nos. 2, 4, 8, 13, 16, and 17.

Respondent, in its motion for reconsideration, inaccurately characterizes this comment as the "basis for the decision against respondent . . ." Page 1, respondent's motion for reconsideration [of the decision and order] filed September 16 1985.

The record establishes that the individuals were all aware of the serious financial problems besetting Weller and his various businesses. These financial difficulties gravely threatened Weller's license as a Perishable Agricultural Commodity handler so Weller allowed his license to lapse, and agreed to entry of a consent decision concerning failure to promptly pay over $800,000 for potatoes he purchased.

Respondent corporation was formed for the precise, clear and primary purpose as a "front" to hold a PACA license and continue Weller's extensive potato business.

This conspiracy-like arrangement to conceal Weller's control and participation is clearly in violation of the spirit of the law and regulations.

In essence, respondent corporation was formed for the purpose of evading federal regulatory control over licensees and those "responsibly connected" with licensees.

The creation of a new business entity with a different legal form or structure, while the people play musical chairs, is prohibited. *Diane Mattes d/b/a Diane Mattes Livestock, et al.* v. *USDA*, 721 F2d 1125, 1131 (CA 7 1983). See also § 3.28 in 1 Davidson, *Agricultural Law*, Ch. 3 (1981 and August 1984 Supp.) *In re George Townsend, et al.* 35 Agric. Dec. 1604, 1605, 1607, 1609, 1610-1615, 1617 (1976).

Here, respondent corporation Perfect Potato Packers was formed by Weller from bits and pieces of his other business operations to enable him to continue dealing in potatoes even though his PACA license had expired and several reparations proceedings pending against him could remain unsatisfied. (Unsatisfied final reparations decisions automatically suspend a PACA license.) Weller attempted to avoid these problems by forming the respondent corporation.

This action, brought pursuant to section 8(c) of the PACA (7 USC § 499h(c)), seeks revocation of respondent's PACA license because the license was obtained through the use of false and misleading statements in its application. The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S-2163 (May 29 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. 1041, 71 Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodites. *Chidsey* v. *Guerin, 443 F2d 584 (6th Cir. 1971); O'Day* v. *George Arakelian Farms, Inc.*, 536 F2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 USC § 499b." *Id.* at 858. Enforcement is effectuated through a system of licensing with penalties for violations. H.R. 1041, 71st Cong., 2d Sess. (1930) 3. See, also *George Steinberg & Son, Inc.* v. *Butz*, 491 F2d 988 (2nd Cir.), *cert. denied*, 419 US 830 (1974).

As noted above, the instant case is brought pursuant to section 8(c) of the PACA, 7 USC 499h(c). Since there have been few cases brought pursuant to that section of the Act, it is one which is virtually unique in the annals of the Department. Section 8(c) of the Act prohibits an applicant from obtaining a PACA license through the use of a false or misleading statement in the application therefor, or through a misrepresentation, concealment, or withholding of facts respecting any violation of the PACA by any officer, agent, or employee of the applicant. Licenses obtained in violation of this section may be revoked. At first passage, the PACA did not include such a prohibition. The purpose of amending the PACA to include it was to close a loophole in the original legislation which might have allowed a violator of the Act to obtain a license through some kind of subterfuge. H. Rep. No. 489, 73d Cong., 2d Sess. (1934).

A review of the reported decisions in cases brought pursuant to the PACA discloses that only two decisions on the merits have been entered in cases brought pursuant to section 8(c).[36] In the first case, *United Fruit Distributors, Inc.*, 24 Agric. Dec. 1234 (1965), the applicant falsely named a person who was not the corporation's president, treasurer and holder of 50% of its stock. In view of the

[36] See, also *Latin-American Frt. and Shipping Corp.*, 14 Agric. Dec. 763 (1955), a case brought pursuant to § 8(c) in which the respondent failed to file an answer, and a default judgment was entered.

false and misleading statements on the application, and in view of the testimony that, had the Department been informed of the identity of the person who truly was the corporation's president, treasurer and 50% stockholder that a bond pursuant to section 4(e) of the PACA (7 USC 499d(e)), would have been required of the applicant before the corporation's license would have been issued, the corporation's license was revoked. In the second case, *Clara DeVault*, 25 Agric. Dec. 1389 (1966), the respondent, an individual, used a new name in applying for a PACA license without disclosing that she had been formerly licensed under a different name. In view of the fact that the new license which was issued to her would not have been issued without the posting of a surety bond had she disclosed in answer to the questions on the application that she had been previously licensed under another name, her new license was revoked.

It is alleged by the complainant that in applying for its license under the PACA, Perfect Potato Packers failed to disclose Weller's dominating control of and interest in all aspects of respondent's affairs. Had Weller's control and direction of respondent's affairs been revealed to the Department at the time that the corporation applied for its license, the license would not have been issued. Thus, under the two cases discussed above, Perfect Potato Packers' license should be revoked. The issues raised are discussed below.

A. Perfect Potato Packers, Inc., was merely an alter ego of Weller.

The evidence is clear that Weller was a potato dealer who had been licensed under the Act for a number of years. It is also clear that Weller's potato business was conducted through a bevy of corporate entities, and that, in the 1982-1983 time period, his businesses were having financial difficulties. In order to enable him to continue to function in the industry, Weller established Perfect Potato Packers as an alter ego through which he could sell potatoes to other dealers in the industry and conceal the proceeds from his creditors.[37] In addition, the establishment of PPP also enabled Weller to avoid problems with transportation companies arising out of his potato operation.[38]

The evidence clearly establishes that, in applying for its PACA license, Perfect Potato Packers did not indicate that Weller had any involvement in the corporation. Rather, three other individ-

[37] The Department's investigator testified that Weller's bookkeeper, Mr. Stanley Karasinski, told her that respondent purchased "all [the] potatoes from Mr. Weller because Mr. Weller didn't want his receivables attached." Hearing Transcript page 41.

[38] Hearing Transcript pages 174-177.

uals (Benoit, Frascona and Sedar) were listed as responsibly connected with it. These three individuals were employees of Weller. They were operating pursuant to his direction and control at all times. Further, the record clearly establishes that Perfect Potato Packers was incorporated as a result of contacts which Weller or Mr. Salvatore Julian (a Weller employee) had with Philip E. Tatoian, Jr., Esq., who was the attorney who prepared the paperwork by which the corporation was formed.

At no time was the corporate respondent ever operated independently of Weller's potato business. It operated from his building; indeed it shared his offices; none of its employees or agents were ever independent of Weller; it used his telephones; and another of Weller's business entities controlled all of the clerical work (including its payroll) involved in the operation of Perfect Potato Packers. All of the documentary evidence submitted into the record in this case supports the above assertions. None of the evidence submitted on behalf of the respondent supports the assertions of Weller and Frascona that Weller was not involved in the operation of Perfect Potato Packers.

The only conclusion which can be reached on the basis of the record adduced in this proceeding is that Perfect Potato Packers was merely an extension of Weller's potato enterprise. In fact, it was the alter ego through which he hoped to be able to continue to operate while he personally was under attack by his suppliers.

B. The respondent's PACA license contained a false and misleading statement in that Benoit and not Weller was reported as the owner of 100% of the corporation's stock.

The gravamen of the PACA violation with which respondent is charged is that it obtained its PACA license through the use of false and misleading statements on its application.

The application listed Marc G. Benoit as president, director and 100% stockholder.[39]

In fact, no stock had been issued to anyone. Throughout this time, the corporate records were wrapped in the printer's sealed cellophane package and kept at Attorney Tatoian's office. No one has requested or instructed Attorney Tatoian to issue any of the stock.

The evidence here establishes that beneficial ownership of PPP's stock rested in Weller. Weller recognized this when he made his petition to the United States Bankruptcy Court for the District of Connecticut, certifying under penalty of perjury that he did busi-

[39] Complainant's Exhibit 1.

ness as Richard Weller, Richard Weller Potatoes and Perfect Potato Packers.[40]

In testimony here, Weller denied owning Respondent's stock. However, in the bankruptcy proceeding, Weller certified under penalty of perjury that he was owner of 100% of the outstanding stock of Perfect Potato Packers, Inc., a corporation which he told the court "was originally activated to handle Richard Weller Potato." [41]

In addition, in a sworn statement given to Complainant's investigator, Weller said that—

> Perfect Potato Packers, Inc. was in reality only an extension of the Richard Weller operation and was *under my sole control, functioning at my direction and upon my instructions.*
>
> Although in applying for a license under the Perishable Agricultural Commodities Act, it was shown that Marc Benoit held 100% of the stock, in reality no stock was issued to any individual, no organizational meeting was held and no officers or directors were ever elected.[42] (emphasis added)

The record establishes beyond doubt that Benoit was not a stockholder of Respondent and that Weller held the primary beneficial interest in respondent's stock, activities, and existence.

Respondent's application for a PACA license was false in listing Benoit as 100% stockholder.

Further, respondent's application for a PACA license was misleading in that it failed to disclose in any way the dominating and controlling interest of Weller. Weller, without question, was the primary beneficiary of Respondent's existence and affairs, and dominated its every move.

At the time respondent submitted its application for a PACA license, there were three open reparation complaints pending against Weller.[43] Just one of these would have been fatal—Weller's alleged failure to pay for $275,000.00 worth of potatoes.

The evidence establishes that had Complainant's licensing authorities been aware of Weller's relationship to Perfect Potato Packers, Inc., an investigation would have been conducted into this

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[40] Complainant's Exhibits 16 and 17.

[41] Bankruptcy schedule B-2. Question F [sic; should be Question t], page 7, lines 18-21, Complainant's Exhibit 17.

[42] Complainant's Exhibit 13, page 1.

[43] Hearing Transcript pages 353-354.

application. Had Weller's dominating control and interest in the respondent corporation been known, the license application would have been carefully examined and checked.

The evidence establishes that had the full circumstances been known to complainant's licensing authorities, no license would have been issued to Respondent corporation.

Respondent's application for a license contained false and misleading statements which concealed Weller's domination and control of respondent's affairs. No license clearly would have been issued to respondent had complainant known the facts.

In deference to separate and independent proceedings to determine who are persons "responsibly connected [44] with a PACA licensee, this decision is narrowly based on the false and misleading statements made in the license application.

There appears to be no need here to now decide whether the corporate entity ought to be disregarded or whether it ever properly began to do business.

Further, for the same reasons, it is not intended to be decisive of any issue concerning the validity or occupancy of any reputed directors, officers or stockholders status or relationship to the respondent corporation.

It is sufficient here to determine that the application, as filed, falsely listed Marc Benoit as 100% stockholder and was misleading in the sense that it concealed the role of Weller in the corporate affairs.

Further, nothing in this decision should suggest that anyone here was a man of evil heart deliberately setting out to cheat and defraud. [b] Serious business difficulties existed for Weller which threatened the continued viability of the businesses.

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[44] § 4(b) of the Act (7 USC 499d(b)); 7 CFR 47.47.

[b] Respondent, on motion to reconsider, notes this lack of intent "to cheat and defraud." This was perhaps a too generous effort to prevent people from jumping to conclusions that a criminal-style conspiracy was established by this evidence. Perhaps it was, but this decision should not imply that possibility to a casual reader.

The effort to exonerate the individuals from this type of implication should not be read out of context wherein the behavior here is described as "a desperate effort" intended to have the effect of making it more difficult, if not impossible, for people to collect money owed by Weller or his various businesses.

Respondent contends that in the absence of an "intent to defraud" no finding of "false *and* misleading statements" is possible. (emphasis added)

The statute permits any license obtained through "a false *or* misleading statement in the application . . . " to be revoked. § 8(c) of the Act, 7 USC 499h(c), *emphasis added.*

It is respectfully submitted that the evidence here more than establishes the application as literally "false" *and* "misleading" to the complainant agency.

As a desperate effort to buy time and more operating room, the actions here were taken on a step-by-step basis. Filing the false application for a PACA license was one of those steps. It seems clear that each action and each individual participated in this matter with the idea that personal and business successes would follow, leading ultimately to full payment of all obligations. However, licensees under the Perishable Agricultural Commodities Act are not allowed to engage in such practices.

* * * * * * *

Respondent violated sections 3 and 8(c) of the PACA (7 USC §§ 499c and 499h(c)) and § 46.4 of the regulations (7 CFR § 46.4).

The only appropriate sanction under the binding precedents is revocation of the license.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends on appeal that the ALJ's key findings are not adequately supported by the record, but the record abundantly supports the ALJ's findings and conclusions. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required.[45]

In addition, the ALJ, who saw and heard the witnesses testify, was in the best position to resolve the conflicts in testimony, and the conflicts between the testimony of certain witnesses, including Weller, and their prior contrary statements made under oath or penalty of perjury.[46] For example, in *Fairbank* v. *Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), the court, in affirming a decision by USDA's Judicial Officer, stated:

> When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. National Labor Relations Board v.

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[45] *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[46] *Fairbank* v. *Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *Great Western Food Distributors* v. *Brannan*, 201 F.2d 476, 479-80 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); see also United States v. Oregon Medical Society, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

Respondent urges that there is no proof that a license was issued to respondent, or that the license number was 831032, as found by the ALJ. However, there is adequate evidence in the record to support the ALJ's finding of fact as to the issuance of the license, particularly in the absence of any evidence to the contrary (see the citations in note 3, *supra*). For example, respondent's APPLICATION FOR LICENSE filed May 16, 1983, has a block on the upper right-hand corner of the first page stating "FOR USDA USE ONLY," in which the figure 831032 is stamped, along with "05/26/84." I infer that the stamped number "831032" is the number of the license issued to respondent, and that the date of May 26, 1984, is the anniversary date on which the license was subject to renewal.[47]

The ALJ properly held that there was no need to determine whether the corporate entity should be disregarded (Initial Decision at 25). But if such a determination were necessary, the issue would not be decided under Connecticut law, as contended by respondent (Appeal Petition at 12), but, rather, under Federal law. Under Federal law, the fact that Weller was the beneficial owner of 100% of the stock of respondent would be enough to invoke the doctrine of piercing the corporate veil.[48]

Respondent argues that there was no intent to defraud, but intent to defraud is not at issue here. Respondent's license may be

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[47] Complainant has belatedly attached a copy of PACA license no. 831032 issued to Perfect Potato Packers Inc., with an anniversary date of May 26, 1984, to its response to respondent's appeal filed December 16, 1985. If it were not for the fact that the record contains sufficient evidence to support the ALJ's finding as to the issuance of the license, I would have complainant file a copy of the license certified by the custodian thereof with the Hearing Clerk, and I would take official notice of the license, pursuant to the Department's rules of practice (7 CFR § 1.145(i)). (The Judicial Officer has, in a number of prior cases, taken official notice of records on file in the Department (see, *e.g.*, *In re Saylor*, 44 Agric. Dec. ____ (slip op. at 523) (Sept. 20, 1985).

[48] *Corn Products Ref. Co.* v. *Benson*, 232 F.2d 554, 565 (2d Cir. 1956). *Accord Sebastopol Meat Co.* v. *Secretary of Agriculture*, 440 F.2d 983, 983-86 (9th Cir. 1971); *Bruhn's Freezer Meats* v. *USDA*, 438 F.2d 1332, 1342-43 (8th Cir. 1971); *Fairbank* v. *Hardin*, 429 F.2d 264, 266, 269 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *Capitol Packing Co.* v. *United States*, 350 F.2d 67, 77-78 (10th Cir. 1965); *In re Jackson Union Stockyards, Inc.*, 37 Agric. Dec. 1533, 1540-42 (1978), *aff'd mem.*, 597 F.2d 770 (5th Cir. 1979); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 566-68 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1559-61 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Bowman*, 23 Agric. Dec. 1074, 1089-90 (1964), *aff'd*, 363 F.2d 81, 84, 86 (5th Cir. 1966).

revoked if "the license was obtained through a false or misleading statement in the application therefor" (7 U.S.C. § 499h(c)). As shown by the ALJ, the license application was false and misleading. In addition, if it were necessary to show intent to defraud, that was shown here. The record here warrants the inference that respondent corporation was created to defraud creditors (in the short run)[49] and to defraud the Secretary by concealing Weller's ownership on the application for a license (because of his payment difficulties that would have prevented him from obtaining a new license in his own name).

Respondent argues that its license expired and, therefore, it cannot now be revoked. But the congressional authorization to revoke a license obtained through a false or misleading statement in the application therefor is not limited to revoking a license in effect when the final order is issued (see 7 U.S.C. § 499h(c)).[50] The license was subject to renewal on May 26, 1984 (CX 1, p. 1), and, therefore, it was in effect when the complaint was filed on May 16, 1984. But irrespective of whether it was still in effect when the complaint was issued, a license which has been allowed to expire can, nonetheless, be revoked or suspended in appropriate circumstances.[51]

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's license is revoked.

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[49] This defrauding of creditors *in the short run* was undertaken to shield respondent's cash flow from creditors so that, hopefully, in the long run, respondent would be able to pay all creditors in full.

[50] If there were such a limitation in the Act, it would seriously undermine the congressional purpose in this respect since licenses expire on their anniversary date each year, unless renewed, and it takes longer than a year to complete a revocation proceeding.

[51] *See Quinn* v. *Butz*, 510 F.2d 743, 749–50 (D.C. Cir. 1975); *Mandell, Spector, Rudolph Co.* v. *United States*, 364 F.2d 889, 893–94 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2440 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 985 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 686 (1980), *aff'd* (unpublished), 673 F.2d 1329 (6th Cir. 1981), *reprinted in* 41 Agric. Dec. 88 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1150–52 (1981); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re J. Acevedo & Sons, Inc.*, 34 Agric. Dec. 120, 138–40, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 250–53 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633 (1976), *aff'd per curiam* (unpublished), 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978).

The facts and circumstances as set forth herein shall be published.

This order shall take effect on the 30th day after service thereof on respondent.

Addendum:

Pertinent Statutory and Regulatory Provisions, pages i, ii.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

1. Section 3 of the PACA (7 U.S.C. § 499c) provides, in pertinent part, that:

> (a) * * * no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. * * *
>
> (b) any person desiring any such license shall make application to the Secretary. The Secretary may by regulation prescribe the information to be contained in such application and to be furnished thereafter. * * *

2. Section 46.4 of the Regulations issued pursuant to the PACA (7 CFR § 46.4), in pertinent part, provides as follows:

> (a) Any person desiring to obtain a license shall make application therefor on the currently approved form to be obtained from the Director or his representatives.
>
> (b) The applicant shall furnish the following information:
>
> (1) name or names in which business is conducted; place of business; mailing address; name, location and number of branches or additional business facilities, divisions or affiliates; name of firm succeeded and whether the applicant assumes responsibility of settling any complaints filed under the Act against the firm succeeded.
>
> * * * * * * *
>
> (3) *Type of ownership*: If a corporation, applicant shall furnish: (i) The month, day and year incorporated; (ii) the State in which incorporated; (iii) the name in which incorporated, and (iv) the address of the principal office.
>
> (4) *Full legal name, all other names used, if any, and home address of the owner.* If a partnership, the applicant shall furnish the full legal names, all other names used, if any, and home address of all partners, indicating whether

general, limited or special partners; or if an association or corporation the applicant shall furnish the full legal names, all other names used, if any, and home address of officers, directors and holders of more than 10 per centum of the outstanding stock and percentage of stock held by each such person.

* * * * * * *

(6) Whether the applicant, or in case the applicant is a partnership, any partner, or in case the applicant is an association or corporation, any officer, director, or holder of more than 10 per centum of the outstanding stock, has prior to the filing of the application:

* * * * * * *

(iii) Been an officer, director, stockholder, partner, or owner of a firm against which there is a pending complaint under the act known to the applicant. If so, he shall furnish the name and address of the firm against which there is a pending complaint;

* * * * * * *

(c) The application shall be signed by the owner, all general partners, or, in case the applicant is an association or corporation, a duly authorized official.

Section 8(c) of the PACA (7 U.S.C. 499h(c)) provides that:

If, after a license shall have been issued to an applicant, the Secretary believes that the license was obtained through a false or misleading statement in the application therefor, or through a misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee, he may after thirty days notice and an opportunity for a hearing, revoke said license, whereupon no license shall be issued to said applicant or any applicant in which the person responsible for such false or misleading statement or misrepresentation, concealment, or withholding of facts is financially interested, except under the conditions set forth in paragraph (b) of Section 4 of this Act.

In re: STANLEY and JOE RUSSO. PACA Docket 2-6897. Decided December 19, 1985.

Stephen Luparello, for complainant.
Respondent, *pro se.*

Decision by Victor Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 23, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1984 through January 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 10 sellers, 25 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $287,959.60.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complaint for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Stanley & Joe Russo, is a partnership comprised of Joe N. Russo and Stanley Russo, whose address is 1168 East 37th Street, Brooklyn, New York 10474.

2. Pursuant to the licensing provisions of the Act, license number 771200 was issued to respondent on May 3, 1977. This license was renewed annually, but terminated on May 3, 1985, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), when respondent failed to pay the required annual license fee. However, respondent's license was automatically suspended on January 2, 1985, pursuant to Section 7(d) of the Act (7 U.S.C. § 499g(d)), when it failed to satisfy a reparation award issued by the Secretary. *See* PACA Docket No. RD-85-24 (44 Agric. Dec. ____).

3. As more fully set forth in paragraph 5 of the complaint, during the period February 1984 through January 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from 10 sellers, 25 lots of fruits and vegetables, all being

perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $287,959.60.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 25 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR # 1.139 and 1.145).

Copies hereof shall be served upon parties.

[The Decision and Order became final on February 19, 1986.—Ed.]

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: TRI-COUNTY WHOLESALE PRODUCE CO. INC. PACA Docket No. 2-6300. Decided February 28, 1986.

Dennis Becker, for complainant.
Stephen McCarron, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

The order previously issued in this case is hereby stayed pending the outcome of proceedings for judicial review.

REPARATION DECISIONS

MISSION FRUIT & VEGETABLES DISTRIBUTORS, INC. *v.* CAL-MEX DISTRIBUTORS, INC. PACA Docket No. 2-6772. Decided January 16, 1986.

Consignment—duty to deal in expeditious and reasonable manner with perishable produce—Accounting-constructed accounting by Department's investigator accepted as most accurate indication of true value of produce.

Respondent accepted a consignment of cucumbers from complainant and dealt with a substantial portion of the cucumbers in a dilatory manner. Also respondent's accounting to complainant was found by the Department's investigator to be inaccurate. The constructed accounting made by the Department's investigator was used as the basis of an award of reparation to complainant.

E. Leigh Larson, Nogales, Arizona, for complainant.
Respondent, *pro se*.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $3,571.20 in connection with the shipment in interstate commerce of one truckload of cucumbers.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Both parties filed a brief.

FINDINGS OF FACT

1. Complainant, Mission Fruit & Vegetables Distributors, Inc., is a corporation whose address is P.O. Box 1268, Nogales, Arizona.

2. Respondent, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California. At the time of

the transaction involved herein respondent was licensed under the Act.

3. On or about November 18, 1983, complainant consigned to respondent and shipped to respondent in Chula Vista, California, from loading point in the state of Arizona, one truckload containing 648 crates of select cucumbers, and 144 crates of small cucumbers. It was agreed that respondent would be paid $.15 per crate as a sellig fee.

4. Respondent accepted the cucumbers on arrival, and on February 23, 1984, issued the following accounting to complainant:

2/23/84	36	CUCUMBERS	5.50	198.00
	72	CUCUMBERS	5.00	360.00
	684	CUCUMBERS (RETURNED)	0	0
	792	HANDLING CHARGES	.15	-118.80
		TOTAL:		$439.20

5. On October 3, 1984, a personal investigation was conducted by an employee of this Department of Agriculture at the place of business of respondent in Chula Vista, California. This investigation showed that the 684 crates of cucumbers shown on respondent's accounting as returned were shipped to the Los Angeles area on December 3, 1983. Other than in the bill of lading showing the above shipment there was no documentation in respondent's records showing the disposition of the 684 crates of cucumbers. Mr. Villalobos, respondent's president, stated that the entire lot of 684 crates of cucumbers had been dumped by the ultimate receiver in Los Angeles. The Department's investigator constructed an accounting based upon Market News Service reports for Los Angeles on December 5, 1983. It was assumed that 144 of the 684 crates shipped to Los Angeles were the small cucumbers, and these cucumbers were assigned a value of the basis of the Market News reports of $3.00 per crate. The remaining 612 crates were assigned a value on the basis of the Market News reports of $5.00 per crate, and the investigator's accounting showed a total due, after a deduction of $.15 per crate as a handling charge, of $3,571.20 for all the cucumbers consigned to respondent.

6. Respondent issued complainant a check in the amount of $439.20 along with its accounting on February 24, 1984. Complainant never cashed this check. Respondent issued complainant an additional check along with its answer on February 9, 1985, in the amount of $360.00. Complainant never cashed this check.

7. An informal complaint was filed on May 10, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

In its answer to the formal complaint respondent admitted that the accounting rendered to complainant in February of 1984, was incorrect. Respondent stated that it inadvertently failed to report 360 cucumbers sold to Milton Poulos on November 28, 1983, at $1.00 per crate for a total of $360.00. According to documentation submitted along with respondent's answer the remaining 324 crates of cucumbers were sent to Caballero Produce Company in Los Angeles on December 3, 1983, and were subsequently dumped. A federal inspection dated December 5, 1983, covering 324 crates of cucumbers at the place of business of Caballero Produce Company in Los Angeles was also included as an exhibit to the respondent's answer. This inspection report showed condition factors as follows: "Mostly fresh and firm. From 10 to 40%, average 26% yellowing. From 6 to 16%, average 12% various decays in various stages."

We are not favorably impressed with respondent's efforts, well over one year after having been consigned the subject cucumbers, to render an accounting for the 648 crates of cucumbers which it had first reported to have been returned, and subsequently reported orally to the Department's investigator to have been dumped. Regardless of the fact that this last accounting of the cucumbers by respondent may in fact be true, such accounting shows that respondent was dilatory in its dealing with the cucumbers. Perishable produce should not be allowed to sit in a warehouse for 10 to 15 days before it is shipped to another state for the purpose of being resold. See *Collins Bros. Produce Co.* v. *Dixieland Produce*, 38 Agric. Dec. 1031 (1979). We accept the constructed accounting of the Department's investigator as the most accurate indication available to us of the true value of the cucumbers. We find that respondent's failure to pay complainant the sum of $3,571.20 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Respondent's attempted defense based on the allegation that the cucumbers were sent to it without its authorization after it had been contacted by complainant with a request to receive the cucumbers on consignment has been considered by us and is deemed inadequate. Respondent was not required to accept the cucumbers when they arrived at its place of business if it had not contracted previously to take them. When respondent did accept the cucumbers it incurred an obligation to deal with them in an expeditious and reasonable manner.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,571.20, with interest thereon at the rate of 13 percent per annum from January 1, 1984, until paid.

Copies of this order shall be served upon the parties.

H. SMITH PACKING CORPORATION *v.* CHRIS SPIRIDIS d/b/a EASTERN FARMERS EXCHANGE COMPANY. PACA Docket No. 2-6778. Decided January 16, 1986.

Delivered sale—breach of contract as to condition and variety—Damages—failure to prove—Federal inspection—failure to prove produce covered by inspection same as produce received from complainant.

Complainant sold three truckloads of potatoes to resondent on a delivered basis. Respondent accepted the potatoes and proved a breach of contract as to two loads but failed to prove damages as to either load. Respondent failed to prove a breach as to the remaining bulk load of potatoes because such potatoes could not be identified with those covered by a federal inspection report submitted by respondent. Respondent also failed to prove damages as to the remaining load of potatoes.

Complainant, *pro se.*
Frank J. Johnson, East Islip, New York, for respondent.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $14,959.87 in connection with the shipment in interstate commerce of three truckloads of potatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant and asserting a set-off in the amount of $12,000 arising out of the same transactions as those alleged in the formal complaint. Complainant filed a reply to the set-off denying any liability to respondent.

The amount claimed in neither the formal complaint nor setoff exceeds $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is appli-

cable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, H. Smith Packing Corporation, is a corporation whose address is P.O. Box 189, Blaine, Maine.

2. Respondent is an individual, Chris Spiridis, doing business as Eastern Farmers Exchange Company, whose address is 11 Runyan Street, Bayshore, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about June 8, 1984, complainant sold to respondent 500 50 lb. master containers of 5 lb. poly bags of U.S. No. 1 round white potatoes at $6.00 per master container; 200 50 lb. master containers of 10 lb. poly bags of U.S. No. 1 round white potatoes at $5.30 per master container; and 200 50 lb. paper bags of U.S. No.1 round white potatoes at $4.25 per bag, for a total price of $4,910.00, delivered, to respondent's place of business in Deer Park, New York.

4. On or about June 8, 1984, complainant shipped from loading points in the State of Maine to respondent in Deer Park, New York 500 50 lb. master containers of 5 lb. poly bags of long russet potatoes; 200 50 lb. master containers of 10 lb. poly bags of long russet potatoes; and 200 50 lb. bags of U.S. No. 1 round white potatoes. The potatoes arrived at destinations on Monday, June 11, 1984, and were unloaded by respondent and placed in respondent's warehouse.

5. On or about June 9, 1984, complainant sold to respondent, and shipped from loading point in the State of Maine to respondent in Deer Park, New York, 57,820 pounds of bulk washed U.S. No. 1 russet Burbank potatoes at $10.35 per hundredweight, delivered, for a total price of $5,984.37. The potatoes arrived at destination on Sunday, June 10, 1984, and were unloaded by respondent and placed in respondent's warehouse.

6. On or about June 11, 1984, complainant sold to respondent 200 50 lb. master containers of 5 lb. poly bags of U.S. No. 1 round white potatoes at $6.00 per master container; 175 50 lb. master containers of 10 lb. poly bags of U.S. No. 1 round white potatoes at $5.30 per master container; and 456 50 lb. paper bags of U.S. No. 1 round white potatoes at $4.25 per bag; for a total price of $4,065.50, delivered, to respondent's place of business in Deer Park, New York.

7. On or about June 11, 1984, complainant shipped from loading points in the state of Maine to respondent in Deer Park, New York, 200 50 lb. master containers of 5 lb. poly bags of long russet potatoes; 175 50 lb. master containers of 10 lb. poly bags of long russet potatoes; and 456 50 lb. bags of U.S. No. 1 round white potatoes. The potatoes arrived at destination on Tuesday, June 12, 1984, and were unloaded by respondent, and placed in respondent's warehouse.

8. On June 13, 1984, at 10:00 a.m. a federal inspection was made of bulk potatoes in respondent's warehouse with the following results in relevant part:

Products Inspected:	Long Russet Potatoes in bulk with no distinguishing marks. Applicant states: 57,000 Lbs.
Condition of Load:	2 to 5 feet in height.
. . .	
Temperature of Product:	Range 70 to 76°F.
. . .	
Condition:	77% Bacterial Soft Rot mostly advanced. Sound potatoes, adjacent decayed potatoes, are wet and smeared with decayed tissue.
. . .	
Remarks:	Applicant states stock unloaded from trailer lic. 75-947 Me.

9. On June 13, 1984, at 2:15 p.m. another federal inspection was made of potatoes in respondent's warehouse. This inspection showed in relevant part as follows:

Products Inspected:	Long Russet Potatoes in fiberboard cartons containing 5-10 lb or 10-5 polly bags branded "5 lbs net, US No. 1" or "10 lbs net, US No. 1 Round White Vacationland Maine Potatoes, packed by H.Smith Packing Corp., Mars Hill Maine 04758." Applicant's count 393 5-10 lb. master cartons 700 10-5 lb. master cartons.

. . .

Temperature of Product:	Range 70 to 76°F.
. . .	
Condition:	10 lb lot: From 3 to 25%, average 13% Bacterial Soft Rot in various stages. Remainder firm. 5 lb lot: Generally firm. From 1 to 18%, average 6% Bacterial Soft Rot.
. . .	
Remarks:	Applicant states stock unloaded from trailer lic. no. 494930 Me. and 7907-RI

10. The formal complaint was filed on December 24, 1984, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant brings this action to recover the purchase price of the three truckloads of potatoes accepted by respondent totalling $14,959.87, no part of which has been paid. Respondent alleges that complainant breached the contract of sale in regard to each of the loads of potatoes, and that instead of owing complainant any part of the purchase price, complainant is indebted to respondent for losses on the three loads of potatoes in the total amount of $12,000.00.

First, we note that as to the first load and third load of potatoes respondent admits that the 50 lb. bags of round white potatoes were received in good condition. Respondent asserts that the remaining master containers of poly bags were received in an abnormally deteriorated condition. Complainant alleges that the high temperatures shown by the federal inspection of these potatoes is responsible for the excessive decay, which amounted to an average of 13% in the 10 lb. poly bags and 6% in the 5 lb. poly bags. One portion of the master containers arrived on June 11, at 6:00 a.m., and other portion arrived on June 12, at 6:00 a.m. Both portions of potatoes were jointly inspected at 2:15 p.m. on June 13, 1984. In view of the fact that this was a delivered sale, making complainant responsible for the potatoes during transit and requiring delivery in good condition, we find that the length of time between arrival

and inspection was not long enough to account for the excessive decay shown by the federal inspection even though temperatures were high. We find that complainant breached the contract of sale as to the master containers of potatoes. In addition it is obvious that complainant breached the contract of sale as to the variety of potatoes delivered in the master containers.

Although respondent alleged a loss resulting from complainant's breach of contract, and submitted a statement of expenses in an attempt to document such loss, respondent nowhere submitted an accounting covering the resale of any of the potatoes which are the subject of this proceeding. Respondent's "statement of expenses" contains no data whatsoever showing the amount for which the potatoes were resold. In the absence of this data we are unable to award respondent any damages for complainant's breach. See *Anthony Brokerage, Inc.* v. *The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979); *Relan Produce Farms* v. *Rushton & Co., Inc.*, 38 Agric. Dec. 1636 (1979); and *Genbroker Corp.* v. *Super Food Services*, 38 Agric. Dec. 83 (1979).

In an effort to prove a breach of contract as to the second load of potatoes respondent submitted the federal inspection referred to in finding of fact 8. Complainant objected strenuously to this inspection on the grounds that the potatoes covered by the inspection could not be identified with the bulk load of potatoes shipped by complainant. Although respondent submitted documentation in an effort to show that no potatoes other than complainant's were on hand during the time period in question, such documentation does not cover bulk potatoes, but only potatoes in poly bags or 50 lb. paper bags. We conclude that respondent has failed to prove a breach of contract in regard to the bulk load of potatoes. In addition we note that even had respondent proved a breach in regard to the bulk load of potatoes respondent also failed to prove damages as to these potatoes.

Respondent accepted the three loads of potatoes shipped by complainant, and has failed to prove any damages with respect to any of the loads. Consequently, respondent is liable to complainant for the full purchase price thereof, or $14,959.87. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. Respondent's set off, of course, cannot be allowed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $14,959.87, with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

H. SCHNELL & COMPANY, INC. *v.* GREEN VILLAGE FRUIT & VEGETABLE CO. INC. PACA Docket No. 2-6988. Decided January 16, 1986.

Reparation award for unpaid produce.

In re Green Village Fruit & Vegetable Co. Inc. PACA Docket No. 2-6988 signed by Donald A. Campbell, Judicial Officer; Andrew Stanton, Presiding Officer. Complainant sought reparation against respondent for a shipment of produce not paid for. Presiding Officer wrote respondent's counsel to show cause why a reparation order should not be issued. Receiving no reply, respondent was thus ordered to pay complainant $144,377, with 13% interest annually until paid.

Complainant, *pro se.*
G. Oliver Koppell, New York, N.Y., for respondent.

Andrew Stanton, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $144,377.00 in connection with a shipment of produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto.

In paragraph 3 of its answer, respondent denied complainant's allegations that it failed to pay for the produce and currently owes $144,377.00, but qualified such denial by adding "in that respondent did not willfully or knowingly commit any violations" of the Act. Respondent qualified its denial even further in paragraph 3A, stating that "it intends to remain current in its obligations to complainant in the future and is currently in the process of arranging to make payment to complainant." In a letter to respondent's counsel dated November 5, 1985, the Presiding Officer noted that the answer appeared to admit liability, and gave respondent's counsel 10 days from its receipt of the letter to show cause why a reparation order against respondent should not be issued in the amount alleged in the complaint. No response was received by the Department. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, H. Schnell & Company, Inc. is a corporation whose address is 243 New York City Terminal Market, Bronx, New York. Respondent, Green Village Fruit & Vegetable Co., Inc., is a corporation whose address is 220A New York City Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $144,377.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $144,377.00, with interest thereon at the rate of 13 percent per annum from April 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC., *v.* FOUR C'S PACKING CO. PACA Docket No 2-7002. Decided January 17, 1986.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely formal complaint was filed on May 24, 1985, in which complainant seeks to recover $2,597.50 which amount is alleged to be the unpaid portion of the purchase price for cucumbers sold to and accepted by respondent in March and April, 1985. Respondent filed an answer to the formal complaint on October 28, 1985, admitting that $2,001.50 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $2,001.50. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from May 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY, INC. *v.* METROPLEX PRODUCE COMPANY.
PACA Docket No. 2-7015. Decided January 17, 1986.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on August 16, 1985. Complainant seeks to recover $13,063.25, which amount is alleged to be the outstanding balance for mixed produce sold to and accepted by respondent between January 16 and May 1, 1985. Respondent filed an answer to the formal complaint on November 14, 1985, admitting that $12,211.50 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $12,211.50. Payment of this amount shall be made within 30 days

from the date of this order with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if an order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

TREE FRUIT MARKETING, INC. *v.* WEST COAST PRODUCE SALES, INC.
PACA Docket No. 2-7027. Decided February 4, 1986.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,850.00 in connection with a shipment of apples in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Tree Fruit Marketing, Inc., is a corporation whose address is P. O. Box 1707, Wenatchee, Washington 98801. Respondent, West Coast Produce Sales, Inc., is a corporation whose address is P. O. Box 3072, Visalia, California 93278. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,850.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,850.00, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

PACIFIC FRUIT, INC. *v.* PETER J. BONAFEDE d/b/a J. BONAFEDE & SONS. PACA Docket No. 2-6746. Decided February 10, 1986.

Probative value of prompt invoice—Failure to secure neutral inspection—Accord and satisfaction-express notice that proffered payment is conditioned upon acceptance as full satisfaction, necessary element of.

Where respondent failed to make timely objection to complainant's invoice, respondent's evidence was found insufficient to show contract price different from that shown on invoice or to show consignment rather than f.o.b. sale. Respondent's failure to secure neutral inspection precluded proof of chilling injury to bananas, and words on payment check cashed by complainant—"if incorrect please return", did not show that profferred payment was conditioned upon acceptance of check as full satisfaction of indebtedness.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Frank V. Charles, Chelsea, Mass., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,292.00 in connection with the shipment in interstate commerce of five truckloads of bananas.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim in the amount of $13,919.43 arising out of the same transactions. Complainant filed a reply to the counterclaim denying any liability thereunder.

Since amount claimed in both the formal complaint and the counterclaim does not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, re-

spondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Pacific Fruit, Inc., is a corporation whose address is 19 Rector Street, New York, New York.

2. Respondent, Peter J. Bonafede, is an individual doing business as J. Bonafede & Sons, whose address is 15–16 New England Produce Center, Chelsea, Massachusetts. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about September 30, 1983, complainant sold to respondent, and shipped from loading point at the port of Newark, New Jersey to respondent in Chelsea, Massachusetts, three truckloads of bananas, each containing 950 boxes at $8.00 per box, plus a handling charge of $.36 per box, and a fuel surcharge of $.37 per box, for a total invoice price for the three truckloads of $24,880.50, f.o.b.

4. On or about December 24, 1983, complainant sold to respondent, and shipped from loading point in the port of Newark, New Jersey to respondent in Chelsea, Massachusetts, two truckloads of bananas, one containing 920 containers at $6.00 per container, and the other containing 814 containers at $6.00 per container, plus $.40 per container for a handling charge, and $.37 per container for a fuel surcharge, or a total invoice price for the two truckloads of $11,739.18, f.o.b.

5. Respondent accepted the three truckloads of bananas shipped on September 30, 1983, and has paid complainant $22,030.50, leaving a balance still due and owing of $2,850.00.

6. Respondent accepted the two truckloads of bananas shipped on December 23, 1983, and has paid complainant $9,297.18, leaving a balance still due and owing of $2,442.00.

7. The informal complaint was filed on February 7, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent has raised a number of defenses to complainant's action. First, respondent claims that two of the truckloads sold on September 30, 1983, were not sold at $8.00 per box, but rather were to be priced at $1.00 per box less than the prevailing market price for a different brand of bananas. Second, respondent contends that the third load shipped on September 30, 1983, was not sold, but was consigned by complainant to respondent. Respondent lays great stress upon the fact that "complainant did not issue a confirmation of sale stating the quality of the bananas to be shipped or the prices agreed upon for the bananas shipped etc." We are frankly at

a loss to understand why this point was raised by respondent as a defense. The record clearly establishes that complainant promptly issued invoices stating the quantities and prices of the bananas, and nowhere does respondent deny receiving such invoices. Neither does the record show that respondent objected promptly to the invoices received. The duty to issue a "confirmation of sale" is placed by the regulations upon brokers. In any event the invoices sent by complainant accomplished the same purpose as a "confirmation of sale". We have carefully considered all of the evidence submitted by both parties in regard to the two shipments in question and have no hesitation in finding that respondent has failed to meet its burden of proof in regard to his allegation of a different pricing arrangement than that reflected in the invoice sent by complainant.

As to the third load of bananas shipped on September 30, 1983, respondent contends that such bananas were not sold, but rather were consigned to respondent by complainant. This load was, of course, also included on the same invoice as the other two loads, and such invoice clearly shows this load was sold at the same price as the other two loads. Again, we have examined all of the evidence submitted by the parties, and we conclude that respondent has failed to meet its burden of proving that this load was consigned by complainant.

As to the two loads shipped on December 23, 1983, complainant also promptly invoiced respondent for the prices shown in the findings of fact. Respondent again contends that there was a different pricing agreement. However, respondent has not shown that it objected promptly to complainant's invoice, and we find the other evidence submitted by respondent in an effort to prove a separate pricing agreement to be unconvincing.

Respondent also alleges that some of the bananas which it received had been damaged by chilling injury. However, respondent submitted no inspection by a neutral party to establish the extent or fact of such injury. Consequently this defense can be given no credence. See *Mutual Vegetable Sales* v. *Select Distributors*, 38 Agric. Dec. 1359 (1979).

Respondent raises as an additional defense the allegations that there was an accord and satisfaction between the parties as a result of complainant's acceptance of the two checks sent by respondent in payment of the two invoices. In *National Produce Distributors, Inc.* v. *Stewart Produce Company*, 21 Agric. Dec. 955 (1962) we stated ". . . to establish an accord and satisfaction, payment should be offered in full satisfaction of the demand, and be accompanied by acts and declarations amounting to express notice that the payment is conditional, and, if accepted, must be received

in satisfaction of the claim." Respondent asserts that because the checks had the printed words "if incorrect please return", complainant's acceptance of such checks accomplished an accord and satisfaction. This is clearly not the case. The elements of an accord and satisfaction have not been proven by the respondent.

Respondent accepted the five truckloads of bananas, and thus became liable to complainant for the full purchase price thereof, or $36,619.68. Of this amount respondent has already paid complainant $31,327.68, which leaves a balance still due and owing of $5,292.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. The counterclaim, since it arose out of the same transactions which were the subject of the complaint, should be dismissed.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation $5,292.00, with interest thereon at the rate of 13 percent per annum from January 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

CHIQUITA BRANDS, INC. *v.* JOSEPH WILLIAMS, JR. CO. INC. PACA Docket No. 2-6753. Decided February 10, 1986.

F.O.B. sale—Unloading and resale constitutes acceptance—Condition of produce on arrival must be established by neutral inspection showing exact extent of damage—Modification of contract allowing produce to be handled on consignment must be shown by clear and unambiguous language.

In a f.o.b. sale of bananas respondent accepted by unloading and reselling the produce. Respondent did not secure a neutral inspection of the bananas and thus failed to prove that they did not make good delivery. Respondent also failed to establish that the contract was modified to allow it to handle the bananas on a consignment basis. Complainant awarded reparation in the full amount of the purchase price, or $4,320.

George S. Whitten, Presiding Officer.
Marilyn Caruso, New York, N.Y., for complainant.
Richard Gee, Yalesville, Calif., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,320.00 in connection with the shipment in interstate commerce of one truckload of bananas.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim arising out of the same transaction as that which was the subject of the complaint. Complainant filed a reply to respondent's counterclaim denying any liability thereunder. The amount claimed in neither the formal complaint nor counterclaim exceeds $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Chiquita Brands, Inc., is a corporation whose address is 15 Mercedes Drive, Montvale, New Jersey.

2. Respondent, J. Williams, Jr. Co., Inc., is a corporation whose address is 116 Harrison Road, Wallingford, Connecticut. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about March 1, 1984, complainant sold to respondent one truckload containing 900 boxes of bananas at four dollars per box, plus a fuel surcharge of $360, and handling charges of $360, for a total amount of $4,320.00, f.o.b.

4. On or about March 1, 1984, complainant shipped the bananas from loading point in the state of New York to respondent in the

State of Connecticut. The bananas were imported from the country of Costa Rica.

5. The bananas arrived at respondent's place of business on or about March 2, 1984, and were unloaded by respondent. Respondent has not paid complainant any part of the purchase price of the bananas.

6. The formal complaint was filed on October 15, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Although respondent denies acceptance of the 900 boxes of bananas it is evident that respondent unloaded such bananas from the truck, and resold a portion of the bananas. We have held many times that such actions constitute sufficient exercise of dominion and control over produce so as legally to amount to an acceptance. See *Santa Clara Produce* v. *Caruso Produce Inc.*, 41 Agric. Dec. 2279 (1982) and *Crown Orchard Co.* v. *Mid-Valley Prod. Corp.*, 34 Agric. Dec. 1381 (1975). Having accepted the bananas respondent became liable to complainant for the full purchase price thereof less any damages caused by any breach of contract proved by respondent.

Respondent alleges that complainant breached the contract of sale by shipping bananas of extremely poor quality. Respondent's president, Joseph Williams, III, stated in a sworn affidavit that he personally inspected the bananas after their arrival and found that they were "of very poor quality in that they were of poor color, old, scarred and generally unsalable." We have often discounted testimonial evidence concerning the condition of perishable commodities, and stated the necessity of obtaining a neutral inspection showing the exact extent of damage. See *Mutual Vegetable Sales* v. *Select Distributors*, 38 Agric. Dec. 1359 (1979); *G. J. Albert, Inc.* v. *Salvo*, 36 Agric. Dec. 240 (1977); *Salt Lake Produce Co., Inc.* v. *Butte Produce Co. Inc.*, 32 Agric. Dec. 1732 (1973); *B. G. Anderson Company, Inc.* v. *Mountain Produce Co.*, 29 Agric. Dec. 513 (1970); and *O. D. Huff, Jr., Inc.* v. *Pagano & Sons*, 21 Agric. Dec. 385 (1962). We conclude that respondent has not met its burden of proving that the bananas failed to make good delivery on arrival.

Respondent's president also asserted that after noting the poor quality of the bananas he contacted complainant's area sales representative who stated that respondent "should keep the shipment, do with it what respondent could and he, the sales representative, would deal with it later." Assuming that this allegation by respondent's president is true, there is nothing in the alleged statement of respondent's sales representative from which we could con-

strue a settlement of any dispute between the parties, or which would authorize respondent paying for the bananas at less than contract price. Words such as "do the best you can", "the buyer should work it out", "handle best possible", or "handle to best advantage" do not constitute permission to handle a shipment on a consignment basis. See *Relan Produce Farms* v. *Rushton & Co., Inc.*, 38 Agric. Dec. 1636 (1979); *Barkley Company of Arizona* v. *Ifsco, Inc.*, 31 Agric. Dec. 279 (1972); *Frank Gaglione & Son* v. *Theron Hooker Co.*, 30 Agric. Dec. 528 (1971); and *Ralph Samsel* v. *L. Gillarde Sons Co.*, 19 Agric. Dec. 374 (1960).

Respondent accepted the bananas and has not proved a breach of contract on the part of complainant, nor has respondent proved that the contract was modified after acceptance. Accordingly, respondent is liable to complainant for the full purchase price of the bananas, or $4,320.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. Respondent's counterclaim, since it arose out of the same cause of action as alleged in the complaint, should be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $4,320.00, with interest thereon at the rate of 13% per annum from April 1, 1984, until paid. Copies of this order shall be served upon the parties.

HARVEST FRESH PRODUCE, INC. *v.* ALSUM PRODUCE, INC. PACA Docket No. 2-6791. Decided February 10, 1986.

F.O.B. sale with market protection—Failure to prove market decline.

Evidence supported contention of complainant that contract for sale of potatoes was f.o.b. at $14.25 per hundredweight with protection against market decline to be based on F.O.B. Washington State prices. Respondent failed to submit evidence of market decline and complainant awarded reparation based on original contract price less deduction for a shortage of 8 sacks on arrival.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $556.00 in connection with the shipment in interstate commerce of one truckload of potatoes.

A copy of the Report of Investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant did not file a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Harvest Fresh Produce, Inc., is a corporation whose address is P.O. Box 510, 1246 South Broadway, Othello, Washington.

2. Respondent, Alsum Produce, Inc., is a corporation whose address is P.O. Box 188, Friesland, Wisconsin. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about July 13, 1984, complainant sold to respondent, through H. L. Newland, of Pacific Sun Marketing, acting as broker, one truckload containing 450 100 pound new burlap sacks of U.S. No. 1, size A, Round Red potatoes, at the agreed price of $14.25 per hundredweight, f.o.b., with market protection through July 17, 1984.

4. On or about July 13, 1984, complainant shipped from loading point in Othello, Washington to respondent in Friesland, Wiscon-

sin, the potatoes described in Finding of Fact 3 above, except that the truck was short 8 sacks of potatoes. Respondent accepted the potatoes on arrival.

5. Complainant invoiced respondent on the basis of 450 sacks of potatoes at $14.25 per hundredweight, or $6,412.50. Respondent paid complainant for 442 sacks of potatoes on the basis of $1.00 per sack adjustment for market decline, or $5,856.50.

6. The formal complaint was filed on January 17, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The parties to this proceeding agree that their communication with each other was only through the broker, H.L. Newland of Pacific Sun Marketing. Complainant alleges that the sale of the potatoes was f.o.b. with no provision for adjustment due to market decline. Respondent asserts that the sale was on a delivered basis at a price of $18.00 per hundredweight with a provision for market protection to be measured against potatoes which respondent was purchasing out of Alabama. The broker states that the sale of the potatoes was for $14.25 per hundredweight, f.o.b., with market protection through July 17, 1984, but that the market protection was to be based on f.o.b. prices of potatoes originating in Washington state.

We have carefully assessed the evidence presented by both parties to this proceeding and find that although there was a provision for market protection, such protection was to be based on f.o.b. shipping point prices, and not on the prices of potatoes originating in the state of Alabama. It should be noted that even had we found in respondent's favor in regard to the question of where the market protection was to be measured, respondent failed to submit evidence demonstrating any decline in price of potatoes originating in Alabama. Respondent also did not demonstrate a decline in market price of potatoes originating in Washington state.

Respondent is liable to complainant on the basis of the invoice price of $14.25 per hundredweight for the 442 sacks of potatoes received, or a total of $6,298.50, less the $5,856.50 which it has already paid complainant, or a net amount of $442.00. Respondent's failure to pay complainant such amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $442.00, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

VALE MAYES & COMPANY, INC., *v.* KALECK DISTRIBUTING COMPANY.
PACA Docket No. 2-6810. Decided February 10, 1986.

Testimony evidence of the condition of perishable commodities discounted.

Complainant sold respondent two loads of cantaloupes, which graded U.S. #1 prior to shipment. Respondent claimed the produce arrived in poor condition, but presented no fed. inspection of the produce involved. Respondent ordered to pay reparation.

Allan R. Kahan, Presiding Officer.
B.R. Stewart, Edinburg, Texas, for complainant.
E.G. Hall, McAllen, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on July 27, 1984 and a formal complaint was filed on November 15, 1984. Complainant seeks to recover $4,935.35, which amount is alleged to be the outstanding balance for two loads of cantaloupes sold to, respondent and shipped in interstate commerce during the period June 7 through June 13, 1984.

A copy of the Department's report of investigation was served upon the parties. Respondent filed an answer to the complaint denying liability and claiming a breach of warranty by complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20), is, therefore, applicable. Pursuant to this procedure the verified pleadings of the parties are considered part of the evidence in this case, as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, with two verified statements by witnesses, to which respondent filed an answering

statement, and to which complainant filed a statement in reply. Neither party filed briefs.

FINDINGS OF FACT

1. Complainant, Vale Mayes & Company, Inc., is a corporation whose address is P.O. Box 966, Edinburg, Texas 78540. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Louis Kaleck, is an individual doing business as Kaleck Distributing Company, whose business mailing address is P.O. Box 1432, McAllen, Texas 78501. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On June 7, 1984, complainant sold to respondent for delivery to his customer in interstate commerce 1,095 cartons of cantaloupes, made up of 168 cartons of #12's at $7.00 per carton f.o.b.; 504 cartons of #16's at $7.00 per carton f.o.b.; and 423 cartons of #23's at $5.50 per carton f.o.b. One ryan recording instrument cost $22.50. Thus, the total cost of the shipment was $7,053.00.

4. Prior to the produce being shipped, it was federally inspected and found to grade U.S. No. 1 and have "good internal quality".

5. The produce described in paragraph 3 was shipped June 7, 1984, and arrived in Pittsburgh, Pennsylvania on June 11, 1984, where it was received and accepted by Gullo Produce, Inc.

6. On June 13, 1984, complainant sold to respondent for delivery to his customer in interstate commerce 1,119 cartons of cantaloupe, made up of 199 cartons of #9's at $6.50 per carton f.o.b.; 130 cartons of #12's at $7.50 per carton f.o.b.; 112 cartons of #15's at $8.00 per carton f.o.b.; 616 cartons of #18's at $7.50 per carton f.o.b.; and 112 cartons of #23's at $5.50 per carton. One ryan recording instrument cost $22.50. Thus, the total cost of the shipment was $8,098.00

7. Prior to the produce described in paragraph 6 being shipped, it was federally inspected and found to grade U.S. No. 1 and have "good internal quality".

8. The produce described in paragraph 5 was shipped June 13, 1984, and arrived in Pittsburgh, Pennsylvania on June 17, 1984, where it was received and accepted by Gullo Produce, Inc.

9. Although the total invoiced price of the two shipments was $15,142.00, respondent paid complainant a total of $10,215.65.

10. The complaint was filed on November 15, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent's defense to complainant's action herein is the allegation that complainant breached the contract of sale by supplying cantaloupe which arrived in a deteriorated condition. In other words, respondent alleges a breach of contract based upon the alleged violation of the warranty of suitable shipping condition applicable in f.o.b. sales. There is one problem which precludes us from finding such a breach of contract on the part of complainant. Complainant has introduced credible evidence that both shipments of cantaloupes met the grade U.S. No. 1 prior to shipment. The evidence indicates that the June 7, 1984 purchase arrived in Pittsburgh on either June 10 or 11th, and the purchase of June 13th arrived in Pittsburgh on June 17th. Respondent, in its answering statement, submitted one abridged report of federal inspection which respondent contends shows the product to be in poor condition. The inspection report, B99276, is dated June 15, either four or five days after the arrival and acceptance of the first load, and two days before the arrival of the second load. Since it is obvious that the proffered inspection report cannot relate to the second load, we must determine whether it constitutes an inspection of the first load which arrived on either June 10th or 11th.

Three statements within the proffered document make us conclude that the inspection report dated June 15th does not relate to either of the transactions at issue here. The first statement concerns the total number of cartons contained on the truck. Complainant's evidence shows 1,095 cartons were shipped on June 7th. The June 15th inspection report indicates 1,064 cartons, a difference of 31 cartons. Nowhere in respondent's evidence or pleadings is this discrepancy explained. In addition, the evidence shows that the June 7th shipment contained on ly size 12's, 18's, and 23's cantaloupes, yet the inspection report of June 15th indicates that the truck which was inspected contained cantaloupes in sizes 9's and 15's in addition to the sizes shipped. Even if we were to disregard this significant inconsistency, the final, conclusive discrepancy is the number of cartons of each size. The inspection report of June 15th indicates 392 cartons of #9's and #12's and 672 cartons of #15–18 and 23's. There is no way to match this with the 168 cartons of #12's, the 504 cartons of #18's, and the 423 cartons of #23's shipped to respondent by complainant on June 7, 1984. The only conclusion we can come to after our examination of the proffered inspection report of June 15th is that the report apparently does not relate to either of the two shipments at issue here.

Respondent's only remaining evidence relating to the cantaloupe's condition is its testimonial evidence.

We have often discounted testimonial evidence concerning the condition of perishable commodities, and asserted the necessity of obtaining a neutral inspection showing the exact extent of damage. See *Mutual Vegetable Sales* v. *Select Distributors*, 38 A.D. 1359 (1979), and cases there cited. The problem with such evidence is that it is self-serving, and is almost never based on adequate and randomly selected samples as well as the failure to state the exact percentage of damage based on precisely defined criteria. For us to accept this type of testimony it would be necessary that it first be proved by substantial evidence that no federal or private inspection was available and secondly, that the commodity was inspected by several neutral parties who took a significant number of samples, randomly selected, from the entire lot of produce, and examined each fruit in each sample and accurately recorded the exact percentage of damaged fruit from each sample, with what was considered as "damage" being precisely defined. *Produce Specialists of Arizona, Inc.* v. *Gulfport Tomatoes, Inc.*, 42 A.D. 1194 (1979).

Respondent accepted the subject cantaloupes, and has failed to prove a breach on the part of complainant. Respondent is, therefore, liable to complainant for the full purchase price of the cantaloupes, or $15,142.00 less the $10,215.65 which respondent already paid to complainant on July 16, 1984, or a net amount of $4,926.35. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation $4,926.35 with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

ASSOCIATED PRODUCE DISTRIBUTORS *v.* KURT VAN ENGEL COMMISSION CO. INC. PACA Docket No. 2-6820. Decided February 10, 1986.

Cover—no duty on buyer to give notice to seller of intent to make cover purchase against goods not shipped.

Complainant was forced to have contracted to sell two truck loads of broccoli to respondent at a price. After shipping one load complainant advised the broker that it would probably be unable to ship the second load, and was orally informed by the broker that respondent would purchase replacement broccoli if the second load were not shipped. Complainant shipped only a partial second load and after receipt of

same respondent made cover purchase without first advising complainant of its intent to do so. It was held that there is not duty on a buyer to give notice of intent to cover against goods not shipped.

Geroge S. Whitten, Presiding Officer.
Thomas R. Oliveri, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,512.00 in connection with the shipment in interstate commerce of a truckload of broccoli.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Bennett W. Brown, Reno D. Costella, Lael C. Lee, and Halbert Moller, doing business as Associated Produce Distributors, whose address is P.O. Box 1155, Castroville, California.

2. Respondent, Kurt Van Engel Commission Co., Inc., is a corporation whose address is 115 South Second Street, Milwaukee, Wisconsin. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about September 25, 1984, complainant sold to respondent, through a broker, Tracy Willis Co. of Salinas, California, one truckload containing 1,056 cartons of size 14 broccoli, Green Glen label, at $6.00 per carton, plus $.65 per carton for cooling, $.15 per

carton for palletization, and $65.00 for top ice, or a total price for the truckload of $7,245.80. The terms of sale were stated to be "FOB. *A second load to be shipped Thursday at same price.*"

4. On or about September 26, 1984, complainant advised the broker that it had light supplies of broccoli for the week, and it was questionable whether complainant could make the second load as contracted. The broker advised complainant that both loads were committed at $6.80, and that if the second load was not shipped respondent would have to buy a replacement load, and complainant would be responsible for any additional cost over the agreed $6.80 price.

5. On or about September 28, 1984, complainant shipped to respondent a partial truckload of broccoli consisting of 288 cartons of size 14, Green Glen label at $6.00 per carton, plus $.65 per carton for cooling, $.15 per carton for palletization, and $19.50 for top ice, or a total price of $1,977.90.

6. Respondent accepted the first load of broccoli and the second partial load of broccoli, and made cover purchases to supply the 772 cartons of broccoli not shipped by complainant. Respondent purchased 196 cartons of size 14 broccoli on September 29, 1984, from California Artichoke and Vegetable Growers Corporation of Castrolville, California at a f.o.b. price of $10.80 per carton including cooling and palletization, or a total price of $2,116.80. Respondent purchased an additional 576 cartons of size 14 broccoli from Tom Bengard Ranch, Inc., of Salinas, California on September 29, 1984, at $9.80 per carton, or a total price of $5,644.80. The total cover price for the 772 cartons of broccoli was $7,761.60. Respondent paid complainant in full for the 288 cartons of broccoli shipped on September 28, 1984, and after deducting its cover cost of $2,512.00, respondent paid complainant $4,733.00 of the original $7,245.80 invoice price on the first load of broccoli.

7. The formal complaint was filed on March 11, 1985, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant asserts that the terms of its contract of sale in regard to the first shipment of broccoli only required that it ship a second load of broccoli at the same price if it had sufficient supplies to do so. However, the memorandum of sale issued promptly by the broker does not state any such qualification in regard to complainant's duty to ship a second load at the same price. We conclude that complainant was obligated to ship an entire load of broccoli at the same price as the first load.

Complainant also asserts that it never received any communication either from the broker or from the respondent, that respondent would make cover purchases due to complainant's failure to ship the entire 1,060 cartons of broccoli on the second load. However the broker clearly states in a letter to this Department, which was included as an exhibit to the Department's report of investigation, that he verbally informed complainant that respondent would buy replacement broccoli if the second load were not shipped at the agreed $6.80 price.

In addition complainant calls our attention to the fact that a second broker's memorandum of sale was issued as to the shipment of 288 cartons of broccoli from complainant to respondent, and that this confirmation nowhere states that respondent would be buying against the contract of complainant. We do not consider this to be at all significant. Complainant is somehow under the mistaken notion that respondent had a legal duty to give complainant notice prior to making the cover purchases. However, there is no such duty where, as here, there is a failure to ship produce which a shipper is contractually bound to ship. See Uniform Commercial Code §§ 2-711 & 2-712. Complainant knew without being told that it had failed to ship to respondent the broccoli which it had previously obligated itself to ship. Complainant also should have known that respondent had a legal right to make cover purchases as a consequence of complainant's failure.

We find on the basis of all of the evidence that the cover purchases made by respondent were prompt and proper and that the cost of such cover was properly deducted by respondent when it made payment to complainant. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

UCON PRODUCE, INC. *v.* BEN VASQUEZ PRODUCE, INC. PACA Docket No. 2-6957. Decided February 10, 1986.

Acceptance of product, even if not conforming to original order, obligates purchaser for the cost of the product.

Respondent ordered potatoes, through a broker which were shipped by complainant. Respondent accepted potatoes, although claiming the complainant shipped more than ordered. Respondent found liable for cost of entire shipment.

Allan R. Kahan, Presiding Officer.
Bon Harris, Ucon, Idaho, for complainant.
Ben Vasquez, Jr., Houston, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 999a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in connection with the sale of 421 cartons of Idaho potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability, but claiming that an extension of credit was agreed to by the parties. The amount claimed as damages in the formal complaint does not exceed $15,000.00, and, therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are a part of the evidence in this case as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements, but neither party did. On December 2, 1985, complainant filed a two sentence brief stating that respondent still owed complainant the entire amount for the potatoes, $4,455.00.

FINDINGS OF FACT

1. Complainant is a corporation whose address is 195 West Broadway, Ucon, Idaho 83454. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Ben Vasquez Produce, Inc., is a corporation whose address is 800 Booth Street, 2548 Airline Drive, Houston, Texas 77009. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about November 29, 1984, complainant sold to respondent 225 50 pound cartons of U.S. No. 1-70 count Idaho potatoes at $21.00 per carton, 100 50 pound cartons of U.S. No. 1-80 count Idaho potatoes at $21.00 per carton, 75 50 pound cartons of U.S. NO. 1-90 count Idaho potatoes at $19.00 per carton; and 22 100 pound burlap sacks of U.S. No. 1 Idaho (bakers) potatoes at $15.00 per sack. The terms of the sale were "f.o.b. prices".

4. The sale was negotiated by C. H. Robinson Company, a broker located in Houston, Texas.

5. On or about November 29, 1984, beginning at 8:00 a.m. and concluding on November 30, 1984 at 3:00 p.m., the potatoes which were the subject of the contract between complainant and respondent were federally inspected at complainant's place of business in Ucon, Idaho, with the potatoes grading U.S. No. 1 and meeting the size as marked.

6. On November 30, 1984, complainant shipped the said potatoes to respondent in Houston, Texas. Upon arrival, respondent accepted said potatoes.

7. Respondent has made no payment to complainant in connection with the potatoes which were invoiced at $4,455.00.

8. The complaint was filed on May 30, 1985, which was within nine months from the date the cause of action arose.

CONCLUSIONS

Respondent has failed to pay complainant $4,455.00, the entire amount of the contract price of the potatoes. Respondent received and accepted the potatoes, and is thus liable for the contract price less damages due to any breach of warranty by complainant. Respondent made no allegation regarding the quality of the potatoes, and is thus liable for the contract price, absent other valid defenses.

Respondent did allege that it had originally ordered fewer potatoes than were shipped and accepted. Under section 2-601 of the Uniform Commercial Code, respondent had the right, upon improper delivery of the extra "unordered" potatoes to accept the units it had ordered and reject the rest. U.C.C. § 2-601(c) (1978). Had respondent rejected the excess potatoes, it would have had no further obligation for those "extra" potatoes. U.C.C. § 2-602(2) (1978). By not properly rejecting the potatoes, respondent accepted them, and thus became liable for their cost. U.C.C. § 2-606 (1978).

Respondent also alleges that as a result of the delivery of the extra potatoes, the parties agreed to an unspecified extension of credit. Such claim by respondent is not, in the least, credible. Since respondent failed to pay for the amount of potatoes it did order promptly—nor had it made any effort to make even partial payment to complainant by the time it filed its answer nine months later, respondent's claims are of no value.

Respondent is, therefore, liable to complainant for the contract price of $4,455.00. Its failure to pay such sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $4,455.00, with interest thereon at the rate of 13% per annum from January 1, 1985, until paid.

Copies of this order shall be served upon the parties.

WELL-PICT, INC., *v.* SAM WANG FOOD CORP., INC. PACA Docket No. 2-6737. Decided February 14, 1986.

Acceptance-partial unloading—Inspection-timely—Notice of breach-timely—F.O.B.-suitable shipping warranty—Damages-need not be calculable with mathematical accuracy—Damages-deviation from normal method of computation allowed.

In a F.O.B. sale of strawberries respondent was found to have accepted by unloading. Complainant's breach of warranty of suitable shipping condition was demonstrated by a Federal inspection made 30 hours after arrival showing an average of 35% soft and leaking berries and an average of 14% Gray Mold Rot. Notice of the breach given 2 to 3 days after arrival was found to be timely. Respondent dumped approximately one half of the berries and paid for the remainder at the contract rate plus Tectrol and cooling expenses for the entire load. This was found to be an adequate approximation of respondent's damages. Respondent's counterclaim arising out of the same transaction was denied because respondent failed to establish its contention that the berries were sold as U.S. No. 1, and because respondent failed to account in the normal manner by showing the gross proceeds of the resale of the berries less expenses of the resale.

George S. Whitten, Presiding Officer.
Thomas P. Oliveri, Newport Beach, Calif., for complainant.
Joseph A. Cerroni, Jr., Vienna, VA., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $1,930.00 in connection with the shipment in interstate commerce of one trucklot of strawberries.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant and asserting a counterclaim arising out of

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the same transaction in the amount of $953.99. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in the formal complaint or counterclaim does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant also filed a statement in reply and a brief.

FINDINGS OF FACT

1. Complainant, Well-Pict, Inc., is a corporation whose address is P.O. Box 973, Watsonville, California. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Sam Wang Food Corp., Inc., is a corporation whose address is 1258 5th Street N.E., Washington, D. C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about May 30, 1984, complainant sold to respondent 768 flats of strawberries at $5.00 per flat, plus $.60 per flat for cooling, $148.00 for Tectrol and $11.15 for a Ryan temperature recorder, for a total price for the lot of $4,460.05.

4. Complainant shipped the trucklot of strawberries from loading point in California on May 30, 1984, at 9:15 p.m. local time, to respondent in Washington, D. C. The strawberries arrived in Washington, D. C., and were unloaded at approximately 1:00 a.m. on June 5, 1984, into respondent's warehouse. Respondent made notations on the bill of lading indicating that the strawberries were in poor condition.

5. The Ryan temperature tape showed temperatures throughout the trip which ranged generally from 34 to 36 degrees, but included a few short term excursions into the 45 to 48 degree range.

6. On June 6, 1984, at 6:10 a.m., the strawberries were federally inspected at respondent's warehouse. The inspection showed the temperatures to range from 35 to 38 degrees Fahrenheit, and showed the condition to be as follows:

> Berries mostly ripe and firm. Mostly dull, some fairly bright. 15 to 75% in most, none in some, average 35% soft and leaking berries. Decay ranges 5 to 40%, in most, none

in some, average 14% Gray Mold Rot, mostly nested some scattered throughout pack.

7. Respondent notified the broker, M & M Brokerage Company of Watsonville, California, on June 6, 1984, that 386 flats of the strawberries were in unsalable condition. The broker notified complainant of the condition of the strawberries on or about June 7, to June 9, 1984.

8. On June 11, 1984, at 9:45 a.m., 386 flats of the strawberries were federally inspected in respondent's warehouse. The inspection showed the temperatures to range from 40 to 42°F and stated the condition to be as follows:

> Generally 35 to 75%, in few none, average 44% Soft and leaking berries. Decay ranges 25 to 100% Average 46% Gray Mold Rot in well developed stages.

It was noted on the certificate that respondent stated to the inspector that the lot of strawberries was to be dumped.

9. Respondent dumped 386 flats of the strawberries, and paid complainant at the contract rate for the remaining strawberries, plus cooling, Tetrol, and temperature recorder charges for the entire load, or a total of $2,530.05.

10. The informal complaint was filed on July 3, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price of the 768 flats of strawberries accepted by respondent. Respondent contends that it rejected 386 flats of the strawberries, and only conditionally accepted the remaining strawberries. However, it has been consistently held that even a partial unloading of a shipment of perishable produce is an exercise of sufficient control over the entire load to constitute an acceptance thereof. See *Crown Orchard Co.* v. *Mid-Valley Produce Corporation*, 34 Agric. Dec. 1381 (1975). Respondent is deemed to have accepted the entire load of strawberries, and consequently became liable to complainant for the full purchase price thereof less any damages shown to have been incurred due to any breach of contract by complainant. The burden of proving both breach and damages rest upon respondent. *The Grower-Shipper Potato* v. *Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

Respondent also contends that the contract between the parties called for the strawberries to grade U.S. No. 1. Although the sale of the strawberries was negotiated through a broker, neither party

submitted a copy of a broker's memorandum of sale. Also the record does not contain any statement from the broker. The only documentation of this sale is complainant's invoice which does not show that the strawberries were sold with any grade designation. Respondent used the bottom of the invoice to render its accounting to complainant, and made no objection thereon to the terms of the sale. Complainant has consistently denied that the strawberries were sold as U.S. No. 1, and accordingly we find that the strawberries were sold without any designation as to grade.

Both parties admit that the strawberries were sold on a f.o.b. basis. Consequently under the applicable regulations (7 CFR § 46.43(i) & (j)) the suitable shipping condition warranty was in effect as to this shipment. Under the terms of the warranty complainant was obligated to ship strawberries which would arrive at contract destination without abnormal deterioration provided transportation services and conditions were normal. The Ryan temperature tape, as well as the pulp temperatures disclosed by the federal inspection of June 6, 1984, indicate that transportation service and conditions were normal. Complainant, however, contends that the federal inspection on June 6, some thirty hours after arrival of the berries, should be discounted as being too late. Certainly we would prefer to see inspections made as soon as possible after the arrival of perishable produce. Nevertheless the inspection of these berries showed that temperatures had been kept within an acceptable range, and consequently the results of the inspection showing an average of 35% soft and leaking berries, plus an average of 14% Gray Mold Rot, are clearly indicative of a failure of the strawberries to make good delivery at time of arrival. See *Rala Singh Farms* v. *E. Armata, Inc.*, 32 Agric. Dec. 679 (1973.)

Complainant also vigorously maintains that it was not given notice of a breach within a reasonable time. The requirement for notice of a breach of warranty within a reasonable time is set forth in section 2-607(3)(a) of the Uniform Commercial Code. Its purpose, as stated in a comment to that section, is to prevent commercial bad faith. See *Spudco* v. *Yick Lung Co.*, 36 Agric. Dec. 715 (1977). Complainant maintains in its brief and in its statement in reply, that it was not notified of any condition problems in the strawberries either director through the broker until "some ten days after shipment." However, complainant's representative in filing the informal complaint in this proceeding stated that "according to Well-Pict's salesman, Mr. Dan Murphy, his notes reflect that approximately eight to ten days after shipment, his office was notified of apparent arrival problems with the strawberries. Eight days after shipment would be on June 7, 1983. Consequently, by complain-

ant's own admission it may have been notified of the breach as early as one day following the federal inspection of the strawberries, or two to three days after arrival. We do not feel that this time length, under the circumstances of this case, is excessive or unreasonable. See *Eli Smith* v. *Hy Fisher*, 16 Agric. Dec. 1008 (1957). In summary, we find that respondent has adequately shown that complainant breached the contract of sale by shipping strawberries which were not in suitable shipping condition at time of shipment, and that respondent gave adequate and timely notice of the breach to complainant.

Since respondent accepted the trucklot of strawberries it became liable to complainant for the full contract price thereof less damages resulting from complainant's breach. The measure of damages is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. See UCC § 2-714. Respondent segregated out of the total 768 flats of strawberries, 382 flats which it deemed to be salable. Respondent paid complainant the full contract price for these berries. The remaining 386 flats of berries were stated by respondent, when it gave notice to the broker of complainant's breach, to be unsalable. Respondent on June 11, 1984, secured a federal inspection of these berries which showed an average of 44% soft and leaking berries and an average of 46% Gray Mold Rot in well developed stages. Respondent submitted this inspection certificate as a dump certificate, and it clearly qualifies as such. We conclude that the 386 flats of strawberries had no commercial value.

The proper method for respondent to have shown the value of the strawberries which it accepted would have been to have submitted the results of the resale of the berries not dumped. Instead of doing this respondent paid for these berries at the contract rate. In view of the overall poor condition of the berries as shown by the federal inspection on June 6, we will accept respondent's method of showing damages in this proceeding. The Uniform Commercial Code, Section 1-106, states in relevant part that "The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . ." The comments to this section state that one purpose thereof was "to reject any doctrine that damages must be calculable with mathematical accuracy." As stated earlier in this proceeding respondent not only paid for the berries not dumped at the contract price, but also paid complainant for the Tectrol and cooling expenses for the total shipment of berries. Respondent only deducted from the invoice the contract price of $5.00

per flat for the 386 flats of strawberries dumped, or $1,930.00. We will accept this amount as respondent's damages.

Respondent's counterclaim requested $1.50 per flat for all of the berries on the grounds that they failed to meet the alleged contract requirements of grading U.S. No. 1. We have already disposed of this contention by our finding that the contract did not call for the strawberries to grade U.S. No. 1. The remainder of respondent's counterclaim is an effort to recoup the cooling, Tectrol and USDA inspection costs relative to the shipment of strawberries. However, in view of respondent's failure to account in the normal manner by showing the gross proceeds of the resale of the berries less expenses of the resale, we cannot award respondent this amount. The counterclaim should be dismissed.

ORDER

The complaint is dismissed.
The counterclaim is dismissed.
Copies of this order shall be served upon the parties.

ACTION PRODUCE *v.* CORGAN & SON, INC. PACA Docket No. 2-6801. Decided February 14, 1986.

Burden of proof as to breach and damages-upon respondent—Answer not verified-no evidentiary value—Breach of warranty and damages-not proven.

Respondent held liable for the contract prices of 9 of the 15 lots of lettuce it received and accepted without objection. Respondent failed to sustain its burden of proving a breach of warranty and damages with regard to the 6 remaining lots, as its answer and supporting documents were not in evidence because the answer was unverified, and the documents did not support respondent's position.

Andrew Stanton, Presiding Officer.
Thomas Oliveri, Newport Beach, Calif., for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended 7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $85,939.04 in connection with the sale of 15 truckloads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Although the amount claimed as damages is in excess of $15,000.00, the parties waived oral hearing. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is unverified, is not considered a part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, but respondent elected not to submit any additional evidence. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Action Produce, is a partnership whose address is P.O. Box 1712, Glendale, Arizona.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. In August and September 1984, complainant sold to respondent 15 truckloads of lettuce, as follows:

Complainant's Invoice No.	Date Shipped	Contract Price
1202	8/2/84	$7,100.90
1286	8/13/84	8,299.50
1333	8/17/84	5,763.30
1356	8/18/84	6,094.50
1417	8/30/84	4,677.50
1422	8/31/84	4,412.90
1428	9/4/84	4,677.50
1445	9/5/84	4,412.90
1470	9/6/84	4,422.50
1487	9/7/84	6,425.70
1522	9/12/84	7,996.90
1525	9/13/84	7,227.30
1560	9/18/84	6,094.50
1576	9/19/84	2,128.24
1607	9/21/84	6,204.90
Total		$85,939.04

4. Complainant shipped the 15 trucklots of lettuce to respondent, which accepted them but has failed to make any payment therefor.

5. A formal complaint was filed on January 10, 1985, which was within nine months from when the causes of action herein accrued.

CONCLUSIONS

Respondent does not deny receiving and accepting the 15 lots of lettuce, and therefore is liable for the full contract price, less damages due to any breach of warranty on the part of complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Rogelio C. Sardina d/b/a Sardinas Farms* v. *Caamano Bros., Inc.*, 42 Agric. Dec. 1275 (1983).

In its unsworn answer, respondent offers no defense to nine of the 15 trucklots which complainant alleges it received and accepted, but claims that six of the trucklots were in poor condition, and has enclosed along with its answer six inspection reports purportedly evidencing this poor condition. However, neither the answer nor the inspection reports can be given any consideration as evidence, since the answer was not verified. *H. & M. Fujishige* v. *Mike Phillips Enterprises, Incorporated*, 30 Agric. Dec. 1095 (1971).

Even if we were to give evidentiary value to these documents, they would not be sufficient to sustain respondent's burden of proof. The inspection report alleged to apply to complainant's invoice number 1333 covers only 350 cartons out of the 832 cartons shipped, and therefore, its findings of 10% damage by discoloration and 7% decay in the head leaves are not representative of the condition of the entire load. Similarly, the inspection applicable to complainant's invoice number 1356 was taken on only 120 of the 880 cartons shipped, and the inspection pertaining to complainant's invoice number 1560 was taken on 300 cartons of the 880 cartons shipped. Neither of these inspections are representative of the condition of the lettuce when it arrived at respondent's place of business. The inspection of complainant's invoice number 1576 shows 93% decay, but it was taken on October 3, 1984, which was 12 days after the lettuce was shipped on September 21, 1984. That inspection cannot, therefore, be given any weight. The inspections pertaining to complainant's invoice numbers 1522 and 1525 appear to show that the lettuce was in unsuitable shipping condition, in breach of warranty (7 CFR 46.46(j)). However, even if complainant did commit a breach of warranty with respect to these two loads, the burden is still upon respondent to show the difference between the value of the lettuce if it had been as warranted, and its actual value. The actual value of the lettuce for invoice numbers 1522 and 1525 cannot be determined because respondent has not submitted

any evidence of resale. *Salinas Marketing Cooperative* v. *Ed A. Keil Produce, Inc.*, 42 Agric. Dec. 1237 (1983). Therefore, it is clear that with respect to the six loads of lettuce which respondent asserts were abnormally deteriorated, respondent has failed to sustain its burden of proving a breach of warranty and damages resulting from the breach.

Respondent has offered no defense to liability for nine of the trucklots of lettuce which it admittedly accepted, and we have found that respondent has failed to sustain its burden of proving a breach and damages with respect to the six lots of lettuce it contends were abnormally deteriorated. Therefore, respondent is liable for the entire contract price for the 15 trucklots of $85,939.04, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $85,939.04, with interest thereon at the rate of 13% per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

UNITED DISTRIBUTORS, INC. *v.* FIERRO ENTERPRISES. PACA Docket No. 2-6808. Decided February 14, 1986.

Interstate Commerce—Substantial Evidence—Damages.

Where complainant fails to prove peaches were moved in interstate commerce or sold in contemplation of such movement, complainant is dismissed.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $6,075.15 in connection with the shipment of a truckload of peaches.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was

served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. The respondent filed a verified answering statement, and the complainant filed a verified statement in reply. Also, complainant filed a brief.

FINDINGS OF FACT

1. Complainant, United Distributors, Inc., is a corporation whose mailing address is 746 South Central Avenue, Los Angeles, California 90021.

2. Respondent, Mike Fierro, is an individual doing business as Fierro Enterprises whose mailing address is 1847 Michigan Avenue, Fresno, California 93705. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about July 21, 1983, respondent purchased 1203 cartons of peaches from the complainant at an agreed f.o.b. price of $4.45 per carton for a total agreed f.o.b. price of $5,353.35. The truckload of peaches was shipped to the complainant in care of Valley Fruit & Produce, San Julien Street, Los Angeles, California. Upon arrival, on July 22, 1983, the truckload of peaches was the subject of a federal inspection. The inspection certificate issued subsequent thereto (Certificate No. F 070781) indicates that the condition of the peaches was as follows "Firm and ground color turning yellow. All cartons generally show ⅓ to entire surface damage by brown to black discoloration. No decay."

4. On August 15, 1983, subsequent to an inspection by the Los Angeles County Agricultural Commissioner which showed that the peaches had 90% mold and decay, Valley Fruit & Produce dumped the 1,203 cartons of peaches.

5. On October 3, 1983, the complainant issued a check to respondent in payment for multiple loads of produce in the amount of $17,159.40. Complainant claims that within that total was payment of $5,353.35 to respondent with regard to the subject shipment of peaches. On or about November 11, 1983, complainant requested reimbursement for this payment. Respondent refused to do so.

6. On or about November 22, 1983, the complainant billed the respondent for the subject shipment, as follows: 1203 cartons of

peaches at $4.60 per carton ($5,533.80), and 45 cents per carton freight ($541.35), for a total billing of $6,075.15.

7. The informal complaint was filed on July 3, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issued in this case is whether or not the peaches were shipped in interstate commerce, or even in contemplation thereof. It is only such produce as is shipped in interstate commerce, or in contemplation thereof, over which we have jurisdiction in this forum. *See Dave Mendrin & Son* v. *Nick Delis Co.*, 28 Agric. Dec. 1555 (1969). The complainant, in its complaint, pleaded that the peaches involved here were shipped in "interstate commerce." After the Presiding Officer gave the complainant notice to show cause why the complaint should not be dismissed for want of jurisdiction due to its failure to allege either that the peaches were shipped in interstate commerce or that the shipment was made in contemplation of interstate commerce, the complainant replied it had intended to ship the peaches to Hawaii. In view of this, the Presiding Officer permitted the case to proceed to judgment. The respondent, however, in its answering statement, denied that these peaches were sold in contemplation of interstate commerce, and indicated that these peaches were not purchased in a condition which would have allowed them to be shipped to Hawaii. The complainant did not respond to these allegations. We must hold, therefore, that the complainant failed to carry its burden of proving that the subject shipment was made in contemplation of interstate commerce, and we must hold that we have no jurisdiction over the matter. *P. C. Kellam* v. *Virginia Tomato Corp.*, 29 Agric. Dec. 835 (1970). Therefore, the complaint must be dismissed.

In any event even had we jurisdiction over this matter, we would have to hold that the complainant failed to prove, by substantial evidence, all of the material aspects of its allegations. For example, in order satisfy its burden of proof, the complainant would have to have shown that the respondent breached their contract by shipping goods which were not in conformance with their contractual agreement, and that it was damaged thereby. However, the complainant has failed to provide any evidence that the peaches were not in compliance with the parties' agreement when they were received. The inspection on July 22, 1983, did show a significant amount of discoloration, but there is evidence that the peaches were sold at below market prices because of their maturity and that they were not suitable, when sold, for shipping beyond local markets. In view of this evidence, which was not satisfactorily dis-

puted by complainant, there is insufficient evidence for us to have concluded that there was a breach of contract by the respondent. Moreover, the complainant has failed to prove any damages whatsoever because, apparently, the peaches in the subject shipment sat at Valley Distributors from their July 22, 1983, arrival until they were dumped in August 15, 1983. There is no allegation nor any proof that the peaches were totally unsaleable when received. Nor is there any evidence that the complainant attempted to sell the peaches prior to their being dumped. Complainant's failure to show either that the peaches were unmerchantable upon receipt, or the value of the peaches received through a prompt and proper resale, renders its ability to prove damages impossible since it cannot show the value of the peaches as received. We would therefore have to have concluded that the complainant failed to establish any damages caused by the alleged breach committed by the respondent. *Ralph Samsel Co.* v. *L. Gillarde Sons Co.*, 19 Agric. Dec. 324 (1960). Under these circumstances too, the complaint would have been dismissed. *New England Grape* v. *Crane*, 30 Agric. Dec. 992 (1971).

ORDER

The complaint is dismissed.
Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

PIONEER MARKETING COMPANY *v.* JOHN R. HOFFMAN, JR., PRODUCE COMPANY. PACA Docket No. 2-6711. Decided January 15, 1986.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued on November 21, 1985, requiring respondent to pay complainant $2,904.00 plus interest from April 1, 1984, until paid. On December 6, 1985, respondent moved for reconsideration of that decision based on "new evidence."

The "new evidence" submitted by respondent is inadmissible at this time. In order to gain admission of evidence into the instant

record, respondent would have to have filed a petition to reopen. However, petitions to reopen the record in a reparation case can only be entertained prior to the issuance of the final order. 7 CFR § 47.24(b). In this case, the final order was issued on November 21, 1985. Thus, even had respondent filed a petition to reopen at this time, it would have to have been denied. Moreover, since respondent did not show that its failure to adduce the evidence in a timely fashion was not the result of its failure to use due diligence the petition, even if filed before the issuance of the November 21, 1985, Decision and Order, would have been denied. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. U.S. 321 (1971); and *Reconstruction Finance Corp.* v. *Commercial Union, Etc.*, 123 F. Supp. 748 (S.D. N.Y. 1954).

In any event, the "new evidence" offered by respondent has been reviewed, and it does not aid respondent's cause at all because the "new evidence" does not relate to the 480 cartons of lettuce shipped to it by complainant on February 20, 1985, which are the subject of the complaint filed herein. Further, on reconsideration, respondent appears to be arguing that the broker (Taylor-Byers Co., Inc.) sold it the lettuce. The record, including respondent's admissions in its verified answer, does not support this allegation. Rather, the record reflects that the broker performed its duties as a broker, and was not the seller of these cartons of lettuce to respondent.

On the basis of all of the evidence in the record, we find that the November 21, 1985, Decision and Order is amply supported by the evidence and by the law applicable thereto. Accordingly, respondent's petition for reconsideration is dismissed without prior service upon complainant.

The order of November 21, 1985, is reinstated except that the reparation awarded therein shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

GRENADA MARKETING, INC., a/t/a RICHARD A. GLASS CO., *v.* WESTERN PRODUCE COMPANY. PACA Docket No. 2-6945. Order issued January 17, 1986.

Thomas R. Oliveri, Newport Beach, Cal., for complainant.
Tamara J. Wobig, Phoenix, Arizona, for respondent.

Andrew Stanton, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $6,048.00 in connection with a transaction involving the shipment of strawberries in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated November 20, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of November 20, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GRANADA MARKETING, INC. *v.* ROCKY PRODUCE, INC. PACA Docket No. 2-6958. Order issued January 17, 1986.

Thomas R. Olivert, Newport Beach, Cal., for complainant.
Respondent, *pro se*.

Andrew Stanton, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $16,791.25 in connection with a transaction involving the shipment of grapes in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of November 14, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

R&A PRODUCE DIST. CO. INC. *v.* TOMMY M. BROWN and TIMOTHY X. COLIN d/b/a SARATOGA DISTRIBUTORS. PACA Docket No. 2-7000. Order issued January 17, 1986.

Andrew Stanton, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $4,740.30 in connection with a transaction involving the shipment of watermelons in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of October 22, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FRESH PAK, INC. *v.* DEKLE BROKERAGE CO., INC. PACA Docket No. 2-6455. Decided February 4, 1986.

A. Stanton, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et. seq.*), in which a Decision and Order was issued by the Judicial Officer on July 12, 1985, awarding reparation to complainant in the amount of $5,337.50, plus interest. Respondent filed a timely petition for reconsideration and a Stay Order was issued on September 25, 1985.

Respondent alleges in its petition that it purchased the potatoes at issue from Trademark Produce & Sales, Kennewick, Washington, and that the Decision and Order erred in concluding that respondent purchased the potatoes from complainant, with Trademark acting only as the broker. However, Finding of Fact 3 of the Decision and Order states that Trademark sent a confirmation of

sale to both parties clearly revealing that the sale was made from complainant to respondent, with Trademark as the broker. Respondent admits in paragraph 4 of its petition that it received this confirmation and has never alleged having objected to it. Therefore, respondent's allegation that it purchased the potatoes from Trademark is not supported by the record.

Respondent also contests the conclusion of the Decision and Order that it accepted the potatoes. Respondent alleges that it gave notice of rejection to Trademark at 3:28 p.m. on February 28, 1983, which was 43 minutes after the potatoes were inspected at 2:45 p.m. that same date, and denies that it first notified Trademark of its desire to reject at 8:50 a.m. the next day, as found by the Decision and Order. There is some evidence that notice of rejection was given to the broker at 3:28 p.m., as respondent's telephone bill shows a call made at that time. However, a different time for notification was asserted by the broker who, in a letter to the Department, said that it was not notified until 6:50 a.m. the day after the inspection, or 8:58 a.m. in respondent's time zone. Resolution of this conflicting evidence is not necessary, since, as the Decision and Order concluded, it is clear from the record that at the time of the inspection, respondent accepted the potatoes by unloading them, and any subsequent attempt at rejection would, therefore, have been unreasonable. Respondent argues that unloading was necessary to make the truckload of potatoes accessible for inspection. However, the inspection report does not support respondent, as it states after "Remarks" only that "Inspection made during unloading process." If the unloading had occurred solely to permit the potatoes to be inspected, such would have been clear from the inspection report.

There is no merit to respondent's allegations of error. Therefore, the September 25, 1985, Stay Order is hereby vacated and the July 12, 1985, Decision and Order is hereby reinstated. The amount awarded in the July 12, 1985, Decision and Crder, including interest, shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

KITAHARA FARMS, INC., a/t/a KITAHARA PACKING CO., *v.* UNION FRUIT COMPANY. PACA Docket No. 2-6664. Decided February 4, 1986.

Decision by Donald A. Campbell, Judicial Officer.

DENIAL OF PETITION TO REOPEN

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued July 1, 1985, awarding reparation to complainant against respondent in the amount of $10,324.33. On July 10, 1985, respondent filed a petition for reconsideration. On August 12, 1985, the order of July 1, 1985, was stayed. On November 25, 1985, the respondent's petition was denied and the order of July 1, 1985, was reinstated except that the reparation awarded therein was ordered paid within thirty (30) days from November 25, 1985. On December 17, 1985, the respondent moved to reopen this matter. Under the Rules of Practice, such motions can only be entertained prior to the issuance of a final order. 7 CFR § 47.24. Since the order in this case was issued on July 1, 1985, respondent's motion to reopen must be denied. In any event, the evidence, which consists of documents related to a transaction which took place two months after the transaction at issue, is not relevant or material to the issues in this case.

It is noted that the November 25, 1985, order was not stayed by the filing of the respondent's motion to reopen, and that the respondent is expected to have complied therewith.

Copies of this order shall be served upon the parties.

GLOBAL TRADING, INC., *v.* LIMPERT BROS. INC. PACA Docket No. 2-6679. Order issued February 4, 1986.

G. S. Whitten, Presiding Officer.
David B. Ward, Greenville, S.C., for complainant.
Mitchell H. Kisner, Vineland, New Jersey, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on December 11, 1985, awarding reparation to the complainant in the amount of $8,227.10. By letter received December 26, 1985, respondent has moved that this matter be reconsidered and reopened.

Accordingly, the order of December 11, 1985 is hereby stayed. Complainant may have ten days from receipt of this order to file an answer to the petition to reconsider and reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

GOLD COAST PACKING, INC., *v.* CORGAN & SON, INC. PACA Docket No. 2-6715. Order issued February 6, 1986.

Andrew Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, Calif., for complainant.
Leonard Krences, Harrison, New York, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $52,268.30 in connection with a transaction involving the shipment of mixed vegetables in interstate commerce.

A copy of the formal complaint was served on respondent, which filed an answer thereto, denying liability.

In a letter dated July 19, 1985, respondent moved to dismiss the complaint, claiming that complainant had filed suit in the Supreme Court of the State of New York, County of Bronx, No. 18654/84, involving the same parties and issues as the reparation complaint. In a letter dated August 5, 1985, complainant was given five days from its receipt of such letter to show cause why the reparation complaint should not be dismissed, pursuant to 7 U.S.C. 499e(b). Complainant was given several extensions to respond to the notice to show cause and eventually was told that its requested extension until January 6, 1986, would be its last. Counsel for complainant, in a letter dated January 6, 1986, indicated that it has been unable to obtain a voluntary dismissal of the court action. We must thus conclude that complainant has made an election of remedies under 7 U.S.C. 499e(b). Respondent's motion to dismiss is, therefore, granted.

Copies of this order shall be served upon the parties.

TANITA FARMS, INC. *v.* THADDEUS J. SOBIECH d/b/a TED SOBIECH. PACA Docket No. 2-6866. Order issued February 6, 1986.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, Calif., for complainant.
Jeffrey D. Sherwin, Middletown, N.Y., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $79,176.00 in connection with a transaction involving the shipment of onions in interstate commerce.

A copy of the formal complaint was served on respondent. By motion filed on December 23, 1985, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

COLORADO POTATO GROWERS EXCHANGE *v.* RICHARD C. SHELTON d/b/a MID-VALLEY BROKERAGE CO. PACA Docket No. 2-6980. Order issued February 6, 1986.

Complainant, *pro se*.
Scott Toothaker, McAllen, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $12,150.00 in connection with a transaction involving the shipment of onions in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated December 13, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of December 13, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FURUKAWA SALES CO., INC., *v.* CANINO PRODUCE CO., INC., and/or BENCHMARK BROKERAGE, INC. PACA Docket No. 2-7007. Order issued February 6, 1986.

Thomas R. Oliveri, Newport Beach, Calif., for complainant.
Respondents, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against Canino Produce Co., Inc. (hereinafter, "Canino"), and in the event Canino is found not to be liable, against Benchmark Brokerage, Inc. (hereinafter, "Benchmark"), in the amount of $1,728.00 in connection with a transaction involving the shipment of strawberries in interstate commerce.

A copy of the formal complaint was served upon each respondent. Neither respondent filed an answer, and a Default Order was issued on September 17, 1985, against Canino in the amount of $1,728.00. As Canino was found liable for the full amount of the complaint, the complaint against Benchmark was dismissed, in accordance with complainant's allegation of liability. Canino later moved to reopen after default, and such motion was granted as to Canino only. The Default Order's dismissal of Benchmark remained unaffected by the reopening of the complaint against Canino.

In a letter dated December 2, 1985, complainant authorized dismissal of the complaint against Canino, asserting that Benchmark was solely liable. The complaint against Canino is, therefore, dismissed. However, as Benchmark is no longer subject to a reparation order, since the complaint against Benchmark was dismissed in the September 17, 1985, Default Order, no order of reparation can now be issued against Benchmark.

Copies of this order shall be served upon the parties.

DUAL DISTRIBUTORS, INC., *v.* A. PELLEGRINO & SON, INC., and/or MELON PRODUCE. PACA Docket No. 2-7008. Order issued February 6, 1986.

Andrew Stanton, Presiding Officer.
Complainant, *pro se*.
Joseph E. Obreys, Boston, Mass., for respondent Melon Produce.
Respondent Pellegrino & Son, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondents, jointly and severally, in the amount of $10,689.25 in connection with a transaction involving the shipment of mixed vegetables in interstate commerce.

In a letter dated December 6, 1985, the Department informed complainant that respondent Melon Produce had provided evidence that complainant had filed suit in the United States District Court for the District of Massachusetts (No. 85-3019-W) against both respondents, involving the same issues as the reparation complaint. Complainant was given 15 days from its receipt of such letter to provide evidence that the court suit had been dismissed without prejudice, or the reparation complaint would be dismissed, pursuant to 7 U.S.C. § 499e(b). Complainant did not file a response. Therefore, the complaint herein is hereby dismissed.

Copies of this order shall be served upon the parties.

MOUNTAIN VIEW PRODUCE *v.* REX E. SPARKS PRODUCE and/or C.J.'s BROKERAGE. PACA Docket No. 2-6653. Order issued February 13, 1986.

Peter Train, Presiding Officer.
Harold E. Creamee, Idaho Falls, Idaho, for complainant.
T.C. Bowen, Jr., Tazewell, VA., for respondent Sparks Produce.
Stephen M. McCarron, Silver Spring, MD., for respondent Mark L. Haness, d/b/a C.J.'s Brokerage.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

On November 4, 1985, the parties filed a release in the above-captioned case giving notice that they had reached a settlement in the

above-captioned case. The settlement provided, *inter alia*, that complainant would promptly notify the Department of Agriculture that his claim was settled once he received the agreed-upon payments. Payment has been received and complainant has authorized dismissal of complaint. Therefore this complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

VITA-WELLBROCK-KEARNEY INC. *v.* A.A.A. PRODUCE INC. PACA Docket No. RD-86-94. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation $1,750.00 plus 13 percent interest per annum from February 1, 1985, until paid.

TEXAS DISTRIBUTING CO. INC. *v.* CHINO'S PRODUCE INC. PACA Docket No. RD-86-95. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $31,128.60 plus 13 percent interest per annum from December 1, 1984, until paid.

GERALD E. MANN a/t/a FIESTA PRODUCE *v.* SUNSHINE JUICE CORP. PACA Docket No. RD-86-96. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $8,968.00 plus 13 percent interest per annum from January 1, 1985, until paid.

CORKY FOODS CORP. *v.* PRN FRUIT AND VEGETABLE BROKERS INC. PACA Docket No. RD-86-97. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $1,300.00 plus 13 percent interest per annum from July 1, 1985, until paid.

ELMCO *v.* CENTRAL PRODUCE CORP. and/or NATIONAL PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-98. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $18,976.50 plus 13 percent interest per annum from April 1, 1985, until paid.

SAM WONG & SON INC. *v.* LYCO FOOD PRODUCTS. PACA Docket No. RD-86-99. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $19,123.20 plus 13 percent interest per annum from June 1, 1985, until paid.

TOM LANGE COMPANY INC. *v.* BEN CONTRERAS PRODUCE. PACA Docket No. RD-86-100. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $33,801.30 plus 13 percent interest per annum from June 1, 1985, until paid.

MOUNTAIN LAND APPLE SALES INCORPORATED *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-101. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $4,200.00 plus 13 percent interest per annum from June 1, 1985, until paid.

FOWLER PACKING CO. INC. *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-102. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $1,147.60 plus 13 percent interest per annum from July 1, 1985, until paid.

FOUR STAR TOMATO INC *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-103. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $30,250.00 plus 13 percent interest per annum from June 1, 1985, until paid.

SUCASA PRODUCE INC. *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-104. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $62,222.80 plus 13 percent interest per annum from June 1, 1985, until paid.

C. H. ROBINSON COMPANY *v.* WHIZPAC INC. PACA Docket No. RD-86-105. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $5,128.80 plus 13 percent interest per annum from February 1, 1985, until paid.

RALPH & CONO COMUNALE PRODUCE CORP. *v.* TOM PANNO, JR. INC. PACA Docket No. RD-86-106. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $910.00 plus 13 percent interest per annum from December 1, 1985, until paid.

C. H. ROBINSON COMPANY *v.* T & M MARKET SERVICES INC. a/t/a GET FRESH PRODUCE CO. PACA Docket No. RD-86-107. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $5,720.85 plus 13 percent interest per annum from June 1, 1985, until paid.

INTERSTATE PACKING CO. *v.* BARTON'S PRODUCE INC. PACA Docket No. RD-86-108. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $1,790.00 plus 13 percent interest per annum from February 1, 1985, until paid.

HUNT OIL COMPANY a/t/a PLANTATION PRODUCE COMPANY *v.* GEORGE HOWARD d/b/a THE PRODUCE CO. PACA Docket No. RD-86-109. Decided January 2, 1986.

Respondent was ordered to pay complainant, as reparation, $15,208.60 plus 13 percent interest per annum from July 1, 1985, until paid.

E & S GRAPE GROWERS & SHIPPERS *v.* SANTA FE-WEST SIDE GRAPE DISTRIBUTORS. PACA Docket No. RD-86-110. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, $1,500.00 plus 13 percent interest per annum from October 1, 1984, until paid.

C. H. ROBINSON COMPANY *v.* JAMES N. FAULKNER d/b/a THE JIM FAULKNER CO. PACA Docket No. RD-86-111. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, $163.05 plus 13 percent interest per annum from August 1, 1984, until paid.

MCKENNA BROTHERS LTD. *v.* J. P. DANIEL PRODUCE INC. PACA Docket No. RD-86-112. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, $7,922.50 plus 13 percent interest per annum from March 1, 1985, until paid.

LEE BRANDS INC. *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-113. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, $13,667.90 plus 13 percent interest per annum from May 1, 1985, until paid.

MAUNA KEA AGRONOMICS INC. *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-114. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, $6,599.40 plus 13 percent interest per annum from May 1, 1985, until paid.

MALENA PRODUCE INC. *v.* CROWN PRODUCE Co. PACA Docket No. RD-86-115. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, $4,574.37 plus 13 percent interest per annum from May 1, 1985, until paid.

KELLY PRODUCE INC. *v.* CROWN PRODUCE Co. PACA Docket No. RD-86-116. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, $149,392.05 plus 13 percent interest per annum from June 1, 1985, until paid.

RIO VISTA LIMITED a/t/a GIUMARRA OF CARLSBAD *v.* CHINO'S PRODUCE INC. PACA Docket No. RD-86-117. Decided January 3, 1986.

Respondent was ordered to pay complainant, as reparation, $3,092.90 plus 13 percent interest per annum from May 1, 1985, until paid.

MARVIN A. SCHWARZ d/b/a MARVIN SCHWARZ PRODUCE *v.* THE PRODUCE Co. PACA Docket No. RD-86-118. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, $5,134.80 plus 13 percent interest per annum from July 1, 1985, until paid.

AUSTIN J. MERKEL CO. INC. *v.* DAVID FREED d/b/a FREED PRODUCE Co. PACA Docket No. RD-86-119. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, $639.00 plus 13 percent interest per annum from July 1, 1985, until paid.

MANN PACKING CO. INC. *v.* WAYNE M. HATANAKA d/b/a W. H. DISTRIBUTING. PACA Docket No. RD-86-120. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, $1,716.70 plus 13 percent interest per annum from May 1, 1985, until paid.

SIX L's PACKING COMPANY INC. *v.* BUSBY PRODUCE. PACA Docket No. RD-86-121. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, $647.50 plus 13 percent interest per annum from February 1, 1985, until paid.

TOP QUALITY FRUIT & PRODUCE DISTRIBUTORS INC. *v.* ALPINE BROKERS INC. PACA Docket No. RD-86-122. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, $6,100.00 plus 13 percent interest per annum from October 1, 1984, until paid.

LEE BRANDS INC. *v.* JEFREY L. BARKER d/b/a JET FRESH DISTRIBUTING. PACA Docket No. RD-86-123. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, $3,496.50 plus 13 percent interest per annum from October 1, 1984, until paid.

TEXAS DISTRIBUTING CO. INC. *v.* QUINTERO PRODUCE. PACA Docket No. RD-86-124. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, $5,500.00 plus 13 percent interest per annum from December 1, 1984, until paid.

JONES FAMILY FARM, *v.* SUN ROOT FOODS INC. PACA Docket No. RD-86-125. Decided January 6, 1986.

Respondent was ordered to pay complainant, as reparation, $7,793.61 plus 13 percent interest per annum from May 1, 1985, until paid.

APPLEWOOD ORCHARDS INC. *v.* BENCHMARK BROKERAGE INC. and/or FLEMING COMPANIES INC. PACA Docket No. RD-86-72. Decided January 15, 1986.

Respondent was ordered to pay complainant, as reparation, $1,219.75 plus 13 percent interest per annum from December 1, 1984, until paid.

STEVCO INC. *v.* ALL SEASONS HARVESTING CORPORATION a/t/a ALL SEASONS PACKING. PACA Docket No. RD-86-126. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, $6,732.00 plus 13 percent interest per annum from June 1, 1984, until paid.

DONALD F. SCHAUB d/b/a WM. SCHAUB & CO. *v.* SUPER SPUDS INC. PACA Docket No. RD-86-127. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, $755.25 plus 13 percent interest per annum from June 1, 1984, until paid.

J & L SHELTON INC. *v.* QUALITY KING PRODUCE CO. INC. PACA Docket No. RD-86-128. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, $17,793.50 plus 13 percent interest per annum from July 1, 1985, until paid.

FOUR STAR TOMATO INC. *v.* REM BROKERAGE CO. INC. PACA Docket No. RD-86-129. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, $9,862.50 plus 13 percent interest per annum from December 1, 1984, until paid.

AUSTIN J. MERKEL CO. INC. *v.* CECIL WHITE PRODUCE INC. PACA Docket No. RD-86-130. Decided February 12, 1986.

Respondent was ordered to pay complainant, as reparation, $1,810.50 plus 13 percent interest per annum from August 1, 1985, until paid.

ANTON-ARGIRES BROS. & CO. INC. *v.* CECIL WHITE PRODUCE INC. PACA Docket No. RD-86-131. Decided February 14, 1986.

Respondent was ordered to pay complainant, as reparation, $1,257.00 plus 13 percent interest per annum from August 1, 1985, until paid.

STRUBE CELERY & VEGETABLE CO. *v.* CECIL WHITE PRODUCE INC. PACA Docket No. RD-86-132. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, $540.25 plus 13 percent interest per annum from August 1, 1985, until paid.

GARNAND MARKETING INC. *v.* CECIL WHITE PRODUCE INC. PACA Docket No. RD-86-133. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, $2,905.64 plus 13 percent interest per annum from August 1, 1985, until paid.

TEXAS DISTRIBUTING CO. INC. *v.* HOLLY PRODUCE CO. INC. PACA Docket No. RD-86-134. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, $27,150.15 plus 13 percent interest per annum from August 1, 1984, until paid.

SEQUOIA ENTERPRISES INC. *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA. PACA Docket No. RD-86-135. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, $11,577.25 plus 13 percent interest per annum from July 1, 1985, until paid.

SUNSHINE PRODUCE EXCHANGE INC. *v.* SUMTER VEGETABLE COOPERATIVE. PACA Docket No. RD-86-136. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, $1,739.82 plus 13 percent interest per annum from May 1, 1985, until paid.

EXPORTADORA FRUTICOLA AZTATLAN, S.A. DE C.V. *v.* TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-137. Decided February 18, 1986.

Respondent was ordered to pay complainant, as reparation, $19,815.90 plus 13 percent interest per annum from August 1, 1984, until paid.

SAN MIGUEL PRODUCE INC. *v.* PRN FRUIT & VEGETABLE BROKERS INC. PACA Docket No. RD-86-138. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, $3,432.95 plus 13 percent interest per annum from June 1, 1985, until paid.

WASHBURN POTATO CO. *v.* FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-86-139. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, $3,909.55 plus 13 percent interest per annum from June 1, 1985, until paid.

SUNRICH INCORPORATED *v.* GUERRA BROS. PRODUCE. PACA Docket No. RD-86-140. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, $9,998.25 plus 13 percent interest per annum from March 1, 1985, until paid.

TOM LANGE COMPANY INC. *v.* HOLLY PRODUCE CO. INC. PACA Docket No. RD-86-141. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, $15,833.60 plus 13 percent interest per annum from March 1, 1985, until paid.

MERRILL FARMS *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA. PACA Docket No. RD-86-142. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, $11,583.65 plus 13 percent interest per annum from September 1, 1985, until paid.

A. L. PRAY & SON POTATO CO. LTD *v.* CENTRAL PRODUCE and/or NATIONAL PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-143. Decided February 19, 1986.

Respondent was ordered to pay complainant, as reparation, $13,668.75 plus 13 percent interest per annum from May 1, 1985, until paid.

SCOTT FINKS CO. INC. *v.* H & L SALES INC. PACA Docket No. RD-86-144. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, $2,415.10 plus 13 percent interest per annum from August 1, 1985, until paid.

ADMIRAL PACKING COMPANY *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-145. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, $3,080.00 plus 13 percent interest per annum from August 1, 1985, until paid.

SIGMA PRODUCE CO. INC. *v.* OTAY PACKING CO. PACA Docket No. RD-86-146. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, $22,329.60 plus 13 percent interest per annum from April 1, 1985, until paid.

STRUBE-TRIO INC. *v.* DAVID FREED d/b/a FREED PRODUCE CO. PACA Docket No. RD-86-147. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, $218.81 plus 13 percent interest per annum from August 1, 1985, until paid.

HUNT OIL COMPANY a/t/a PLANTATION PRODUCE COMPANY *v.* MORNINGSIDE PRODUCE INC. PACA Docket No. RD-86-148. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, $2,788.80 plus 13 percent interest per annum from December 1, 1984, until paid.

VICTOR E. REYNOLDS d/b/a RITTER AND COMPANY *v.* CARTIAN PRODUCE INC. PACA Docket No. RD-86-149. Decided February 20, 1986.

Respondent was ordered to pay complainant, as reparation, $938.25 plus 13 percent interest per annum from April 1, 1985, until paid.

PROVIGO DISTRIBUTION INC. *v.* STANLEY & JOE RUSSO. PACA Docket No. RD-86-150. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, $25,267.36 plus 13 percent interest per annum from November 1, 1984, until paid.

BEEF STAKE TOMATO GROWERS INC. *v.* MAR-TIM TOMATO CO. INC. PACA Docket No. RD-86-151. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, $1,221.00 plus 13 percent interest per annum from August 1, 1984, until paid.

DEARDORFF-JACKSON COMPANY *v.* A. PELLEGRINO & SON INC. PACA Docket No. RD-86-152. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, $543.77 plus 13 percent interest per annum from May 1, 1985, until paid.

PLAINVILLE PRODUCE INC. *v.* L. C. INTERNATIONAL COMPANY. PACA Docket No. RD-86-153. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, $2,306.50 plus 13 percent interest per annum from January 1, 1985, until paid.

RIO VISTA LIMITED a/t/a GIUMARRA OF ESCONDIDO *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-154. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, $8,610.00 plus 13 percent interest per annum from August 1, 1985, until paid.

A. J. SALES COMPANY *v.* PRN FRUIT & VEGETABLE BROKERS INC. PACA Docket No. RD-86-155. Decided February 21, 1986.

Respondent was ordered to pay complainant, as reparation, $34,783.30 plus 13 percent interest per annum from July 1, 1985, until paid.

AMERICAN BANANA CO. INC. *v.* M & M PRODUCE BROKERAGE. PACA Docket No. RD-86-52. Decided February 26, 1986.

Respondent was ordered to pay complainant, as reparation, $7,884.90 plus 13 percent interest per annum from August 1, 1984, until paid.

VALLEY BROKERAGE INC. *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-156. Decided February 26, 1986.

Respondent was ordered to pay complainant, as reparation, $2,981.00 plus 13 percent interest per annum from May 1, 1985, until paid.

PACIFIC FARM COMPANY *v.* PRN FRUIT & VEGETABLE BROKERS INC. PACA Docket No. RD-86-157. Decided February 26, 1986.

Respondent was ordered to pay complainant, as reparation, $41,019.30 plus 13 percent interest per annum from July 1, 1985, until paid.

MAINE FARMERS EXCHANGE *v.* NATIONAL PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-158. Decided February 26, 1986.

Respondent was ordered to pay complainant, as reparation, $63,950.25 plus 13 percent interest per annum from June 1, 1985, until paid.

SUNSPROUTS OF TEXAS INC. *v.* BEN VASQUEZ PRODUCE INC. PACA Docket No. RD-86-159. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, $19,469.05 plus 13 percent interest per annum from July 1, 1985, until paid.

DEL MONTE FRESH FRUIT COMPANY *v.* CROWN PRODUCE DISTRIBUTORS. PACA Docket No. RD-86-160. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, $29,673.50 plus 13 percent interest per annum from June 1, 1985, until paid.

PEPPER POTATO FARMS INC. *v.* GILO'S PRODUCE CO. PACA Docket No. RD-86-161. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, $3,460.00 plus 13 percent interest per annum from February 1, 1985, until paid.

CENTRAL PRODUCE DISTRIBUTORS INC. *v.* FREE STATE PRODUCE INC. PACA Docket No. RD-86-162. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, $59,070.00 plus 13 percent interest per annum from March 1, 1985, until paid.

JOHN B. HARDWICKE COMPANY *v.* FREE STATE PRODUCE INC. PACA Docket No. RD-86-163. Decided February 28, 1986.

Respondent was ordered to pay complainant, as reparation, $11,934.50 plus 13 percent interest per annum from June 1, 1985, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

BUD ANTLE INC. *v.* SEVEN SEAS TRADING CO., INC., a/t/a VALLEY VIEW FARMS. PACA Docket No. RD-86-37. Decided January 15, 1986.

DENIAL OF MOTION FOR STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on November 27, 1985, awarding reparation to the complainant in the amount of $749.80. By letter received on November 22, 1985, but not processed until after the Default Order was issued, respondent has moved that this matter be stayed to give it an opportunity to secure evidence of its absence of liability to complainant. However, this is not sufficient reason for staying the Default Order. Therefore, respondent's motion for a stay is denied.

Copies of this order shall be served upon the parties.

APPLEWOOD ORCHARDS, INC., *v.* BENCHMARK BROKERAGE, INC., and/or FLEMING COMPANIES, INC. PACA Docket No. RD-86-72. Order issued January 15, 1986.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondents failed to file timely answers. However, prior to the issuance of a

Default Order, respondent Fleming Companies Inc. filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that respondent Fleming Companies Inc. has failed to present a good reason why it failed to file a timely answer. The record contains a return receipt card which shows that the formal complaint was received by Fleming Companies Inc. on September 26, 1985. The return receipt card bears a signature of a person purporting to sign on behalf of Fleming Companies Inc. Fleming Companies Inc. claims in its motion that the complaint was not received by its "Produce Operations" unit. However, such internal distribution problems are not a good reason for the failure of Fleming Companies Inc. to submit a timely answer. Therefore, the motion to reopen after default is hereby denied.

Copies of this order shall be served upon the parties.

STANDARD FRUIT and STEAMSHIP COMPANY *v.* ASTRO MEAT TRADING, INC. PACA Docket No. RD-85-164. Order issued January 15, 1986.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on March 25, 1985, ordering respondent to pay $48,669.50, with interest. On November 12, 1985, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer.

Respondent's motion must be denied. The March 25, 1985, Default Order ordered respondent to pay reparation "within 30 days from the date of this order." Therefore, payment was due no later than April 24, 1985. After that date the Default Order is considered to have become final, and the Secretary is without jurisdiction to consider motions such as that made by respondent. See *Lasky* v. *Commissioner of Internal Revenue*, 235 F.2d 97 (9th Cir. 1956), *aff'd per curiam* 352 U.S. 1027 (1956); *Southland Produce Co., a/k/a Keystone Produce Co.* v. *Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

Copies of this order shall be served upon the parties.

CONSUMERS PRODUCE CO., of Pittsburgh *v.* CENTRAL PRODUCE CO. INC. PACA Docket No. RD-85-391. Order issued January 17, 1986.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $637.70 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 27, 1985, complainant was notified by the Department that respondent had tendered to complainant a check in full settlement of complainant's claim. Complainant was sent such check and informed that an order would be issued dismissing the complaint. Complainant, in a letter dated November 21, 1985, agreed to the proposed dismissal.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

THE CROSSET COMPANY *v.* KEVIN J. RE d/b/a J.M.J. PRODUCE. PACA Docket No. RD-86-46. ORDER issued January 22, 1986.

ORDER VACATING PRIOR ORDER AND ORDER STAYING PROCEEDING

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1920, as amended (7 U.S.C. 499a *et seq.*), a Default Order was issued against respondent on December 3, 1985, requiring him to pay complainant $4,825.25 with interest thereon from July 1, 1985, until paid. Unknown to the Department however was that respondent had filed a petition in Chapter 7 before the United States Bankruptcy Court for the Southern District of Ohio, Western Division, designated Case No. 1-85-03049, on November 7, 1985. The filing of such a petition automatically stays proceedings such as those involved here. 11 U.S.C. 362(a). The Default Order of December 3, 1985, thus should never have been issued. In view of this, it is now vacated.

It is unknown as to whether the respondent's debts have been discharged by the Bankruptcy Court under 11 U.S.C. 727. Upon receiving notice of such a discharge, we will dismiss the complaint. Until such time as the Department is notified that such a discharge has been ordered, this matter is stayed.

Copies of this order shall be served upon the parties. In addition, copies shall be served on Nicholas J. Pantel, Esq., Assistant United States Attorney, 220 United States Post Office & Courthouse, 100 East Fifth Street, Cincinatti, Ohio 45202, and Robert A. Goering, Esq., Wilke & Goering, 128 E. 6th Street, Cincinatti, Ohio 45202.

JONES FAMILY FARM *v.* SUN ROOT FOODS, INC. PACA Docket No. RD-86-125. Order issued January 24, 1986.

ORDER CORRECTING PRIOR ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Default Order was issued on January 6, 1986, ordering respondent to pay complainant $7,793.61, plus interest at the rate of 13 percent per annum from May 1, 1985. However, the interest should have been from May 1, 1984. Therefore, the January 6, 1986, Default Order is hereby corrected to require respondent to pay complainant, $7,793.61, plus interest at the rate of 13 percent per annum from May 1, 1984, until paid.

Copies hereof shall be served upon the parties.

CHIQUITA BRANDS, INC., *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-28. Order issued February 13, 1986.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, after the issuance of a Default Order on November 15, 1985, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). The November 15, 1985, Order was stayed on December 10, 1985, and respondent's motion was served upon complainant which filed an opposition thereto.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 Agric. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside.

Respondent has ten days from service hereof to file an answer. Failure to file an answer in that time will result in reinstitution of the Default Order against it. No extensions of time will be granted. In order to be considered part of the evidence in this proceeding, the answer must be verified.

Copies of this order shall be served upon the parties.

C.H. ROBINSON COMPANY *v.* WHIZPAC, INC. PACA Docket No. RD-86-105. Order issued February 13, 1986.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on January 2, 1986, awarding reparation to the complainant in the amount of $5,128.80. By letter received January 9, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of January 2, 1986, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

E&S GRAPE GROWERS & SHIPPERS *v.* SANTA FE-WEST SIDE GRAPE DISTRIBUTORS. PACA Docket No. RD-86-110. Order issued February 13, 1986.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on January 3, 1986, for $1,500.00 plus interest. Subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the that a good reason has not been shown why the relief requested in the motion should be granted. Respondent claims that it operated only from September 20, 1985 to November 1, 1985, and that it was closed on November 1 and could not receive any mail. Howev-

er, the return receipt card in the file shows that the complaint was received and signed for by respondent on October 30, 1985. Even if respondent was not operating after November 1, 1985, it could have responded to the complaint, as it allegedly was not operating in January 1986 as well, but nonetheless submitted a motion to reopen after default after receiving the January 3, 1986, Default Order. The motion to reopen is, therefore, denied.

Copies of this order shall be served upon the parties.

In re: WILLIAM GRAHAM. P.Q. Docket No. 47. Decided January 9, 1986.

Robert Broussard, Reg. Div. OGC, for complainant.
John Todesco, Chicago, Illinois, for respondent.

Decision by Edward McGrail, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act"), (7 U.S.C. Section 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR Section 318.13 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to the issuance of this Consent Decision without further procedures.

3. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

FINDINGS OF FACT

1. United Airlines is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii.

2. Respondent William Graham is an employee of United Airlines at Honolulu International Airport.

3. In the course of his employment for United Airlines, respondent William Graham handles baggage moving from Honolulu International Airport to the continental United States.

CONCLUSIONS

The parties having admitted the jurisdictional facts and having agreed to the provisions set forth in the instant order in disposition of the above-referenced proceeding, such order and decision will be issued.

ORDER

1. Respondent William Graham shall pay the sum of one hundred dollars ($100) in settlement of this matter. Respondent William Graham shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Mark Dopp, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: UNITED AIRLINES. P.Q. Docket No. 49. Decided January 9, 1986.

Robert Broussard, Reg. Div. OGC., for complainant.
Sylvia Bateman, Honolulu, Hawaii, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act"), (7 U.S.C. Section 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR Section 318.13 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to the issuance of this Consent Decision without further procedures.

3. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and

conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

FINDINGS OF FACT

1. United Airlines is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii.

2. In the course of doing business, United Airlines handles baggage moving from Honolulu International Airport to the continental United States.

CONCLUSIONS

The parties having admitted the jurisdictional facts and having agreed to the provisions set forth in the instant order in disposition of the above-referenced proceeding, such order and decision will be issued.

ORDER

1. Respondent United Airlines shall pay two thousand two hundred dollars ($2200) in settlement of this matter. Respondent United Airlines shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Mark Dopp, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: ELIZABETH MANN. P.Q. Docket No. 50. Decided January 9, 1986.

Robert Broussard, Reg. Div. OGC, for complainant.
John Tedesco, Chicago, Illinois, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act"), (7 U.S.C. Section 151 *et seq.*) by a complaint filed by the Administrator of the

Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 C.F.R. Section 318.13 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and conclusion with respect to all material issues of fact, law, or discretion, as well as the reasons or based thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

Findings of Fact

1. United Airlines is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii.

2. Respondent Elizabeth Mann is an employee of United Airlines at Honolulu International Airport.

3. In the course of her employment for United Airlines, respondent Elizabeth Mann handles baggage moving from Honolulu International Airport to the continental United States.

Conclusion

The parties having admitted the jurisdictional facts and having agreed to the provisions set forth in the instant order in disposition of the above-referenced proceeding, such order and decision will be issued.

Order

1. Elizabeth Mann shall pay the sum of one hundred dollars ($100) in settlement of this matter. Respondent Elizabeth Mann shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Mark Dopp, Office of the General Counsel, Room 2422 South Building, United States De-

partment of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: ART PAUL. P.Q. Docket No. 60. Decided January 9, 1986.

Robert Broussard, Reg. Div. OGC, for complainant.
John Todesco, Chicago, Illinois, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act"), (7 U.S.C. Section 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR Section 318.13 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to the issuance of this Consent Decision without further procedures.

3. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

FINDINGS OF FACT

1. United Airlines is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii.

2. Respondent Art Paul is an employee of United Airlines at Honolulu International Airport.

3. In the course of his employment for United Airlines, respondent Art Paul handles baggage moving from Honolulu International Airport to the continental United States.

CONCLUSIONS

The parties having admitted the jurisdictional fact and having agreed to the provisions set forth in the instant order in disposition of the above-referenced proceeding, such order and decision will be issued.

ORDER

1. Art Paul shall pay the sum of one hundred dollars ($100) in settlement of this matter. Respondent Art Paul shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Mark Dopp, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: UNITED AIRLINES. P.Q. Docket No. 51. Decided January 13, 1986.

Robert L. Broussard, for complainant.
Sylvia Bateman, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

The above-referenced proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended ("Act") (7 U.S.C. §§ 161 and 162), the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), and the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et. seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Acts and regulations promulgated thereunder (7 CFR § 330.100 *et seq.* and 9 CFR § 94.1 *et seq.*). The parties have agreed that the above-referenced proceeding should be terminated by entry of this Consent Decision and have agreed to the following stipulations:

1. For the purpose of this Consent Decision only, the respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in the above-referenced proceeding, but respondent does not admit or deny the remaining allegations in the complaint.

2. The parties stipulate and agree to the issuance of this Consent Decision without further procedures.

3. The parties stipulate and agree to waive any requirements that the final decision in these proceedings contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

4. The parties stipulate and agree to waive all rights to seek judicial review and otherwise challenge or contest the validity of this decision.

5. The respondent waives any action under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*), for fees and other expenses incurred by the respondent in connection with the above-referenced proceeding.

FINDINGS OF FACT

1. United Airlines is a corporation doing business at Stapleton International Airport, Denver, Colorado.

2. In the course of doing business, United Airlines handles foreign-origin garbage at Stapleton International Airport.

CONCLUSIONS

The parties having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision are hereby issued.

ORDER

Respondent United Airlines shall pay three hundred seventy-five dollars ($375) in settlement of this matter. Respondent United Airlines shall send, payable to the "Treasurer of the United States," a certified check or money order for said amount to Robert L. Broussard, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day that a signed copy of this order is served upon the respondent.

In re: D & K CORPORATION, INC. P.Q. Docket No. 146. Decided January 15, 1986.

Kris H. Ikejiri, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111 and § 120) and the Act of July 2, 1962 (21 U.S.C. § 134 *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that D & K Corporation, Inc., violated the Acts and regulations promulgated thereunder (9 CFR § 94.1 and § 95.1 *et seq.*). Respondent D & K Corporation, Inc., and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent D & K Corporation, Inc. admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations of the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. D & K Corporation, Inc., also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

1. D & K Corporation, Inc., respondent herein, is a corporation doing business within the territorial limits of the United States, and whose mailing address is P. O. Box 3567, Agana, Guam 96910.

2. On or about February 8, 1985, the respondent imported from Hong Kong to Guam, pork product of fried shredded pork.

3. On or about February 8, 1985, the respondent imported from Hong Kong to Guam, animal bones and deer antlers.

4. On or about February 8, 1985, the respondent imported from Hong Kong to Guam, animal manure.

CONCLUSIONS

Respondent D & K Corporation, Inc., having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent D & K Corporation, Inc., is assessed a civil penalty of one thousand five hundred dollars (1,500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C., 20250-1400, on or before January 31, 1986.

This order shall become effective on the day this order is served upon the respondent.

In re: CANDIDO SANCHEZ. P.Q. Docket No. 89. Decided December 6, 1985.

Ronald A. Cipolla, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 92.2(a) of the regulations promulgated thereunder (9 CFR § 92.2(a)). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to,

any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and respondent has not requested an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Candido Sanchez, herein referred to as respondent, is an individual whose address is 202 Calle Arzuaga, Rio Piedras, Puerto Rico.

2. On or about October 29, 1984, the respondent violated section 318.58–2 of the regulations (7 CFR § 318.58–2) in that the respondent offered for shipment to a common carrier, for movement to Philadelphia, Pennsylvania, three (3) cases of jobo (Spondias duclis), a prohibited fruit, at International Airport, Isla Verde, Puerto Rico.

CONCLUSION

Respondent has failed to respond in any manner to the allegation of the complaint. By reason of the Findings of Fact set forth above the respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent Candido Sanchez is hereby assessed a civil penalty of seven hundred fifty dollars ($750). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursu-

ant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR# 1.145).

[The Default Decision and Order became final on January 17, 1986.—Ed.]

In re: IVER BUGGE. P.Q. Docket No. 133. Decided January 24, 1986.

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Iver Bugge, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 95.4 and 7 CFR § 330.400). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Iver Bugge, respondent, has as its principal place of business Storgaten 52, Post Boks 160, N-3251, Larvik, Norway. Its duly au-

thorized agent in the United States is Kerr Steam Ship Company, Inc., American General Tower, Suite 1500, 2727 Allen Parkway, Houston, Texas 77019.

2. On or about April 29, 1985, the respondent stored regulated garbage aboard the vessel M/T Iver Chaser, which was docked at the Barbours Cut Terminal, Houston, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred dollars ($300.00). The respondent shall send a certified check or money order for $300.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: ANDREA LEO. P.Q. Docket No. 114. Decided January 27, 1986.

Importation of not fully cooked salamis.

The Judicial Officer affirmed Judge McGrail's order assessing a $250 civil penalty against respondent for importing pork salamis that had not been fully cooked as required from Italy to the United States. Respondent's violation, although inadvertent, was a very serious violation warranting a $250 civil penalty.

Sherrie Kopka Kennedy, for complainant.
Respondent, *pro se*.
Edward H. McGrail, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a proceeding under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 *et seq.*), in which Administrative Law Judge Edward H. McGrail (ALJ) filed an initial Decision and Order on October 10, 1985, assessing a civil penalty of $250 against respondent for importing pork salamis that had not been fully cooked

by a commercial method in a container hermetically sealed promptly after filling, but before such cooking, as required, from Italy to the United States in violation of the Act and regulations.

On October 30, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on November 15, 1985.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111), by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on July 15, 1985. The complaint alleged that the respondent violated section 111 of the Act and section 94.8(a) of the regulations promulgated thereunder (9 CFR § 94.8(a)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on July 25, 1985. On August 19, 1985, respondent was sent, by regular mail, a notice that his answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing.

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[1] The position of the Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Andrea Leo, respondent, is an individual whose address is 1363 Merry Avenue, Bronx, New York 10461.

2. On or about September 3, 1984, the respondent imported into the United States at J.F.K. Airport in Jamaica, New York, from Italy, approximately three (3) pork salamis in violation of section 94.8(a) of the regulations (9 CFR § 94.8(a)), because the pork salamis had not been fully cooked by a commercial method in a container hermetically sealed promptly after filling but before such cooking, as required.

CONCLUSIONS

By reason of the facts in the finding of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's violation, although inadvertent, was a very serious violation of the Act and regulations. African swine fever is potentially the most dangerous and destructive of all communicable swine diseases. This virus is highly virulent and may be present in pork products, such as salami, originating in countries where the disease exists, such as Italy. The only known practical method of destroying the contagion of the disease in pork products is by heat treatment. Accordingly, a civil penalty of $250 should be imposed. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985).

ORDER

Respondent is hereby assessed a civil penalty of $250, which shall be paid within 30 days after service of this Order. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie L. Kopka Kennedy, U.S. Department of Agriculture, Office of the

General Counsel, Room 2422, South Building, Washington, D. C. 20250–1400.

In re: SHARON GORDON. P.Q. Docket No. 158. Decided January 29, 1986.

Joseph Pembroke, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

By motion, filed January 24, 1986, Complainant seeks dismissal of the complaint in this matter.

IT IS ORDERED, that the complaint issued in this matter, filed December 3, 1985, be, and hereby is, dismissed.

In re: RENE VALLALTA. P.Q. Docket No. 138. Filed February 5, 1986.

Illegal plant importation.

Filed by William J. Weber, Administrative Law Judge.

Answered by Donald A. Campbell, Judicial Officer.

CERTIFICATION OF QUESTIONS TO THE JUDICIAL OFFICER

Complainant charges that Respondent illegally imported one (1) cacao seed pod.

The Respondent states, *inter alia*, that:

> "* * * I told him [Customs Officer] the only food I had was cheese., exactly as I had said in my declaration for customs.
>
> "I was traveling with my wife and my three children I had five pieces of luggage., to my surprise the officer found in one of the suitcases some cocoa seeds (pod). I started explaining to the officer that the day before departure from San Salvador a relative of mine asked me if I could bring a letter and a little package for a friend of hers., I asked about the content of the package and she told me that were cocoa seeds, immediately I told her that I could bring her the letter but not the seeds, because is prohibited to bring plants or seeds., she agreed to send the letter only., ,

"But obsviously [sic] while she was helping my wife to pack the clothes of my children she put those seeds in one of the suitcases, I explained the officer that I had no reason to bring those seeds.

"Every time I enter thru Los Angeles I had seen when officers take away fruits from passengers (mango, avocados etc.) People that travel for the first time are ignorant of the customs restriccions, [sic] they ignore that California is one of the largest producer of avocados. Like I said before I had enter thru New York, Portland, Houston, Miami, Los Angeles, New Orleans, and I had never before had any problems at any port of entry. * * *" (Respondent's letter filed November 13, 1985, answering the Complaint allegations).

Essentially, he contends that his failure to declare the cacao seed pod to the Customs officer was due to lack of knowledge that it had been placed in the baggage contrary, to his explicit instructions.

Respondent also contends that he was subjected to racial slurs by a second Customs officer at the time he was trying to explain the situation to the first Customs officer. While this in not directly relevant to the key issues, it upset him and arguably created emotional distress which effectively reduced his capacity to rationally discuss and evaluate the alleged violation at the scene and might explain why a compromise settlement was not accepted by him earlier.

Respondent contends that he had no knowledge of the cacao seed in the luggage and that he is innocent.

Complainant's response in opposition to the Respondent's request for a hearing filed January 3, 1986, states:

"* * * On October 7, 1985, Judicial Officer Donald A. Campbell issued his decision in, *In re: Richard Duran Lopez*, P.Q. Docket No. 59 (Exhibit A). The *Lopez* decision is controlling in this matter. On page 8 of the decision, the Judicial Officer states that:

'The *only* mitigating circumstance that should be considered in a plant quarantine violation case is if the presence of the prohibited article was declared to the Customs Inspector, in a manner sufficiently loud and dear that the customs inspector understood the declaration, before a search of the car, baggage, or possessions began.' (Emphasis in the original).

Respondent's answer does not disclose an acceptable mitigating circumstance.

"Complainant offered to settle this matter for a sum considerably less than the requested civil penalty of $250. In the settlement letter to the respondent, complainant enclosed a copy of the *Lopez* decision. Respondent rejected the offer, and has requested a hearing.

"Section 1.141, subparts (a) and (b) of the Rules of Practice (7 CFR § 1.141 (a) and (b)) provides, in part, that (a) 'Any party may request a hearing on the facts . . .' and (b) 'If any material issue of fact is joined by the pleadings . . .' The respondent admitted all the facts in his answer. The only issue is the sanction, and the Judicial Officer has stated the Department's position, at page 14 of the decision,

> 'To summarize, where a person *unintentionally* violates a quarantine regulation issued under the Plant Quarantine Act by bringing a prohibited article into the United States, and the matter is not settled informally, the *minimum* civil penalty that will be imposed by the Judicial Officer in a formal case . . . is $250.' (Emphasis in the original).

"WHEREFORE, complainant request that:

> 1) The respondent's request for a hearing be denied, and
>
> 2) That the Administrative Law Judge grant the order requested in the complaint. (Complainant's Response filed January 3, 1986, in Opposition to Respondent's Request for a Hearing.)

If "unintentional" is construed to include "unknowing" then Complainant's position may have merit under the cited precedent.

Further, there appears to have been five family members traveling together with five pieces of luggage for the family group. No issue is raised concerning the various pieces of luggage, their contents, and the various members of the family group, nor how the luggage was packed with reference to these people.

The following questions are certified to the United States Department of Agriculture Judicial Officer:

> (1) Should Respondent's motion for hearing be denied?
> Yes. D.A.C. 1/10/86

(2) If no hearing is appropriate and if Complainant files a motion for a decision on the pleadings, should that decision be entered finding a violation and assessing a $250.00 civil penalty against Respondent Rene Vallalta? Yes. D.A.C. 1/10/86

In re: UBEM S.A. P.Q. Docket No. 160. Decided February 6, 1986.

Jaru Ruley, Reg. Div., OGC, for complainant.
Thomas Clure, Duluth, MN, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Ubem S.A., respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 95.4 and 7 CFR § 330.400). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Ubem S.A., respondent, is a foreign business whose agent in the United States is Federal Marine Terminals, Inc., 605 Board of Trade Building, Duluth, Minnesota 55802.

2. On or about June 5, 1985, the respondent stored regulated garbage aboard the vessel M/V Federal Thames, at Duluth, Minnesota.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty dollars ($250.00). The respondent shall send a certified check or money order for $250.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250 1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: NORTH AMERICAN VAN LINES, INC. P.Q. Docket No. 156. Decided February 10, 1986.

Kevin Thiemann, for complainant.
Mark J. Andrews, Washington, D.C., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7 U.S.C. §§ 151-164a and 167, and 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that North American Van Lines, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. North American Van Lines, Inc., respondent, is a corporation doing business at Fort Wayne, Indiana, and whose address is P. O. Box 988, Fort Wayne, Indiana 46801.

2. On or about April 26, 1985, the respondent moved interstate outdoor household articles from Gales Ferry, Connecticut, a gypsy moth high risk area, to San Jose, California, a gypsy moth non-regulated area.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred dollars ($700.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S. W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: NORTH AMERICAN VAN LINES, INC. and E. ERNY (RAYMOND J. ERNY). P.Q. Docket No. 156. Decided February 10, 1986.

Kevin Thiemann, Reg. Div., OGC, for complainant.
Mark Andrews, Washington, D.C., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DISMISSAL OF COMPLAINT AS TO RESPONDENT RAYMOND J. ERNY

Pursuant to Motion therefor, and for good cause shown, the Complaint filed herein on November 25, 1985, is hereby dismissed as to Respondent E. Erny (Raymond J. Erny).

In re: FRANCISCO PAULINO. P.Q. Docket No. 171. Decided February 10, 1986.

Sherrie Kopka Kennedy, Reg. Div. OGC, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown by complainant, the complaint that was filed herein against Francisco Paulino on January 8, 1986, is herewith dismissed.

In re: PAN AMERICAN WORLD AIRWAYS, INC. P.Q. Docket No. 98. Decided February 12, 1986.

Clement J. McGovern, for complainant.
Carl Haberbusch, Pan American World Airways, Inc., New York, N.Y., for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspec-

tion Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedures;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Pan American World Airways, Inc., respondent, is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii, with a mailing address of Post Office Box 29900, Honolulu, Hawaii 96820.

2. On or about January 25, 1985, respondent at Honolulu International Airport, had in its possession a piece of baggage destined for Washington, D. C. via Pan American Flight 838/72 and Flight 581.

3. On or about May 28, 1985, respondent at Honolulu International Airport, had in its possession nine (9) pieces of baggage destined for Los Angeles, California via Pan American Flight 3812.

4. On or about July 1, 1985, respondent at Honolulu International Airport, had in its possession five (5) pieces of baggage destined for Los Angeles, California via Pan American Flight 812.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in

disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two thousand dollars ($2,000). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Clement J. McGovern, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: PAN AMERICAN WORLD AIRWAYS, INC. P.Q. Docket No. 90. Decided February 13, 1986.

Clement J. McGovern, for complainant.
Carl Haberbusch, Pan American World Airways, Inc., New York, N.Y., for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedures;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issue of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Pan American World Airways, Inc., respondent, is a corporation doing business at 6501 W. Imperial Highway, P. O. Box 9227B, Los Angeles, California 90009.

2. On or about July 19, 1984, the respondent had in its possession at Los Angeles Airport, 22 cartons of CYMBIDIUM ORCHID blooms which had been imported from Australia on Pan American flight 816 and which were subsequently placed on Agricultural Hold.

3. On or about August 8, 1984, the respondent had in its possession, at Los Angeles Airport a box of orchid blooms which had been imported from New Zealand on Pan American flight 816 and subsequently placed on agricultural hold.

4. On or about October 17, 1984, the respondent had in its possession, at Los Angeles Airport, certain palm on ARAUCARIA seedlings which were imported from Australia and subsequently placed on agricultural hold.

5. On or about August 1, 1984, the respondent had in its possession at Los Angeles Airport, certain ATROPURPUREM SEEDS (bean seeds) which were imported from Australia on Pan American Flight 812 and required treatment for soybean rust.

CONCLUSIONS

The respondent having admitted the jurisdiction facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three thousand dollars ($3,000). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Clement J. McGovern, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.

C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: FRANCISCO RAMOS. P.Q. Docket No. 36. Decided December 24, 1985.

Importation of limes without a permit—Civil penalty.

Fronds Woods, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 151-164a, 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-2(e) of the regulations promulgated thereunder (7 CFR § 319.56-2(e)) by importing limes from Mexico into the United States without a permit. Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent. Respondent was informed in the complaint and the letter of service that failure to plead specifically to any allegation of the complaint would constitute an admission of such allegation.

On February 20, 1985, the respondent filed an answer in which he admitted that he had a bag of lemons as he crossed the border between the United States and Mexico on September 16, 1984. Respondent did not deny that he had no permit for the fruit. Under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)), respondent thus admitted the allegations of the complaint.

On June 24, 1985, Judicial Officer Donald A. Campbell ruled that respondent, in his answer, admitted that he violated the Act and regulations promulgated thereunder (Ruling on Reconsideration, P.Q. Docket No. 36). Under Section 1.139 of the Rules of Practice (7 CFR § 1.139), the admission by the answer of all the material allegations of fact contained in the complaint constitutes a waiver of hearing.

The Judicial Officer further ruled, in effect, that if complainant stipulated to the facts alleged in respondent's answer, no hearing would be needed to determine the sanction to be imposed. Accordingly, complainant hereby stipulates to the facts alleged in respondent's answer, making a hearing unnecessary. Furthermore, on September 10, 1985, the Judicial Officer ruled that the facts alleged in respondent's answer do not constitute mitigating circumstances. *In re Lopez*, P. Q. Docket No. 59, Tentative Decision and Order, at 10. There is thus no basis for reducing the requested sanction.

As there is no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Francisco Ramos, respondent, is an individual whose address is 1336 Glencroft Road, Glendora, California 91740.

2. On or about September 16, 1984, respondent imported 2.5 pounds of limes from Mexico into the United States in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)), because the fruit was not accompanied by a permit.

CONCLUSIONS

In his answer, respondent did not deny any of the material allegations in the complaint. In addition, the facts alleged in respondent's answer constitute no basis for reducing the requested sanction.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Francisco Ramos is hereby assessed a civil penalty of two hundred fifty dollars ($250). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Fronda C. Woods, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, no later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent (7 CFR 1.142(c)), unless there is an appeal to the Judicial Officer *within 30 days of service* pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final February 18, 1986.—Ed.]

In re: MAGUALITA ROSE RENCARGE. P.Q. Docket No. 125. Decided December 23, 1985.

Thomas Bundy, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 151–164a and 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56 of the regulations promulgated thereunder (7 CFR § 319.56). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of each allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and respondent has not requested an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Magualita Rose Rencarge, herein referred to as the respondent, is an individual whose address is 5905 Santa Maria, Laredo, Texas 78041.

2. On or about February 27, 1985, the respondent transported sixteen (16) limes into the United States from Mexico in violation of section 319.56 of the regulations (7 CFR § 319.56), because the limes were imported without a permit, as required.

CONCLUSION

Respondent has failed to respond in any manner to the allegation of the complaint. By reason of the Findings of Fact set forth above the respondent has violated the Act and the regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent Magualita Rose Rencarge is hereby assessed a civil penalty of two hundred fifty dollars ($250). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR # 1.145).

[The Default Decision and Order became final on February 17, 1986.—Ed.]

In re: AUTO LINERS, INC. P.Q. Docket No. 166. Decided February 19, 1986.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

On December 23, 1985, this proceeding was instituted under the Act of February 2, 1903, as amended, (21 U.S.C. §§ 111 and 120), the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C.

§§ 151-164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Acts and regulations promulgated thereunder (7 CFR §§ 330.100-300.400 and 9 CFR § 94.5 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Auto Liners, Inc. respondent, is a corporation whose address is 100 East 42nd Street, New York, New York 10017.

2. On or about June 4, 1985, the respondent brought foreign origin garbage into Jacksonville, Florida, on its ship the M/V Oppama Maru.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

Respondent Auto Liners, Inc. is assessed a civil penalty of two hundred fifty dollars ($250) which shall be payable to the "Treasurer of the United States" by certified check or money order, and

which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: DAVID E. MCCRACKEN and DAVID R. WEBB CO., INC. P.Q. Docket No. 169. Decided February 20, 1986.

Sherrie J. Kennedy, for complainant.
Art Beck, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*) and the Act of August 20, 1912, as amended (Plant Quarantine Act) (7 U.S.C. §§ 151-164a and 167), by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Acts and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admit the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also stipulate and agree that the United States Department of Agriculture is the "prevailing party" in the proceeding and waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

FINDINGS OF FACT

1. David E. McCracken, herein referred to as the respondent, is an individual whose address is 4707 Sloan Drive, Jeffersonville, Indiana 47130.

2. David R. Webb Company, Inc., herein referred to as the respondent, is a business located at 206 South Holland Street, Edinburgh, Indiana 46124.

3. On or about March 18, 1985, the respondents moved interstate regulated articles, specifically, approximately fourteen (14) logs, from Somerset County, Pennsylvania, a gypsy moth high-risk area, into Edinburgh located in Johnson County, Indiana, a non-regulated area.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

1. The respondent, David E. McCracken, is assessed a civil penalty of two hundred fifty dollars ($250.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

2. The respondent, David R. Webb Co., Inc., is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C., 20250-1400, within thirty (30) days from the effective date of this Order.

3. This Order shall become effective on the day upon which service of this Order is made upon the respondents.

In re: JAMES KANDA and WORLD AIRWAYS, INC. P.Q. Docket No. 74.
Decided February 21, 1986.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION FOR WORLD AIRWAYS, INC.

On March 26, 1985, this proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa–150jj) (Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondents violated the Act and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). On November 25, 1985, a motion was filed to dismiss the complaint against respondent James Kanda. The Honorable Edward H. McGrail, Administrative Law Judge, granted the motion on November 26, 1985. World Airways, Inc., is the only remaining respondent. The parties have agreed that the proceeding with respect to World Airways should be terminated by entry of the Consent Decision set forth below. The parties have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent World Airways specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons of bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent World Airways also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. World Airways, Inc., respondent, is a corporation whose mailing address is Terminal Box 26, Honolulu International Airport, Honolulu, Hawaii 96819.

2. On or about October 31, 1984, at Honolulu International Airport, the respondent checked baggage to the mainland United States.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

Respondent World Airways is assessed a civil penalty of three hundred seventy-five dollars ($375) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: KAPPALARAN SHIPPING COMPANY. P.Q. Docket No. 145. Decided February 21, 1986.

Jaru Ruley, for complainant.
Abe Phillips, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150 aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Kappalaran Shipping Company, respondent, violated the Act and regulations promulgated thereunder (7 CFR § 330.400). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only and this specific proceeding only, re-

spondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

3. The civil penalty assessed herein, when paid, shall stand as final disposition of all charges against and full and final satisfaction of all liability of the respondent, Kappalaran Shipping Company, the M/V STAR KANDA, her master, officers and crew, and her owners, operators, charterers, and agents, and all of their agents, servants and employees, with respect to the matters and things charged and/or alleged in this proceeding.

4. The Animal and Plant Health Inspection Service, USDA, will not use the admissions made herein to pursue any other matter arising out of Respondent's storage of regulated garbage aboard the vessel M/V STAR KANDA which was docked at Mobile, Alabama on or about March 7, 1985.

FINDINGS OF FACT

1. Kappalaran Shipping Company, respondent, has its principal place of business at Bonifacio Drive, Manila, Philippines. Its duly authorized agent in the United States is Star Shipping, Inc., 905 Commerce Building, Mobile, Alabama 36602.

2. On or about March 7, 1985, the respondent stored regulated garbage aboard the vessel M/V STAR KANDA, which was docked at Mobile, Alabama.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the things related hereinabove and the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Kappalaran Shipping Company such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred dollars ($300.00). The respondent shall send a certified check or money order for $300.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service on this order is made upon the respondent.

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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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In re: C.L. MORGAN d/b/a/ CLEVELAND LIVESTOCK MARKET. A.Q. Docket No. 228. Decided March 7, 1986.

Edward H. McGrail, Administrative Law Judge.
Joseph Pembroke, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that C.L. Morgan d/b/a Cleveland Livestock Market, respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*) and (9 CFR 85.7 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. C.L. Morgan, is an individual doing business as Cleveland Livestock Market whose mailing address is P.O. Box 488, Cleveland, Texas.

2. On or about February 26, 1985, respondent shipped swine and one adult cow from Miller Livestock Market, DeRidder, Louisiana, to Cleveland, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500) which shall be payed in five equal monthly installment of one hundred dollars each. Payment shall be to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: OLE SKAARUP d/b/a SKAARSHIP FARMS. A.Q. Docket No. 230. Decided March 7, 1986.

Victor W. Palmer, Administrative Law Judge.
Jaru Ruley, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material

issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ole Skaarup d/b/a Skarship Farms, respondent, is an individual whose mailing address is Skarship Farms, c/o Skaarup Shipping Corporation, 66 Field Point Road, Greenwich, Connecticut 06830.

2. On or about September 12, 1984, the respondent moved a brucellosis-exposed cow interstate from Hillsdale, New York, to Quirk Land and Cattle Company, Hastings, Nebraska.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred fifty dollars ($450.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: RALPH MOONEY. A.Q. Docket No. 139. Decided March 12, 1986.

Three violations brucellosis eradication program—Interstate cattle movement without documentation—civil penalty.

The Judicial Officer affirmed Judge McGrail's order assessing civil penalties totalling $3,000 for violations of the Brucellosis Eradication Program involving the transportation of cattle interstate that were not accompanied by the required owner's

statement or other document; that were not accompanied by a health certificate and a permit for entry; and brucellosis reactors were not moved directly to a recognized slaughtering establishment. Complainant need only prevail by a preponderance of the evidence. Respondent's actions in connection with four cattle involved three separate violations and, therefore, a $3,000 civil penalty may be assessed. Severe sanction policy explained. Violations of the Brucellosis Eradication Program are very serious violations.

Donald A. Campbell, Judicial Officer.
Kris Ikejiri, for complainant.
Kenneth M. Burns, Okolona, Mississippi, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR §§ 71.18, 78.7, 78.9(c)). An initial Decision and Order was issued on December 16, 1985, by Administrative Law Judge Edward H. McGrail (ALJ) assessing civil penalties totalling $3,000.

On January 22, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.25).* The case was referred to the Judicial Officer for decision on February 25, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few changes too trivial to be itemized). Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is an administrative proceeding for the assessment of civil penalties against Ralph Mooney, respondent herein, for violations of the Act of February 2, 1903, as amended (21 U.S.C. § 111 and § 120), and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*), in accordance with the Rules of Practice in 9 CFR § 70.1 *et seq.* and 7 CFR 1.130 *et seq.* This proceeding was instituted by a complaint filed on December 20, 1984, by the Adminis-

* The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

trator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture. Respondent filed an answer on Febrary 19, 1985, *pro se*. Respondent's Motion to Amend Answer was granted by Order dated June 5, 1985, and such amended answer was filed on June 17, 1985. A full evidentiary hearing on the record was held before the undersigned on June 26, 1985, in Oxford, Mississippi. Complainant was represented by Kris H. Ikejiri, Esq., Office of General Counsel, U.S. Department of Agriculture, Washington, D. C. Respondent was represented by Kenneth M. Burns, Esq., Okolona, Mississippi. The parties were given leave to file simultaneous post hearing briefs by August 16, 1985, and such brief have been filed by both parties.

ISSUES PRESENTED

I

Whether the respondent on March 13, 1984, moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately four (4) cattle in violation of section 71.18 of the regulations because the cattle were not accompanied by an owner's statement or other document.

II

Whether the respondent on March 13, 1984, moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately two (2) cattle in violation of section 78.7 of the regulations because the cattle were brucellosis reactors and were not moved for immediate slaughter directly to a recognized slaughtering establishment.

III

Whether the respondent on or about March 13, 1984, moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately two (2) cattle in violation of section 78.9(c) of the regulations because the cattle were not accompanied by a health certificate and a "Permit for Entry", as required.

STATEMENT OF LAW AND REGULATIONS

Generally, Sections 111 and 120 of Title 21, of the United States Code, authorize the Secretary of Agriculture to promulgate such regulations as to prevent the introduction, dissemination, or spread of contagious animal diseases through interstate movements of cattle. Section 122 of Title 21, of the United States Code, provides for the assessment of not more than one thousand dollars for each violation of the regulations issued by the Secretary of Agriculture

pursuant to the authority invested in him in Sections 111 and 120 of Title 21, United States Code.

Section 71.18 of the Regulations (9 CFR § 71.18) promulgated by the Secretary of Agriculture pursuant to the above authority requires, as pertinent here, that cattle two (2) years of age, or over, and moved interstate other than directly to slaughter or to a quarantined feed lot must be accompanied by an owner's statement, or other document, showing the point of origin, the destination, the number of animals covered by the statement, the name and address of the owner or shipper, and the identifying numbers of the backtags or other approved identification applied.

Section 78.7 of the Regulations (9 CFR § 78.7) provides that brucellosis reactor cattle may only be moved interstate for immediate slaughter directly to a recognized slaughtering establishment if they are identified by a "B" brand on the left jaw and a metal tag on the left ear with a serial number and indication the animals are brucellosis reactors; and accompanied by a permit to be delivered to the consignee. A "Permit", VS Form 1-27, is required to accompany an interstate movement of "B" branded cattle (78.1(o)(1)).

Section 78.9(c) of the Regulations (9 CFR 78.9(c)) provides that cattle originating in a Class B State that are non-vaccinates under 18 months of age, or are official calfhood vaccinates of the beef breeds under 24 months of age, or are official calfhood vaccinates of the dairy breeds under 20 months of age, unless they are parturient or postparturient, may be moved interstate without being tested for brucellosis. If over these ages, or if they are parturient or postparturient and under these ages, they may be moved interstate when accompanied by a health certificate and "Permit for Entry." A "Permit for Entry" is a premovement authorization, oral or written, for entry into the State of destination (9 CFR § 78.1(o)(2)).

DISCUSSION AND CONCLUSIONS

As noted from the Issues, *supra*, the allegations charged evolve from respondent's purchase of four (4) cows at the South Memphis Stockyards Co., Memphis, Tennessee, on March 13, 1984, and their interstate movement on that same date, culminating in three separate charges of violations of Title 9, Code of Federal Regulations, §§ 71.18, 78.7 and 78.9(c).

Dr. A. H. Ward is a Veterinary Medical Officer, Animal and Plant Health Inspection Service, U.S. Department of Agriculture (APHIS–USDA). He supervises various veterinary services in an eleven county area in north-central Mississippi, including the Federal/State brucellosis control and eradication program. He described brucellosis as a higly infectious, contagious communicative

disease of livestock which can also infect humans. In livestock, it is considered a reproductive disease which causes aborted fetuses, weak or stillborn calves, decreased milk production and sterility in mature animals. In humans, it can cause undulant fever. He noted that states are classified by regulation as to the degree of prevalence of the disease in a particular state, i.e., "Free", "A", "B" or "C". The lower the letter of the alphabet, the more serious the degree of existence of brucellosis in that state; i.e., a "B" State has more brucellosis than an "A" State. Tennessee is classified as a Class B State (9 CFR 78.20(c)).

He further testified that interstate movement of cattle is strenuously governed by regulations which are aimed at the prevention of the disease and control of infected animals. Such brucellosis infected animals are referred to as "reactors" and are required to have a red tag in the left ear and to be branded with a "B" on the left jaw. Once such animals are loaded on a truck for interstate shipment they must not be unloaded until they reach their destination at a slaughtering plant. Other controls promulgated in the regulations for the interstate shipment of cattle include an owner's statement, Health Certificate, Permits for Entry, eartags and backtags. They make up an identification system whereby individual animals moving interstate may, among other things, be traced to theherd of origin, as well as their destination (Tr. 12-18).[1]

Dr. Ward has spoken to Mr. Mooney on several occasions with regard to these regulations. He cited a letter, dated June 17, 1983, from the Senior Staff Veterinarian, Veterinary Services, APHIS-USDA, to Mr. Mooney cautioning him that he had not followed the regulations in shipping cattle on March 31, 1983, from South Memphis Stockyards, Memphis, Tennessee (South Memphis) to his stockyard at Pontotoc, Mississippi, because they were not accompanied by the required Health Certificate or Permit for Entry. The letter provided a copy of the regulations and offered to be of assistance to him in the interstate movement of cattle. Dr. Ward also testified that the Pontotoc Stockyard, operated by Mr. Mooney, is not an official quarantined feedlot. To his knowledge, the only reqirement to unload animals for watering is when animals are shipped over long distances by railroad. He would consider unloading brucellosis reactor animals on to another conveyance because of mechanical difficulties with the original truck to be a mitigating

[1] Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

circumstance to the requirement that such animals be taken directly to a slaughtering establishment (CX-1; Tr. 16, 19-21, 103-106).

Mr. Olin A. Valentine, Compliance Officer, APHIS-USDA, Jackson, Mississippi, testified that while on official business at the Pontotoc Stockyards, Pontotoc, Mississippi, on the afternoon of March 14, 1984, and accompanied by Compliance Officer Joe L. Pigott, he observed four adult cows enclosed in a fenced dirt pen containing a watering trough and feed facilities. Two of these cows had tag numbers 63AA7581 and 63AA7582 in their left ears and a "B" branded on their left jaws. The other two cows wore backtags, numbers 63AA9376 and 63AA9383, sprayed with red paint indicating they were restricted cattle destined for slaughter. The first two digits are the code assigned to a particular State, e.g., "63"-Tennessee, "65"-Mississippi. The following two letters are the code assigned to a particular stockyard or sale barn, e.g., "AA"-South Memphis Stockyards Company (Tr. 34-36).

While Compliance Officer Valentine was still on the premises, Mr. Mooney arrived with a load of cattle which were not unloaded but which included another branded brucellosis reactor. When asked for the papers which accompanied the animals already in the pen and those on his truck, Mr. Mooney produced one VS Form 1-27, "Permit for Movement of Restricted Animals", a USDA form. The Permit, No. 656739, showed South Memphis Stockyards Co., Memphis, Tennessee (South Memphis) as the origin, Pioneer Beef Company, Grenada, Mississippi (Pioneer), as the destination, and Ralph Mooney as the shipper. The eartags of the three "B" branded cows on this form were listed as, 63FL7581, 63AA7582 and 63AA7584, and it was signed by Tennessee State Inspector Glen W. Curbo on the afternoon of March 13, 1984.[2] The Permit also contained a "Warning" that the "Livestock Must be Delivered to Consignee Without Diversion" (CX-3, Tr. 37, 47-48).

Mr. Valentine wrote up a statement based on his interview with Mr. Mooney on March 14, 1984; however, Mr. Mooney refused to sign it. The statement reflects that Mr. Mooney advised that on March 13, 1984, he transported cows in the penned area from South Memphis to Pontotoc, Mississippi. He also advised that it was the custom of the inspector at South Memphis to list each separate day's purchases on the same Permit, VS-1-27, and to issue only one Permit for all purchases, usually on the last day of the sales. He transported one of the "B" branded cows, No. 63AA7584, from South Memphis to Pontotoc on March 14, 1984. Mr. Mooney

[2] "Other Identification" listed for these reactor cows were Nos. 485326, 485325, and 454210 respectively.

could not provide a Health Certificate or Permit for Entry for two other penned cows identified by red backtags, Nos. 63AA9376 and 63AA9383. Such documents were required to unload these animals at Pontotoc. Mr. Mooney's reason for transporting the penned cows to his Pontotoc Stockyard, rather than to Pioneer, was that he did not have a big enough load, and was waiting to bring in more cattle before he hauled them to slaughter (CX-12, 13; Tr. 38).

In his testimony, Mr. Valentine reiterated what Mr. Mooney had told him and which he recorded in the statement of March 14, 1984. Mr. Valentine was emphatic that Mr. Mooney advised him on that date that he did not have the VS-1-27 form with him when he transported the two (2) "B" branded cows from South Memphis to Pontotoc on March 13, 1984 (Tr. 42, 45). As a further record of his interview with Mr. Mooney and the circumstances surrounding his visit to Pontotoc on March 14, 1984, Mr. Valentine gave an affidavit to Compliance Officer Pigott on March 15, 1984. This statement reflects the presence of four adult cows on the premises of Pontotoc on March 14, 1984, two being branded brucellosis reactor cows, and two wearing backtags sprayed with red paint. Mr. Valentine's affidavit repeats the same information provided in his oral testimony and contained in the unsigned statement of Mr. Mooney (CX-13).

Mr. Joe L. Pigott, Compliance Officer, APHIS-USDA, Jackson, Mississippi, accompanied Mr. Valentine, *supra*, to the Pontotoc Stockyard, Pontotoc, Mississippi, on March 14, 1984. While there he too observed four adult cows in the fenced pen and noted that two of the cows had backtags which had been sprayed with red paint. He also noted that two were branded as brucellosis reactors and bore brucellosis reactor tags in their left ears. Although he did not question Mr. Mooney concerning these cows, he was present during all of the questioning by Mr. Valentine. During this questioning he heard Mr. Mooney explain that the reason for the four (4) cows being at Pontotoc was that Mr. Mooney did not have a load to transport to Pioneer and that he was waiting to obtain additional cows in order to make a load. At no time did he hear Mr. Mooney say that the four cows were there because his truck broke down (Tr. 113-114, 116). Mr. Pigott later obtained an affidavit from Mr. Valentine which reflected Mr. Mooney's answers to questions posed by Mr. Valentine on March 14, 1984 (CX-13). He also read over the statement Mr. Valentine had drawn up for Mr. Mooney to sign, but which was not signed by Mr. Mooney (Tr. 116).

Mr. Glen Curbo, Livestock Inspector, Tennessee Department of Agriculture, was on duty in his official capacity at South Memphis, Memphis, Tennessee, on March 13, 1984. He testified that he executed the VS-1-27 form, CX-3, at the request of Respondent

Mooney because the latter had purchased two (2) brucellosis reactor cows at South Memphis on that date and intended to ship them to the Pioneer Beef Company, Grenada, Mississippi. Although he signed the VS-1-27 on March 13, 1984, he retained the form in his possession until Respondent Mooney signed it and picked it up on either March 14th or 15th, 1984. It is Mr. Curbo's practice to sign the VS-1-27 form on the date the brucellosis reactor cattle are purchased to indicate that the cattle must be slaughtered fifteen (15) days from that date in order to qualify the seller for the indemnity payment. Mr. Curbo is acquainted with Respondent Mooney and knows he purchases brucellosis reactor cows on a regular basis. Mr. Curbo testified with certainty that he retained the VS-1-27 form, dated March 13, 1984, in his possession until March 14 or 15, 1984, because of the manner in which he keeps control of the VS-1-27 forms in his office, and from the fact that one of the animals on the Form, No. 63AA7584, was not bought by Respondent Mooney at South Memphis until March 14, 1984, on which date it was added to the VS-1-27 form. Thus, Respondent Mooney did not have the VS-1-27 form with him when he transported the two brucellosis reactor cows from South Memphis to Pontotoc, Mississippi, on March 13, 1984.

Mr. Curbo further testified that on the VS-1-27 form he inadvertently recorded the backtag of one of the cows purchased by Respondent Mooney as 63FL7581. "FL" is the letter code for the sale barn at Cottierville, Tennessee, where he works at other times. The backtag number should properly have been recorded as 63AA7581 to show South Memphis as the place of purchase (CX-3, 9: Tr. 50-58).

Mr. Jimmy R. Odle, Compliance Officer, Veterinary Services, APHIS, USDA, Jackson, Tennessee, obtained an invoice and sale tickets from the Burnette-Carter Commission Agency (B-C) at South Memphis. Mr. Mooney has been asssigned buyer's code M&M 324X by B-C. The invoice, dated March 13, 1984, shows that 4 head of cattle weighing a total of 3,030 lbs. were purchased on that date by Mr. Mooney (M&M 324X) for a total price of $827.84 (CX-5). The separate sale tickets show the following : No. 178765—1 cow, weight-845 lbs., price-$276.74, backtag no. 63AA9376; No. 178921—2 cows, weight-1,335 lbs., price $347.10, backtag nos. 63AA7581 and 63AA7582; and No. 178931—1 cow, weight-850 lbs., price-$204.00, backtag no. 63AA9383. It is noted that the weights and prices listed on these scale tickets for March 13, 1984, equal the totals found on the Burnette-Carter invoice ticket of the same date (CX-6, 7, 8). A fourth scale ticket, No. 191541, dated March 14, 1985, shows that Mr. Mooney purchased an additional cow on that

date. The weight was listed as 785 lbs. and the price paid to B–C as $196.25. The cow is identified by backtag No. 63AA7584 (CX–5–9; Tr. 61–69).

Mr. Odle also obtained copies of "Brucellosis Test Record" from the official files of APHIS–USDA, Nashville, Tennessee. The records show a partial list of animals tested for brucellosis at South Memphis on March 13, 1985. They include two adult cows purchased by Mr. Mooney (M&M 324X), backtag Nos. 63AA9383 and 63AA9376 (CX–10, 11; Tr. 71–72).

Harvey F. McCrory, D.V.M., State Veterinarian for the State of Mississippi, stated in his affidavit of June 10, 1985, that his records failed to show that a Health Certificate was received from the South Memphis Stockyards Co. for a consignment of cattle to Ralph Mooney, Pontotoc, Mississippi, during the month of March, 1984. Additionally, he stated that a Permit for Entry was not requested for any cattle consigned to Ralph Mooney and brought into the State of Mississippi during the month of March, 1984 (CX–4, Tr. 39–41).

Respondent Ralph Mooney, Pontotoc, Mississippi, testified he operates the Pontotoc Stockyard which holds livestock sales every Saturday afternoon. He also purchases cattle for the Pioneer Beef Company, Grenada, Mississippi (Pioneer) on three days per week, Tuesdays, Wednesdays and Thursdays, at the South Memphis Stockyards, Memphis, Tennessee (South Memphis). For the past five years he has purchased cattle through Burnette-Carter (B–C), a commission agency operating at South Memphis. Usually he purchases restricted cows, i.e., "B" branded, and those bearing red backtags, and sells them to Pioneer which is a slaughtering plant. He is assigned No. M&M 324X as a buyer's code for the purpose of purchasing this type animal. On March 13, 1984, he purchased four head of cattle, two red tag reactor cows, and two "B" branded cows. He testified further that he intended to transport these four cows to his stockyard at Pontotoc, pick up six additional head of cattle he had purchased for Pioneer at Pontotoc the previous Saturday, and transport all ten cows to Pioneer, Grenada, Mississippi, on that date. However, he testified that he had muffler problems with his truck between Oxford and Pontotoc, Mississippi, which caused him to drop the trailer with the four cows off at his Pontotoc Stockyard and return to Pontotoc to have the truck repaired. He testified that since it was too late in the afternoon of March 13, 1984, to have the truck repaired, he returned the next morning, March 14, 1984, to have the truck repaired. Although he picked up the repaired truck "around 9 o'clock" on March 14, 1984, he testified that it was too late to drive the load from Pontotoc to Grenada, return to South

Memphis to pickup additional cattle, and then return again to Pioneer. Because of this, the four (4) head of cattle purchased at South Memphis on March 13, 1984, were unloaded at his Pontotoc Stockyard to be watered and fed, and he returned to South Memphis on March 14, 1984, to purchase additional cattle. It was when he returned from South Memphis to Pontotoc on March 14, 1984, that he was confronted by the APHIS Compliance Officers (Tr. 61, 82–90, 109).

Respondent placed in evidence a check drawn on his account, No. 193, dated March 16, 1984, in the amount of $12.72. The check was issued to the "Muffler Center" for "Trk. Repair". Mr. Mooney testified that the check was issued on March 16, 1984, because he did not have his checkbook with him on the date the repairs were made, March 14, 1984 (RX–1; Tr. 90–91, 109). He also testified that he only had the VS–1–27 form with him on March 13, 1984, when he transported the four (4) head of cattle from South Memphis to Pontotoc, and that he returned with it to South Memphis the next day where his additional purchase of cattle was added to the form by the inspector. Mr. Mooney explained in his testimony that although this was not the usual procedure carried out at South Memphis, i.e., provide a buyer with the VS–1–27 form and return it the next day to have additional purchases of cattle entered on it, the inspector at South Memphis made an exception in his case (Tr. 92–93, 197). Finally, as to these cattle, Mr. Mooney testified that he transported all of the cattle from Pontotoc to Pioneer on March 14, 1984, and that they were eventually slaughtered (Tr. 95–98, 100).

Although Mr. Mooney acknowledges that Compliance Officer Valentine wrote out a statement for him to sign on March 14, 1984, he did not sign it. He testified that he told Mr. Valentine at that time that he stopped at Pontotoc because he had problems with his truck. Contrary to Mr. Mooney's testimony, this unsigned statement fails to show that Mr. Mooney advised Mr. Valentine of any truck problems. Rather, it shows that Mr. Mooney's divergence to Pontotoc was for the reason that he did not have enough cattle for a load to take to Pioneer (CX–12; Tr. 93, 110). Lastly, Mr. Mooney acknowledged in his testimony that Dr. Ward, *supra*, "probably" talked with him about the June 17, 1983, letter, *supra*, as well as informing him of the regulations governing the interstate movement of cattle (CX–1; Tr. 103–106).

Mrs. Joyce Mooney, Pontotoc, Mississippi, is the wife of the respondent. She testified that she was present on March 14, 1984, when Compliance Officers Valentine and Pigott were there. She not only heard the questioning of her husband, but also read aloud the statement Mr. Valentine had written out for her husband to

sign. She heard her husband say that the reason he stopped at Pontotoc was to pick up the six additional head of cattle owned by Pioneer and transport them to Grenada, Mississippi. She also recalled that her husband had the VS-1-27 form with him on March 14, 1984 and that he showed it to the Compliance Officers (Tr. 119-121).

It is noted here that the most direct route from South Memphis to Pioneer at Grenada, Mississippi, and the one traversed by Mr. Mooney, is due south via U.S. Highway 51, a distance of approximately 85 miles. In order to reach Pontotoc, Mississippi, from South Memphis one must proceed due south over U.S. Highway 51 to Batesville, Mississippi, a distance of approximately 53 miles, thence proceed due east over Mississippi Highway 6 to Pontotoc, a distance of approximately 57 miles. Thus, a trip from South Memphis to Pontotoc is a distance of approximately 110 miles. Proceeding westward to Batesville, Mississippi, over Mississippi Highway 6 (57) miles, thence south from Batesville over U.S. Highway 51 to Grenada, Mississippi (36) miles, a trip from South Memphis, Tennessee to Grenada, Mississippi, with a divergence to Pontotoc would be approximately 203 miles, or 118 miles longer than the direct 85 miles from South Memphis, Tennessee to Grenada, Mississippi (CX-2).

From the evidence of record it is clear that Respondent Mooney purchased four adult cows, two "B" branded (Nos. 63AA7581 and 63AA7582) and two with red backtags (Nos. 63AA9376 and 63AA9383) at South Memphis on March 13, 1984, and transported them to his Pontotoc Stockyard where they were unloaded on the same date, thereby completing an interstate movement. It is also clear from the testimony of experienced Compliance Officers, Messrs. Valentine and Pigott, and from the fact that experienced veterinary personnel found the red tagged cows to be brucellosis test eligible, that they were adult cows two years of age or over and therefore subject to the regulations.

The initial question here is whether or not Mr. Mooney had in his possession the VS-1-27 form when he transported these four (4) cows to his Pontotoc Stockyard on March 13, 1984. Mr. Mooney testified that he did. He also testified that this was the only document that accompanied the four (4) cows on this trip. He could not produce for Compliance Officer Valentine either a Health Certificate, or a Permit for Entry, for the two red tagged cows. Thus, assuming Mr. Mooney did have the VS-1-27 form in his possession when he transported these four (4) cows to Pontotoc on March 13, 1984, it must be noted that the Form only listed the two "B" branded cows, Nos. 63AA7581 and 63AA7582, and did not list the

two red tagged cows, Nos. 63AA9376 and 63AA9384. At this point alone, whether Mr. Mooney had problems with his truck or not, he violated § 71.18, 9 CFR § 71.18, in that the two red tagged cows were not accompanied by an owner's statement or other document, as required.

However, contrary to Mr. Mooney's assertion in his testimony that he did have the VS-1-27 form in his possession when he transported the four (4) cows to Pontotoc, is the testimony of Tennessee State Inspector Curbo who executed the VS-1-27 form at South Memphis. Inspector Curbo's procedure is to use only one VS-1-27 form for each buyer of "B" branded cattle for the three days of sales at South Memphis. Procedure requires that he retain this form in his possession and record on it the purchases made on each successive day. There are no exceptions. He signs and dates the form on the first day a purchase is made so that time commences running for the seller to collect the indemnity payment. Moreover, the form is only released to the buyer on the date of his last purchase. This procedure was followed with Mr. Mooney's purchases. Inspector Curbo testified with certainty on following this procedure, i.e., that the form was not released to Mr. Mooney until March 14 or 15, 1984, because of the fact that another "B" branded cow, No. 63AA7584, was purchased by Mr. Mooney on March 14, 1984, and added to the Form on that date. Thus, based on the creditable testimony of Inspector Curbo alone, Mr. Mooney could not have had the VS-1-27 form in his possession when he transported the four (4) cows to Pontotoc on March 13, 1984. This is further buttressed by the scale ticket from B-C which showed that, indeed, Mr. Mooney purchased an additional animal on March 14, 1984, and by the testimony of Compliance Officer Valentine who stated Mr. Mooney told him on March 14, 1984, that he did not have the VS-1-27 form with him when he transported the cattle to the Pontotoc Stockyard on March 13, 1984. The testimony of Compliance Officer Valentine also shows that Mr. Mooney did not have a Health Certificate, nor a Permit for Entry for the two red tagged cows. This testimony is corroborated by the affidavit of the Mississippi State Veterinarian whose records failed to disclose that a Health Certificate had been received, or that a Permit for Entry was issued, for any cattle consigned to Ralph Mooney during the month of March 1984.

The second matter to be considered is whether Mr. Mooney's detour to Pontotoc was permitted under the regulations, and whether his testimony regarding muffler trouble with his truck deserves credence as a defense to his divergence and the unloading of the cattle at Pontotoc on March 13, 1984. The language of § 78.7, 9

CFR § 78.7, is explicit in that brucellosis reactor cattle, here Nos. 63AA7581 and 63AA7582, must be moved interstate directly to a recognized slaughtering establishment. "Directly" is not further enlarged upon in the regulations, presumably because it is a common usage adverb which is readily understod as: in direct line or manner; without anyone or anything intervening; immediately.[3] Taking this meaning in the normal sense, divergence of 114 miles (Batesville to Pontotoc and return) from the normal 85 mile route, (South Memphis to Grenada via U.S. Highway 51) could hardly be said to be "directly" to a slaughtering establishment, Pioneer, as required by the regulations. Nor has any regulation been cited requiring the necessity for detour to feed and water animals.

In reference to Mr. Mooney's testimony regarding muffler problems with his truck on March 13, 1984, it is noted here that it purportedly occurred between Oxford and Pontotoc, Mississippi. Oxford is located approximately halfway between the 57-mile distance between Batesvile, the turnoff point from U.S. Highway 51, and Pontotoc. Thus, Mr. Mooney at that point was well on a detour which was not "directly" to a slaughtering establishment. Nevertheless, the record also shows that at the time Mr. Mooney was questioned by Compliance Officer Valentine on March 14, 1984, he made no mention of truck problems as the cause of his detour to Pontotoc and unloading the cattle there. Rather, his reason was that he was waiting to obtain a full load of cattle before proceeding to Pioneer. Although Mr. Mooney did not sign the statement prepared by Compliance Officer Valentine, Mrs. Mooney testified that she was present during the interview with her husband and read the statement aloud in the presence of the group. The statement is of record and makes no reference to truck problems nor does it indicate that any changes or corrections in the statement were requested by Mr. Mooney. Further, I find little credibility in Mr. Mooney's testimony that he did not pay for the muffler repairs on March 14, 1984, when he picked up the repaired truck, because he did not have his checkbook with him. As noted previously, after picking up his truck he proceeded to South Memphis to purchase additional cattle.

FINDINGS OF FACT

1. Ralph Mooney, respondent, is an individual whose address is P. O. Box 217, Pontotoc, Mississippi 38863.

2. The respondent operates a specifically approved stockyard in Pontotoc, Mississippi.

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[3] "The American Heritage Dictionary" (Houghton-Mifflin, 1976).

3. Brucellosis is an infectious, contagious, and communicable disease of cattle which also affects humans and is known in humans as undulant fever.

4. The regulations in Title 9, Code of Federal Regulations, Part 71.1 *et seq.*, and Part 78.1 *et seq.*, are an integral and significant part of the federal and state cooperative efforts to control and eradicate brucellosis.

5. On March 13, 1984, Tennessee was classified as a Class B State, 9 CFR § 78.20(c).

6. The cattle identified below as 63AA9376 and 63AA9383 were adult cattle, two years of age or over.

7. On March 13, 1984, the respondent moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately four (4) cattle, identified by eartag numbers 63AA7581, 63AA7582, and backtag numbers 63AA9376 and 63AA9383, in violation of section 71.18 of the regulations because the cattle were not accompanied by an owner's statement or other document, as required.

8. On or about March 13, 1984, the respondent moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately two (2) cattle, identified by eartag numbers 63AA7581 and 63AA7582, in violation of section 78.7 of the regulations because the cattle were brucellosis reactors and were not moved for immediate slaughter directly to a recognized slaughtering establishment, as required.

9. On or about March 13, 1984, the respondent moved interstate from Memphis, Tennessee to Pontotoc, Mississippi, approximately two (2) cattle which were identified with the backtags of 63AA9376 and 63AA9383, in violation of section 78.9(c) of the regulations because the cattle were not accompanied by a Health Certificate and a "Permit for Entry", as required.

CIVIL ASSESSMENT

Section 122 of Title 21 of the United States Code provides for the assessment of a civil penalty "of not more than one thousand dollars" for each violation of the regulations published pursuant to authority granted to the Secretary of Agriculture in §§ 111 and 120 of Title 21 of the United States Code. The Secretary has issued such regulations governing the interstate transportation of cattle, as here pertinent: §§ 71.18, 78.7 and 78.9, 9 CFR §§ 71.18, 78.7 and 78.9. Each is a separate and distinct violation subject to the maximum penalty of $1,000. Severe sanctions for violation of the Department's regulations has been an established policy. *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974); see also *In re Donald Hageman, S&H Hogs, Inc.*, et al., 42 Agric. Dec. 531, 546

(1983) and cases cited therein. The complainant here seeks the maximum civil penalty assessment for each proven violation. The evidence of record is void of any mitigating or extenuating circumstances which would lessen the assessment of the maximum penalty. Rather, it shows the respondent to be an experienced cattle dealer, the operator of a stockyard, one who has been previously made aware of the regulations, and one who has had a prior caution as to violation of the same regulations involved here. Therefore, the evidence of record supports the requested assessment of $1,000 for each violation alleged and proven as appropriate to accomplish the goals of compliance and deterrence of respondents and others similarly situated.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends on appeal that the evidence does not support the findings of fact, and that respondent's motion to dismiss should have been granted. However, there is more than enough evidence to support the findings of fact. Complainant need only prevail by a preponderance of the evidence.[4]

Respondent also contends that the civil penalties totalling $3,000 are unwarranted. Respondent contends that only a single violation occurred. However, respondent's actions in connection with the four cattle involved here constituted three separate violations and, therefore, a civil penalty of $1,000 may be assessed as to each violation (21 U.S.C. § 122).

The record here supports the assessment of civil penalties totalling $3,000 for the serious violations found here. As stated in *In re Grady*, 45 Agric. Dec. ____, slip op. at 67 (Jan. 31, 1986):

> The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of $1 billion. It costs about $150 million a year (Tr. 440). There is no excuse for respondents' complete disregard of the regulatory requirements.

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. ____, slip op. at 4-5 (Oct. 31, 1984), *appeal docketed*, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984), as follows:

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[4] *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd* 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.[4] (Tr. 32, 95–96, 1056–59, 1160–64, 1177–80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).

[4] Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).

For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32–33, 1059–63). For example, in 1980, the Federal Government spent $73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239–41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

Respondent was warned on June 17, 1983, in a certified letter from the Department about violations similar to those involved here, and a copy of the regulations was sent to respondent (CX 1). In addition, as the ALJ noted, Dr. Ward spoke to respondent on several occasions with respect to the regulations. Accordingly, respondent's violations here were flagrant and serious violations of the Brucellosis Eradication Program.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),[5] which is set forth as an appendix to this decision.[6] The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

For the foregoing reasons, the following order should be issued.

ORDER

Ralph Mooney, respondent, is assessed a civil penalty of $3,000 ($1,000 per violation). The civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order and shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within 60 days after service of this order.

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[5] The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[6] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9. 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam, 524 F.2d 977 (5th Cir. 1975)*; *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

APPENDIX Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556–71, (1974).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

In re: ROBERT CARSON d/b/a CARSON'S TAXIDERMIST, INC. A.Q. Docket No. 226. Decided March 12, 1986.

Victor W. Palmer, Administrative Law Judge.
Kevin B. Thiemann, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Robert Carson, d/b/a Carson's Taxidermist, Inc., respondent, violated the Act and regulations promulgated thereunder (9 CFR § 95.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Robert Carson, respondent, is an individual whose mailing address is 16 Verbena Avenue, Floral Park, New York 11001, and who is doing business as Carson's Taxidermist, Inc.

2. In November 1983, Carson's Taxidermist, Inc., was an establishment approved by the United States Department of Agriculture, Veterinary Services, for the receipt and handling of restricted import animal byproducts.

3. On or about November 21, 1983, the respondent released from his establishment deer antlers and their accompanying cardboard boxes which had been imported into the United States from the People's Republic of China.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S. W., Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: CHARLES BOWEN, A.Q. Docket No. 215. Decided January 30, 1986.

Victor W. Palmer, Administrative Law Judge.
Jaru Ruley, for complainant.
For respondent, *pro se.*

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR §§ 78.1 *et seq.*),

hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was instituted by a complaint filed on October 30, 1985, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about November 12, 1984, respondent moved four cattle interstate from his brucellosis quarantined herd in McCurtain County Oklahoma, to the D&W Packing Company, Texarkana, Texas, in violation of section 78.8 of the regulations (9 CFR § 78.8) in that the cattle were not "S" branded when they moved. In his answer, respondent admitted the material allegations contained into the complaint, thereby waiving a hearing. (See 7 CFR § 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Charles Bowen, is an individual whose address is Box 156, Bethel, Oklahoma 74724.

2. On or about November 12, 1984, the respondent moved interstate four cattle from his brucellosis quarantined herd in McCurtain County, Oklahoma, to the D&W Packing Company, Texarkana, Texas, in violation of section 78.8 of the regulations (9 CFR § 78.8) because the cattle were not "S" branded when they moved interstate, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 78.8 of the regulations (9 CFR § 78.8).

Therefore, the following Order is issued.

ORDER

Respondent, Charles Bowen, is hereby assessed a civil penalty of three hundred dollars ($300.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order

upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on March 13, 1986.—Ed.]

In re: JOHNNY DOBSON, LARRY FREELAND and SPEEDWAY TRANSPORTATION, INC., A.Q. Docket No. 168. Decided March 14, 1986.

Edward McGrail, Administrative Law Judge.
Kris Ikejiri, for complainant.
Patrick Nelson, Kearney, NE, for respondent.

CONSENT DECISION AND ORDER AS TO LARRY FREELAND

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. Section 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Larry Freeland and others, violated the Act and regulations promulgated thereunder (9 CFR Section 71.1 *et seq.* and 78.1 *et seq.*). Respondent Larry Freeland and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Larry Freeland admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Larry Freeland stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding, and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

3. Complainant, the Animal and Plant Health Inspection Service of the U. S. Department of Agriculture, stipulates and agrees

that it will not bring any administrative actions and will not recommend to the Department of Justice that it take any civil or criminal actions on the alleged movements of cattle from Nebraska to Kansas and Kansas to Nebraska in July of 1984 by, or on behalf of, respondent Larry Freeland and Alma Livestock Commission Company, Inc., of which respondent is president.

FINDINGS OF FACT

1. Larry Freeland, respondent, is an individual whose address is Box 409, Alma, Nebraska 68920.

2. On or about August 1, 1984, the respondent moved interstate from Sulphur Springs, Texas, to Alma, Nebraska, approximately 44 cattle.

CONCLUSIONS

Respondent Larry Freeland having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Larry Freeland is assessed a civil penalty of one thousand five hundred dollars ($1,500.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day of service upon the respondent.

In re: BILLY VAN NORMAN, A.Q. Docket No. 43. Decided February 3, 1986.

Dorothea A. Baker, Administrative Law Judge.
Jaru Ruley, for complainant.
Timothy E. Hurley, Jackson, Mississippi, for respondent.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is an administrative disciplinary proceeding arising by reason of a Complaint filed on February 24, 1984, by the Acting Ad-

ministrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. Therein the Respondent was charged with having violated the Act of February 2, 1903, as amended (21 U.S.C. sections 111 and 120), and the regulations promulgated thereunder, found in 9 CFR section 78.1 *et seq.* The Respondent filed an Answer on March 20, 1984, and an Amended Answer was filed on September 20, 1984. Thereafter, at the oral hearing, the Complainant amended the Complaint to delete Count V, and the requested penalties were reduced from $2,000.00 to $1,500.00.

This case arose from the routine transport of four adult cows across the Mississippi/Louisiana State line and their transfer to a larger vehicle for transport to a Texas slaughtering establishment.

In the complaint filed in this proceeding, it was alleged that on or about August 25, 1983, the Respondent shipped, interstate, four cows from Columbia, Mississippi, to Kentwood, Louisiana, in violation of sections 71.18 and 78.9(d)(3)(iii) of the regulations because the cows, which were over 24 months of age and which allegedly did not go directly to a slaughter establishment or to a quarantined feedlot, moved interstate unaccompanied by an owner's statement or other acceptable document, and a certificate showing prescribed information, and a "Permit for Entry," as required.

In his Amended Answer the Respondent admitted that on or about August 25, 1983, he was a driver of a truck carrying cows from Columbia, Mississippi, to Kentwood, Louisiana. Respondent denied the remaining allegations and stated he would affirmatively show that the cows in question did go directly to slaughter. Respondent specifically denied that he shipped or was a shipper of any cows.

At the oral hearing it was stipulated among other things:

> (1) The cattle in question were all over 24 months of age and were slaughtered at the Calhoun Packing Company, Palestine, Texas, on August 26, 1983, the day after they were transported across State lines by the Respondent;
>
> (2) That the Stringer Sale Barn, Columbia, Mississippi, from which the cows moved in interstate, was a specifically approved stockyard and that the cows in question were subjected to a premovement brucellosis test in the 30 days immediately prior to the interstate movement and the results of that test were negative for all cows;

(3) That at the point of arrival at Hatcher Dairy Farm, a dealer assembly point in Kentwood, Louisiana, the cows were unloaded from the truck they had been moved in;

(4) That the cows were subsequently moved from Kentwood, Louisiana, to Palestine, Texas, by someone other than Respondent; and

(5) That no owner's statement or "other document" listing Kentwood, Louisiana, as the destination, accompanied the movement from Columbia, Mississippi, to Kentwood, Louisiana.

This is a case of first impression, particularly with respect to the issue of whether the cattle in question went "directly to a recognized slaughtering establishment" under 9 CFR section 78.9(d)(1)(iii). There is no published case nor published interpretation as to what is meant by going directly to a slaughtering establishment. Respective counsel have not located any authority defining this terminology.

If the cattle in question had gone directly to a recognized slaughtering establishment, it was not necessary that such cattle be accompanied by certain documents, the absence of which is alleged as a violation of 9 CFR section 78.9(d)(3)(iii).

The Respondent raises the issue as to the validity of the Complainant's position as to the imposition of a fine based on two violations for an alleged violation where only one regulation is violated.

An oral hearing took place on January 15, 1985, in Jackson, Mississippi. The Complainant was represented by Jaru Ruley, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D. C. 20250. The Respondent was represented by John B. Clark, Esquire, and Timothy E. Hurley, Esquire, of Daniel, Coker, Horton and Bell, Attorneys at Law, Post Office Box 94, Jackson, Mississippi, 39205. In due course the parties filed Briefs, the last Brief having been filed herein on April 2, 1985.

STATEMENT OF THE LAW

As herein pertinent, *21 U.S.C. § 120* provides that:

In order to enable the Commissioner of Agriculture [Secretary of Agriculture] to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other livestock and/or live poultry and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules

and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory [, including the Indian territory], and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

21 U.S.C. § 122 provides that:

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq]. The validity of such order may not be reviewed in an action to collect such civil penalty.

9 CFR § 71.18(a)(1) provides, in relevant part, that:

All cattle, except for certain exceptions not applicable here, two years of age or over, may be moved interstate if "accompanied by a statement signed by the owner or shipper of the cattle or other document stating . . . (b) the destination of the animals . . . ."

9 CFR § 78.5 provides that:

Cattle may not be moved interstate except in compliance with the regulations in this subpart.

9 CFR § 78.9 provides, in relevant part, that:

Cattle from herds not known to be affected with brucellosis must be moved interstate in compliance with § 71.18 of

this subchapter, except where specifically exempted, and then only as follows:

* * * * * * *

(d) *Class C States.*

(1) *Movement for immediate slaughter.*

* * * * * * *

(iii) Such cattle from other than a farm of origin or a nonquarantined feedlot may also be moved interstate directly to a recognized slaughtering establishment, if they have been tested negative within 30 days prior to movement, or if they are "S" branded and are accompanied by an "A" brand permit.

(iv) Such cattle from other than a farm of origin or a nonquarantined feedlot may also be moved interstate for immediate slaughter to a recognized slaughtering establishment without being "S" branded, if they are accompanied by a VS Form 1-27 permit and are moved in vehicles closed with official seals. Official seals shall only be applied or removed by a Veterinary Services representative, a State representative, an accredited veterinarian, or by other persons authorized for this purpose by the Veterinary Services representatives.

(2) *Movement to quarantined feedlot.*

* * * * * * *

(3) *Movement other than in accordance with paragraphs (d)(1) or (2) of this section.* Such cattle may be moved other than in accordance with paragraph (d)(1) or (2) of this section only if:

(iii) Such cattle have been subjected to two consecutive official negative tests for brucellosis with the first test not less than 60 days before interstate movement and the second test not less than 60 days after the first test nor more than 30 days before the date of the interstate movement, provided however, that the time period for the first test is valid up to 12 months. These tested cattle shall be accompanied by a certificate which shows, in addition to the items required under § 78.1(n), the dates and results of

the official tests required by this paragraph and shall be accompanied by a "Permit for Entry"; . . . .

FINDINGS OF FACT

1. Respondent, Billy Van Norman, sometimes herein referred to as "Respondent," is an individual, whose mailing address is Route 2, McComb, Mississippi 39648.

2. Respondent, Billy Van Norman, was, on August 25, 1983, in the business of purchasing and hauling livestock for others. He operates out of his home and has no employees. His only equipment is a truck and trailer.

3. On August 25, 1983, Respondent purchased four adult cows, for Mr. William Hatcher, at the Stringer Sale Barn, Columbia, Mississippi. In purchasing the four cows, Respondent acted as subagent, at the request of Mr. William Hatcher, who in turn acted as agent for the Calhoun Packing Company, of Palestine, Texas. On the same date, Respondent also purchased four calves at the Stringer Sale Barn.

4. Respondent hauled the four cows and four calves across the State line to the Hatcher Dairy Farm, in Kentwood, Louisiana. None of the cows left the trailer during the trip to the Hatcher Dairy Farm in Kentwood.

5. Respondent was stopped at a road check, at 5:30 p. m., the first in four years, with the four cows and four calves. Respondent didn't have the health papers and said he did not believe they were needed inasmuch as the cattle were moving directly to slaughter. At this point there was no violation and when Exhibit No. 1 was filled out, there was no violation indicated.

6. It is the custom and common practice in the State of Mississippi that various "gooseneck" trailer trucks bring small loads of cattle to a central location where the cattle are then placed in a larger truck. It is impracticable to load cattle directly from a "gooseneck" to a "double-deck" truck.

7. The four cows in question had tested negatively to a brucellosis test within 30 days prior to August 25, 1983.

8. Respondent, Billy Van Norman, moved the four cows, interstate, to a dealer assembly point known as Hatcher Dairy Farm, Kentwood, Louisiana.

9. The only document which accompanied the interstate movement of the four cows was a sales invoice which listed Calhoun Packing Company as the buyer.

10. It is approximately 400 miles from Columbia, Mississippi, to Palestine, Texas, the location of Calhoun Packing Company.

11. When Respondent arrived at the Hatcher Dairy Farm, a "double-deck" truck was waiting at the chute normally used by such trucks.

12. Respondent unloaded the four calves into a pen and placed the four mature cows in the alley between the pens.

13. An "alley" is a walkway or passageway between pens, and is not a pen.

14. Respondent was present at the Hatcher Dairy Farm, for approximately 15 minutes.

15. Respondent received $35.00 for his hauling fee and left the Hatcher Dairy Farm, while the mature cows were still in the "alley."

16. Respondent believed he was complying with the law and he acted in a reasonable and good faith belief that the mature cows were about to be loaded onto the "double-deck" truck for transport to Palestine, Texas. Although Respondent could have turned around to have avoided the road check, he did not do so because he "had no reason" to turn around. He thought he was in compliance. Respondent was justified in believing that the four cattle were about to be loaded for transport to Palestine.

17. The four adult cows reached Palestine, Texas, the next morning, August 26, 1983, and were slaughtered there that day.

18. Given the distance from Columbia, Mississippi, to Palestine, Texas, and the times that the cattle departed from Mississippi and arrived in Texas, the cattle could not have remained at the Hatcher Dairy Farm, for a period longer than two or three hours, if that long. What happened to the cattle after Respondent left was not shown by the evidence, but inasmuch as Respondent was stopped at the road check at 5:30 p. m., and the cattle were slaughtered the next day, it seems doubtful that the cattle remained more than a few minutes in the "alley," as such presence would have interfered with the loading of other cattle.

19. Brucellosis is a communicable disease of cattle, but consumption of meat from infected animals poses no risk to man, and cattle with brucellosis may be sold for slaughter.

20. The Calhoun Packing Company is a "recognized slaughtering establishment" as that term is defined in 9 CFR section 78.18.

21. The violation on Complainant's Exhibit No. 1 was put in later when a determination was made that the cattle were not shipped "directly" to slaughter. Thus, on September 1, an initial determination was made of alleged violations because of the "holding pens" at Hatcher Dairy Farm.

22. The testimony is indisputable that there is nothing in the regulations specifically defining what is meant by direct movement

nor is there anything in the regulations which specifically prohibit loading and unloading of cattle when they are involved in a shipment to slaughter.

23. A knowledgeable and experienced witness, Mr. Minter, testified. He is employed by the Southeast Mississippi Livestock Farmers Association. He is a long standing President of the Mississippi Livestock Association, a trade association, which is composed of 60 to 80 members. Said witness has been a dealer, buyer, auctioneer, stockyard manager, scale man, and has engaged in other livestock activities as well as having had experience in transporting cattle in many States. Although there were no regulations pertaining to the transfer of cattle from the smaller trucks, i.e., the "gooseneck" trailers into the moving vans that take the cattle to slaughter, it was his opinion that the movement of cattle in this particular case was not in violation of the rules and regulations and he expressed the view that the temporary presence of the animals at Hatcher's appeared to him to be a direct movement to slaughter. This was in accord with his understanding of what had occurred in prior years. He also made reference to a symposium of United States Department of Agriculture, Animal Health Inspection, personnel in Fort Worth, Texas, which was attended by Mr. Bert Harkins, Administrator, relative to the brucellosis program, at which time Mr. Harkins appealed for a common sense application with respect to the rules and regulations. Mr. Minter was a knowledgeable witness and explained the cattle could not be unloaded from a "gooseneck" truck directly into an 18 wheeler; that such a movement required an unloading and reloading; that the practice of bringing cattle into a central assembly point in little haulers, and reloading them into the larger trucks was widespread in Mississippi and that it would be ruinous for the Mississippi livestock industry if this were precluded. He also testified that he was of the opinion that what occurred in this case was a direct movement and it met all the requirements of the regulations.

24. The unloading and loading of cattle from "gooseneck" trucks into the 18 wheeler trucks is a widespread and prevalent practice, at least in the State of Mississippi, where the cattle are brought in, in smaller trucks, and then for economy and other reasons are reloaded onto another truck. As a practical matter, all of the smaller "gooseneck" trucks do not arrive at the precise minute of all others, and accordingly, the cattle may well be placed on the ground for a few minutes or a short time pending the reloading procedures onto the larger truck.

25. If the original "gooseneck" truck had transported the cattle without stopping or unloading, there would be no issue herein. The

only reason a question arises here is because of the unloading and reloading procedures.

26. The question of whether or not the cattle should have been accompanied by a certificate and a "Permit for Entry," in compliance with section 78.9(d)(3)(iii) of the regulations (9 CFR section 78.9(d)(3)(iii)), depends upon whether or not the four cows in question went directly to a recognized slaughtering establishment. If they did, the sales invoice, showing Calhoun Packing Company as the concern that the cows were sold to, would have been acceptable to satisfy the requirement of 9 CFR section 71.18. Under the regulations a waybill can be an appropriate document to accompany cattle which are moving interstate to slaughter. The invoice which accompanied the four cattle here showed the weights and numbers of each animal and the name of the purchaser and herd owner's name.

27. The burden of proof is on the Agency to establish that a violation of the Act and regulations occurred. This burden has not been achieved. The regulations do not define what is meant by direct movement. The unloading—reloading activity of Respondent on August 25, 1983, was consonant with a widespread accepted practice in the industry in this part of the Country. The agency, of course, is not precluded from issuing appropriate regulations which would prohibit such unloading—reloading, and defining the manner in which "direct" movement is interpreted. It has not done so.

28. As far as Respondent is concerned, the cattle in question in this proceeding went directly to slaughter, and were, therefore, not required to be accompanied by the documents prescribed by 9 CFR section 78.9(d)(3)(iii).

29. The invoice accompanying the cattle was a proper "statement signed by the owner or shipper of the cattle, or other document" under 9 CFR section 71.18(a)(1)(i).

30. No violation of the Act and regulations has been proven in this case.

CONCLUSIONS

There is lack of precedent with respect to this case inasmuch as there is no decided authority as to what is meant by direct movement to slaughter. From the testimony of the witnesses, it can easily be discerned that any interpretation at the present time is subjective, absent regulations of definition.

There are no regulations relating to what is permissible with respect to the transfer of cattle under the circumstances herein. It is the position of the Complainant, through its witnesses, that once

an animal is "penned" it is not "direct" movement but rather it is under the control of the person who owns the land, who in this case was Mr. Hatcher. The Respondent was responsible for the movement only to the facility and not to the land owner ("pen" owner) or the person who brought the 18 wheeler truck there. Briefly summarized, and in the absence of any regulations setting forth what is permissible and what is not permissible, there is a situation here where the cattle were purchased for a distant purchaser's slaughterhouse by Mr. Hatcher through the Respondent and the Respondent hauled the four cows to Mr. Hatcher's facility for the sole purpose of loading them onto the 18 wheeler truck and he deposited them in an alley for that purpose. With respect to the practicalities of the situation, the Complainant's own witnesses pointed out that offloading may be needed not only to get the cattle on the truck but also because of the "28-hour" law which provides, among other things, that cattle cannot remain in transit for more than 28 hours without offloading for feed and water.

In its Reply Brief, Complainant maintains that reference to the "Twenty-Eight Hour Law" (45 U.S.C. sections 71-74) is irrelevant and immaterial to the issues herein. Moreover, Complainant states on Brief that such law does not apply to cattle hauled in trucks, but only to cattle to be moved in railcars and water vessels. The witnesses testifying made no such distinction. Complainant would distinguish unloading for humanitarian reasons and economic reasons.

Careful consideration has been accorded the Complainant's arguments and full accord is acknowleged with repect to the purposes to be achieved by the statutory enactment and the rules and regulations promulgated thereunder.

There is no disagreement with the underlying philosophy of the Complainant that the Government and industry wish to achieve the eradiction of brucellosis, and that the regulations should be enforced and implemented to that end.

The United States Department of Agriculture has spent millions of dollars annually, over many years, to implement and administer the brucellosis eradication program. In order for the Department to successfully control and eradicate brucellosis, it must have the cooperation and compliance of the livestock industry, such as buyers, sellers and stockyard owners.

The Department is seeking a civil penalty of $1,500.00 against Respondent, Billy Van Norman. Title 21 of the United States Code, section 122, provides for assessment of civil penalties for the violation of regulations published pursuant to authority granted to the

Secretary of Agriculture in section 111 and 120 of Title 21 of the United States Code.

Title 21 of the United State Code, section 120, authorizes the Secretary of Agriculture to "issue regulations governing the interstate transportation of animals from any place where communicable disease exists or where he may have reason to believe it exists." *Penderson* v. *Benson,* 255 F.2d 524 at 529 (D.C. Cir. 1958). The Secretary has issued such regulations governing the interstate transportation of cattle from herds not known to be affected with brucellosis from what the Department has classified as Class C States. Mississippi has been designated as such a Class C State.

Title 9 of the Code of Federal Regulations, section 78.9(d)(iii), requires that such cattle originating in a Class C State and moving interstate other than for immediate slaughter directly to a recognized slaughtering establishment or directly to a quarantined feedlot may be moved interstate only if, under the circumstances of the movement in question, the cattle have two consecutive negative official tests for brucellosis at least 60 days apart and within 30 days prior to such interstate movement, and the cattle are accompanied interstate by a certificate and a "Permit for Entry." Section 71.18 of the regulations (9 CFR section 71.18), requires that cattle, over two years of age, be accompanied by an owner's or shipper's statement, or another document containing prescribed information.

Specifically, 9 CFR section 78.9(d)(1) seeks to accomplish a monitoring aspect by the United States Department of Agriculture by requiring that cattle moving from other than a farm of origin or a nonquarantined feedlot, without, among other things, two brucellosis tests and various informational papers, move directly to a recognized slaughtering establishment. The Department of Agriculture, in enforcing this regulation, has not in this case construed 9 CFR section 78.9(d)(1) to permit the movement in question.

However, the Respondent in this particular case did not violate any rule or regulation. There is no regulation covering the definition of what is direct movement. The Government witnesses indicated that they would now interpret direct movement to preclude the unloading and reloading of cattle such as happened in this particular case. Both the Respondent and Mr. Minter, on behalf of the Mississippi Livestock Association, indicated that a definite rule or regulation is needed on this but that this is a prevalent practice in that part of the Country and, in their opinion, what occurred in this case was a direct movement of the cattle.

If there was a violation, and I don't believe that there was, the question of who violated this *interpretation* (of "direct" movement), would require a determination as to whether or not someone other

than Respondent was not the one who would be in violation inasmuch as all that the Respondent did was to haul the cattle from one place to another and then leave them in a walkway alley.

Mr. Pigott, Compliance Oficer, must be presumed to be familiar with the customs and practices of the livestock industry in Mississippi, and supposedly would have known Respondent would not be hauling such a small load in excess of 400 miles to Palestine, Texas. Respondent indicated when he was stopped that he was hauling the cattle to Hatcher's (Tr. 27). Mr. Pigott's and his staff's determination was premised on it appearing, "* * * that by those cattle putting into the holding pen at Hatcher's Farm that that constituted a violation." (Tr. 32, 33). Mr. Pigott has never seen what was described as "holding pens." (Tr. 53). Neither he nor Dr. Garnett had seen Hatcher Dairy Farm's facilities.

Mr. Pigott's testimony illustrated instances where cattle could be offloaded unto an unloading dock. (Tr. 44, 45, 49). With respect to loading directly from a "gooseneck" onto a "double-deck," using some sort of ramp, Mr. Pigott indicated, "That would be an impossibility * * *" (Tr. 48) However, he would approve of walking animals off one truck down a ramp and walking them up a ramp to another truck. (Tr. 51). That is what the persuasive evidence shows happened here.

Further, Mr. Pigott acknowledged:

> "* * * And in certain instances where it's necessary that these smaller trucks load to the larger, we have tried to be reasonable and allow that movement to be made * * * *" (Tr. 58).

This case should not be regarded as "approving" the "gooseneck" to "18 wheeler" procedure and it certainly serves notice to Respondent that such proceure, as was used here, in the future, will not be interpreted and construed as "direct" movement. However, the Department has within its authority the capacity *to issue and publish* rules and regulations, which would preclude much of the subjectiveness present when both sides seek to establish what is "reasonable."

The most that the Complainant has proven is that there has been no regulation which the Respondent has violated, only its present interpretation; that this is a widespread practice in Mississippi (and possibly other areas); that the determination of what is direct movement, is a matter of interpretation; and, there are varying interpretations as to what is direct movement. The Complainant is seeking to establish an interpretation which is a change from the interpretation which has been applied in the past, and

which has allowed the movement of cattle such as was present here.

Respondent argues that because, in its estimation, the manner in which the four cows were moved is reasonable and in accordance with the custom of the trade, it, too, must be accepted as a legitimate movement under section 78.9(d)(1). Complainant states that this argument goes too far, and cites, *Lucas Coal Company, et al.* v. *Interior Board of Mine Operations Appeal, et al.,* 522 F.2d 581, 584 (C.A. 3rd Cir. 1975), where the court held that an "[a]gency's explication of its own regulation, if reasonable . . . is controlling despite existence of other interpretations that might seem even more reasonable. Also cited is *Expedient Services, Inc.* v. *Weaver,*614 F.2d 56, 57, fn. 1 (C.A. 5th Cir. 1980). Furthermore, the Complainant contends that the Respondent's contention forces upon the Department, which has the broader perspective and experience in eradicating this disease, a practice which is beneficial to but one segment of the nation's livestock owners, the livestock haulers in the State of Mississippi.

It is a common practice in the industry for a number of the smaller "gooseneck" trailers to converge at one spot, and for the cattle there to be loaded onto a larger vehicle for transport to the actual destination. Just such a routine practice was followed in this case. When Respondent arrived at the Hatcher Dairy Farm in Kentwood, an 18 wheeler "double-deck" truck awaited at the chute normally used by such trucks. Obviously, the Respondent was entitled to believe this truck to be the truck in which the cattle in question were to be loaded for delivery to Texas, and in fact, it apparently was. The Respondent unloaded the cattle in question in the alley walkway between pens at the Hatcher's facility.

Barns such as Hatcher's have alleys, which are walkways between pens, and pens, which are four walled enclosures with gates. To get from the "gooseneck" chute unto the "double-deck" truck, cattle simply had to be guided into the alley, around a turn and onto a ramp to the "double-deck." Of course, the alley could not be used to hold cattle for any period because this would interfere with the movement of other cattle in the alley.

The Respondent did not place any cattle in pens, rather he placed the cows in the alley and immediately left the premises after being paid $35.00 for his hauling fee. As the undisputed evidence shows, a "double-deck" truck was waiting at the Barn, so Respondent clearly was justified in believing that the four cattle were about to be loaded for transport to Palestine. This was especially so since there were personnel in the alley who could load the cattle, which clearly was not Respondent's job.

The Respondent had every reason to believe that the cattle in question were to be loaded presently onto a truck for transport to Texas. For all he knew the cattle would hardly stop walking on their way through the alley walkway to the other vehicle. This is significant because obviously the responsibility for seeing that the cattle continued in their "direct" movement would pass to others, after the Respondent parted with the cattle.

On Brief, Complainant suggests several ways direct movement can be accomplished and approved. However, some of these suggestions are not bottomed by careful study, revealed in this hearing record, and some of the witnesses have indicated such alternative methods are not feasible and practical.

For instance, Complainant suggests that in order for this movement to have been directly to a recognized slaughtering establishment, the transfer to another truck would have had to have been accomplished in one of three manners: Firstly, the truck carrying the cows could have backed up to another truck where the cows could have been transferred to the second truck, and a loading ramp could be utilized where the cows could be unloaded and made to walk up the ramp to the decks of the second truck; Secondly, the cows could have been held at the Sale Barn in Mississippi, and a truck could have picked them up on its way to the other recognized slaughtering establishment and that under this alternative, although the movement did not go directly to a recognized slaughtering establishment after leaving the Sale Barn, the program makes allowances for cows to be picked up at other markets along the way to the slaughtering estblishment so long as no animal, once picked up, was unloaded until the truck reached the recognized slaughtering establishment; and, finally, it is said the transfer from one truck to another truck could have been accomplished by unloading the cows into pens at an approved facility, such as a quarantined feedlot.

The Complainant argues that its interpretation of the regulations as to what is direct movement should be adopted because of the large amount of money, and effort, which the Department of Agriculture has expended with respect to the eradication of brucellosis. However, this interpretation, including the alternatives set forth above, which is presently being urged by the Complainant, is not set forth in the regulations themselves. Also, there is persuasive testimony of record, that the practice engaged in by the Respondent was an accepted and widespread practice in the State of Mississippi. To the extent the presently urged subjective interpretation, or, the alternative methods which are indicated, on Brief,

are set forth in published and known regulations and rules, they, of course, should be adhered to and complied with.

It was brought out through testimony that there is nothing in the regulations which specifically prohibit loading and unloading of cattle when they are involved in a shipment to slaughter. A general consensus of opinion of the witnesses was that the person who was the owner of the land, or, the person in charge of the large truck was responsible for what happened to the animals after they were unloaded from the "gooseneck."

In the absence of any clear violation of the regulations in question, and recognizing that the Government has the burden of proof, it would be unjust to say that this Respondent violated the regulations which can, and have been, interpreted differently than that now put forth by the Complainant. Moreover, the regulations are silent as to what constitutes direct movement. Based on a consideration of the record as a whole, including weighty credence given to the testimony of Respondent and Mr. Minter, it is concluded that the Government has not borne its burden of proof in establishing a violation.

The many other arguments, contentions, and requests of the parties have been considered carefully. To the extent not ruled upon and to the extent, if any, they may be inconsistent with this Decision and Order, they are hereby denied.

ORDER

The Complaint filed herein on February 24, 1984, is hereby dismissed with prejudice.

This Decision and Order shall take effect 35 days after service thereof, unless appealed to the Secretary's Judicial Officer within 30 days as set forth in the Rules of Practice and Procedure, 7 CFR 1.130, *et seq.*

[The Decision and Order became final on March 17, 1986.—Ed.]

In re: ELMO MAYES and MELVIN CHEATWOOD, A.Q. Docket No. 208. Decided January 31, 1986.

Victor W. Palmer, Administrative Law Judge.
Fronda Woods, for complainant.
For respondent, *pro se*.

DECISION AND ORDER MELVIN CHEATWOOD

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that the respondents violated section 78.9(c)(3)(ii) of the regulations promulgated thereunder (9 CFR § 78.9(c)(3)(ii)). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent Melvin Cheatwood.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent Melvin Cheatwood was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Respondent Melvin Cheatwood filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent Melvin Cheatwood is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Melvin Cheatwood, respondent, is an individual whose business address is Rackley-Madding Trucking Company, 6517 S.W. 57th Street, Oklahoma City, Oklahoma 73179.

2. On or about March 3, 1985, respondent Melvin Cheatwood moved 102 cattle from Cumberland Gap, Tennessee, a Class B State, to Oklahoma City, Oklahoma. Five of the cattle were moved in violation of 9 CFR § 78.9(c)(3)(ii), because they were not accompanied by a certificate, as required.

CONCLUSIONS

Respondent Melvin Cheatwood has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to Mr. Cheatwood in the complaint and in the letter of service that accompanied it. By his silence respondent Melvin Cheatwood has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, respondent Melvin Cheatwood has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Melvin Cheatwood is hereby assessed a civil penalty of one thousand dollars ($1000), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent Melvin Cheatwood, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR # 1.145).

[The Decision and Order for Melvin Cheatwood became final on March 17, 1986.—Ed.]

In re: ELMO MAYES and MELVIN CHEATWOOD, A.Q. Docket No. 208. Decided January 31, 1986.

Victor W. Palmer, Administrative Law Judge.
Fronda Woods, for complainant.
For respondent, *pro se*.

DEFAULT DECISION AND ORDER FOR ELMO MAYES

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint al-

leged that the respondents violated section 78.9(c)(3)(ii) of the regulations promulgated thereunder (9 CFR § 78.9(c)(3)(ii)).

The Office of the Hearing Clerk mailed to respondent Elmo Mayes, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act. Mr. Mayes refused to accept delivery, and the documents were returned to the Hearing Clerk undelivered. The Hearing Clerk then remailed the documents by regular mail. This constitutes service under section 1.147(b)(3) of the Rules of Practice applicable to this proceeding (7 CFR § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136), respondent Elmo Mayes was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Respondent Elmo Mayes filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent Elmo Mayes is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Elmo Mayes, respondent, is an individual whose address is Route 1, Cumberland Gap, Tennessee 37724.

2. On or about March 3, 1985, respondent Elmo Mayes moved 102 cattle from Cumberland Gap, Tennessee, a Class B State, to Oklahoma City, Oklahoma. Five of the cattle were moved in violation of 9 CFR § 78.9(c)(3)(ii), because they were not accompanied by a certificate, as required.

CONCLUSIONS

Respondent Elmo Mayes has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to Mr. Mayes in the complaint and in the letter of service that accompanied it. By his silence respondent Elmo Mayes has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, respondent Elmo Mayes has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Elmo Mayes is hereby assessed a civil penalty of two thousand dollars ($2000), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent Elmo Mayes, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order for Elmo Mayes became final on March 20, 1986.—Ed.]

In re: WAYLAND LIVESTOCK AUCTION, INC., and JOHN TIEMEYER, A.Q. Docket No. 238. Decided March 24, 1986.

Dorothea A. Baker, Administrative Law Judge.
Jaru Ruley, for complainant.
James A. Jeske, III, Grand Haven, Michigan, for respondent.

CONSENT DECISION AS TO WAYLAND LIVESTOCK AUCTION INC.

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Wayland Livestock Auction, Inc., respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Wayland Livestock Auction, Inc., specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, Wayland Livestock Auction, Inc., also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Wayland Livestock Auction, Inc., respondent, is a corporation incorporated under the laws of the State of Michigan and having its principal place of business at 3634 N. Main Street, Wayland, Michigan 49345.

2. On or about February 5, 1985, the respondent moved at least nine cattle interstate from livestock markets in Goshen and Topeka, Indiana, to the premises of John Tiemeyer, Caledonia, Michigan.

3. On or about February 12, 1985, the respondent moved at least eight cattle interstate from livestock markets in Goshen and Topeka, Indiana, to the premises of John Tiemeyer, Caledonia, Michigan.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding with respect to respondent Wayland Livestock Auction, Inc., such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: WAYLAND LIVESTOCK AUCTION, INC., and JOHN TIEMEYER, A.Q. Docket No. 238. Decided March 24, 1986.

Dorothea A. Baker, Administrative Law Judge.
Jaru Ruley, for complainant.
James Jeske, III, Grand Haven, Michigan, for respondent.

CONSENT DECISION AS TO JOHN TIEMEYER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that John Tiemeyer, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, John Tiemeyer, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, John Tiemeyer, also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. John Tiemeyer, respondent, is an individual whose mailing address is 8005 Breton Road, Route 1, Caledonia, Michigan 49316.

2. On or about February 12, 1985, the respondent moved at least eight cattle interstate from livestock markets in Goshen and Topeka, Indiana, to the premises of John Tiemeyer, Caledonia, Michigan.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in

disposition of this proceeding with respect to respondent John Tiemeyer, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty dollars ($250.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: KENNETH BURDETTE and JAMES BURDETTE, A.Q. Docket No. 167. Decided January 27, 1986.

Victor W. Palmer, Administrative Law Judge.
Kris Ikejiri, for complainant.
For respondent, *pro se*.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted by a complaint by the Administrator, Animal and Plant Health Inspection Service, which alleged that Kenneth Burdette and James Burdette violated the Act of February 2, 1903, as amended, (21 U.S.C. § 111 and § 120), and the regulations thereunder (9 C.F.R. § 71.1 *et seq* and § 78.1 *et seq.*), by moving cattle interstate without the documents required for the control of brucellosis, an infectious and communicable disease of cattle. An answer was thereafter filed on behalf of both respondents on June 10, 1985 by Kent O. Hyde, a member of the Missouri Bar.

On October 21, 1985, an oral hearing was scheduled to take place in Springfield, Missouri, on November 19, 1985. Pursuant to a request by respondents' counsel for an alternative hearing date due to a conflict in his schedule, a Notice of Rescheduled Hearing was issued on November 1, 1985, scheduling the hearing to begin on January 22, 1986, in the Green County Courthouse Annex, 833 Boonville, Springfield, Missouri.

The oral hearing was thereafter held as scheduled on January 22, 1986. Mr. Kent O. Hyde, the attorney for both respondents, ap-

peared at that time and presented a consent decree on behalf of respondent Kenneth Burdette, which was accepted for filing and issued on that day. Mr. Hyde advised that he had notified Mr. James Burdette by letter of the scheduled hearing date, but that James Burdette was not present and Mr. Hyde was unable to secure his presence. Mr. Hyde moved that his appearance as counsel be withdrawn. That motion was granted and the hearing was thereafter held as scheduled.

On the basis of the testimony that was transcribed that day and the exhibits that were received, the following findings and conclusions are herewith being entered.

Mr. James Burdette is being assessed the maximum civil penalty of $3,000 for the three violations of the Act of February 2, 1903, as amended, which were proved by the evidence of record.

FINDINGS OF FACT

1. James Burdette, respondent, is an individual whose last known address is Route 1, Pleasant Hope, Missouri 65725.

2. Brucellosis is an infectious, contagious, and communicable disease of cattle, which also affects humans and is known in humans as undulant fever.

3. The regulations in Title 9, Code of Federal Regulations, Part 71.1 *et seq.*, and part 78.1 *et seq.*, are an integral and significant part of the Federal-State cooperative efforts to control and eradicate brucellosis.

4.The cattle identified below as 43 BE 3343, 43 BE 3422, 43 BE 3520, and 43 BE 3344 were non-vaccinates, 2 years of age or over.

5. The cattle identified below as 43 BE 3390 was a calfhood vaccinate, 2 years of age or over.

6. On or about July 11, 1984, the respondent moved interstate from Missouri to Texas, at least five cattle, identified as 43 BE 3343, 43 BE 3422, 43 BE 3520, 43 BE 3344, and 43 BE 3390, in violation of section 71.18 of the regulations (9 CFR § 71.18), because a statement signed by the owner or shipper of the cattle, or other document, did not accompany the cattle, as required.

7. On or about July 11, 1984, the respondent moved interstate from Missouri to Texas, at least five cattle, identified as 43 BE 3343, 43 BE 3422, 43 BE 3520, 43 BE 3344, and 43 BE 3390, in violation of section 78.9(c) of the regulations (9 CFR § 78.9(c)), because the cattle were not accompanied by a certificate, as required.

8. On or about July 11, 1984, the respondent moved interstate from Missouri to Texas, at least five cattle, identified as 43 BE 3343, 43 BE 3422, 43 BE 3520, 43 BE 3344, and 43 BE 3390, in violation of section 78.9(c) of the regulations (9 CFR § 78.9(c)) because

the cattle were not accompanied by a "Permit for Entry", as required.

9. The July 11, 1984 violations were detected during an inspection of a truck driven by respondent which contained over 40 cattle. When confronted by the government inspector, respondent, James Burdette, gave false and misleading information respecting his movement of the cattle and the reasons why he did not have the required documents.

CONCLUSIONS

On July 11, 1984, respondent James Burdette committed three separate violations of the Act of February 2, 1903, as amended, (21 U.S.C. § 111 and § 120) and the regulations thereunder (9 C.F.R. § 78.9(c)), for which he should be assessed the maximum civil penalty of $1,000 per violation or $3,000 total.

ORDER

Respondent James Burdette is assessed a civil penalty of $3,000 (three thousand dollars), which shall be made payable to the "Treasurer of the United States" by certified check or money order, and it shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422-South Building, U.S. Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this Decision and Order. This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision shall become final without further proceedings thirty-five (35) days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty (30) days after service pursuant to sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on April 4, 1986.—Ed.]

In re: JAMES JOHNSON and FRANK HAYNES d/b/a J&H HARDWOOD COMPANY, A.Q. Docket No. 198. Decided April 8, 1986.

John A. Campbell, Administrative Law Judge.
Sherrie Kennedy, for complainant.
Michael M. Haynes, Clinton, Louisiana, for respondents.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admit the Findings of Facts set forth below, and waive:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also stipulate and agree that the United States Department of Agriculture is the "prevailing party" in this proceeding and waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (9 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the Respondents in connection with this proceeding.

FINDINGS OF FACT

1. James Johnson, herein referred to as the respondent, is an individual whose address is P.O. Box 339, Zachary, Louisiana 70791, and who is doing business as J&H Hardwood Company.

2. Frank Haynes, herein referred to as the respondent, is an individual whose address is P.O. Box 222, Clinton, Louisiana 70722, and who is doing business as J&H Hardwood Company.

3. On or about December 20, 1984, the respondents moved approximately sixty-two (62) brucellosis-exposed heifer cattle inter-

state from East Feliciana Parish, Louisiana, to Centreville, Mississippi.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Decision and Order will be issued.

ORDER

1. The Respondent, James Johnson, is assessed a civil penalty of one hundred dollars ($100.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

2. The Respondent, Frank Haynes, is assessed a civil penalty of one hundred dollars ($100.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D.C., 20250-1400, within thirty (30) days from the effective date of this order.

3. This order shall become effective on the day upon which service of this Order is made upon the Respondents.

In re: FORREST BURNHAM D.V.M., A.Q. Docket No. 179. Decided April 9, 1986.

John A. Campbell, Administrative Law Judge.
Jaru Ruley, for complainant.
For respondent, *pro se.*

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Forrest Burnham, D.V.M., respondent, violated the Act and regulations promulgated thereunder (9 CFR § 71.18. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Forrest Burnham, D.V.M, respondent, is an individual whose mailing address is P. O. Box 702, McKinney, Texas 75069.

2. On or about March 2, 1984, the respondent caused the interstate movement of one cow, which was two years of age or over, from McKinney, Texas, to Pueblo, Colorado.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred dollars ($300.00). The respondent shall send a certified check or money order for $300.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: JOHN FALEN, A.Q. Docket No. 193. Decided April 11, 1986.

John A. Campbell, Administrative Law Judge.
Joseph Pembroke, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that John Falen, respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. John Falen, is an individual whose mailing address is Box 132, Orovada, Nevada 89512.

2. On or about December 2, 1984, respondent shipped interstate 179 adult cattle from OK Livestock Exchange, Caldwell, Idaho to Orovada, Nevada.

3. On or about December 14, 1984, respondent shipped interstate 140 adult cattle from Orovada, Nevada to Fort Morgan, Colorado.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondents is assessed a civil penalty of five hundred dollars ($500) which shall be payed in five equal monthly installment of one hundred dollars each. Payment shall be to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: AGOSTINHO CAMARA, A.Q. Docket No. 213. Decided February 28, 1986.

William Weber, Administrative Law Judge.
Sherrie Kennedy, for complainant.
For respondent, *pro se*.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Swine Health Protection Act (Act) (7 U.S.C. § 3801 *et seq.*), by a Complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint was filed with the Hearing Clerk on October 18, 1985. The Complaint alleged that Respondent violated section 4 of the Act (7 U.S.C. § 3803) and section 166.2 of the regulations promulgated thereunder (9 CFR § 166.2).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on October 28, 1985.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Respondent was informed in the Complaint and the letter of service that an Answer should be filed with the Hearing Clerk within twenty (20) days after service of the

Complaint, and that failure to file an answer either denying or otherwise responding to the allegations in the Complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. On November 21, 1995, Respondent was sent, by regular mail, a notice that his Answer had not been received by the Hearing Clerk in the allotted time. More than twenty (20) days have elapsed since Respondent was served with the Complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an Answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Agostinho Camara, respondent, is an individual whose address is 105 George Street, Fall River, Massachusetts 02720.

2. On or about December 12, 1994, the respondent fed garbage to swine, in violation of section 4 of the Act (7 U.S.C. § 3803) and section 166.2 of the regulations (9 CFR § 166.2), because the garbage was not treated, as required.

3. On or about February 4, 1995, the respondent fed garbage to swine, in violation of section 4 of the Act (7 U.S.C. § 3803) and section 166.2 of the regulations (9 CFR § 166.2), because the garbage was not treated, as required.

4. On or about February 7, 1995, the respondent fed garbage to swine, in violation of section 4 of the Act (7 U.S.C. § 3803) and section 166.2 of the regulations (9 CFR § 166.2), because the garbage was not treated, as required.

CONCLUSION

By reason of the facts in the findings of fact set forth above, Respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Respondent is assessed a civil penalty of one thousand five hundred dollars [$1,500] ($500.00 per violation) which shall be paid within thirty (30) days from the date this Order becomes effective. This civil penalty shall be made payable to "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U.S. Department of Agricul-

ture, Office of the General Counsel, Room 2422 South Building, Washington, D. C. 20250–1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer within 30 days of service pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on April 14, 1986.—Ed.]

In re: BUCK HUMMER d/b/a BUCK HUMMER TRUCKING and SWIFT INDEPENDENT PACKING CO., A.Q. Docket No. 240. Decided April 21, 1986.

Victor W. Palmer, Administrative Law Judge.
Clement McGovern, for complainant.
Collins P. Whitfield, Chicago, Illinois, for respondents.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. Section 111 and Section 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR Section 71.1 *et seq.*).

Respondents have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Buck Hummer d/b/a Buck Hummer Trucking, herein referred to as the respondent, is an individual whose address is Box 196, Oxford, Iowa 52322.

2. Swift Independent Packing Co., herein referred to as the respondent, is a corporation incorporated under the laws of the State of Delaware and qualified to do business in Iowa, and whose agent for service is CT Corporation Systems, 2222 Grand Avenue, Des Moines, Iowa 50312.

3. On or about May 13, 1985, the respondents moved seventy-two (72) cattle interstate from Rock Island, Illinois, to Des Moines, Iowa.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondents are assessed a civil penalty of seven hundred and fifty dollars ($750.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: KING LIVESTOCK COMPANY, INC., NORTHWEST ALABAMA LIVESTOCK AUCTION, CARL "DICKIE" GUIER, and TRENTON GRAIN COMPANY. A.Q. Docket No. 197. Decided April 22, 1986.

Victor W. Palmer, Administrative Law Judge.
Jaru Ruley, for complainant.
For respondents, *pro se*.

CONSENT DECISION AS TO TRENTON GRAIN COMPANY

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Trenton Grain Company, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Trenton Grain Company, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, Trenton Grain Company, also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Trenton Grain Company, respondent, is a business having its principal place of business at E. First Street, Hopkinsville, Kentucky 42250.

2. On or about September 11, 1984, the respondent moved interstate a number of cattle from Russellville and Florence, Alabama, to Hopkinsville, Kentucky.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of six hundred dollars ($600.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: GARY KEEN, A.Q. Docket No. 214. Decided April 25, 1986.

Dorothea A. Baker, Administrative Law Judge.
Fronda Woods, for complainant.
Joe Ellis, Cassville, MO, for respondent.

CONSENT DECISION

On October 30, 1985, this proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Gary Keen, respondent, is an individual whose address is Box 413, Cassville, Missouri 65625.

2. On or about January 4, 1985, respondent moved four cows from Cassville, Missouri, to Brush, Colorado. The cows had eartag identification numbers 43VZB3506, 43VZB3510, 43VZB3517, and 43VZB3521, and were accompanied by Missouri Official Health Certificate No. 490518.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

Respondent Gary Keen is assessed a civil penalty of five hundred dollars ($500) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: ROSIA LEE ENNES. AWA Docket No. 269. Decided March 3, 1986.

Sale of animals without obtaining dealer license—Penalty

The Judicial Officer reversed Judge Baker's order, which assessed a suspended $200 civil penalty against respondent for selling dogs in commerce without a license. The Judicial Officer assessed a penalty of $1,000. Civil penalties under the Act must be based on the size of the business, gravity of the violation, the person's good faith, and previous violations. Operating without a license strikes at the heart of the regulatory program. A moderate-sized facility is assessed a more modest penalty than a large-sized facility. Although the Judicial Officer gives great weight to findings of ALJ's because they have the opportunity to see and hear the witnesses testify, the ALJ's finding that respondent did not know that she could not sell her dogs without a license during the period her license application was pending is set aside as "hopelessly incredible." Although there were no previous violations, the numerous violations here warrant a severe sanction.

Dorothea A. Baker, Administrative Law Judge.
Donald Tracy, for complainant.
For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and standards issued thereunder (9 CFR § 1.1 *et seq.*). On October 11, 1985, Administrative Law Judge Dorothea A. Baker (ALJ) issued an initial Decision and Order directing respondent to cease and desist from selling dogs in commerce without a license and violating the Act and regulations, and assessing a suspended civil penalty of $200.

On November 18, 1985, complainant, seeking a $1,000 civil penalty (with no more than half suspended), appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on December 21, 1985.

Based on a careful consideration of the entire record in this case, I am assessing a civil penalty of $1,000. The preliminary statement

[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

and findings of fact are taken from the ALJ's initial decision, except that Findings 8, 10, 11, 15, 17, 18, and 20 are omitted, and one sentence in Finding 19 is omitted. Additional findings and conclusions by the Judicial Officer follow the ALJ's preliminary statement and findings.

ADMINISTRATIVE LAW JUDGE'S PRELIMINARY STATEMENT AND FINDINGS

This is an administrative proceeding initiated by a Complaint filed September 14, 1983, wherein the Respondent was charged with having violated the Regulations and Standards (9 CFR 1.1, *et seq.*) issued pursuant to the Animal Welfare Act, as amended (7 U.S.C. 2131, *et seq.*), hereinafter sometimes referred to as the Act. The Complaint herein avers that the Respondent at all times material herein was unlicensed but was operating as a "dealer" as that term is defined in section 2(f) of the Act (7 U.S.C. 2132(f)).

The Complaint further alleges that between January 1980 and April 1983 Respondent on numerous occasions, for compensation, sold and offered for transportation in commerce, a total of 383 dogs, without being licensed as a dealer as required by section 4 of the Act (7 U.S.C. 2134). It is further alleged that on the dates of November 10, 1979, May 23, 1980, and April 23, 1981, Respondent's facilities were inspected by Animal and Plant Health Inspection Service personnel as a prerequisite for obtaining a license and that on each such occasion Respondent was notified "that deficiencies existed which would preclude licensing."

In its Complaint, the Complainant seeks a sanction of a Cease and Desist Order and the imposition of a monetary penalty of $2500.00, which on brief, it reduces to $1000.00.

An oral hearing was held on May 23, 1985, in Cassville, Missouri, before Administrative Law Judge Dorothea A. Baker. At that time the Complainant was represented by Gary C. Shockley, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D. C. 20250-1400, and the Respondent appeared *pro se*. The parties were given the opportunity to file Briefs herein. The Complainant filed its Brief on June 21, 1985, and Respondent, on July 22, 1985. Complainant filed no Reply Brief.

FINDINGS OF FACT

1. Rosia Lee Ennes, hereinafter sometimes referred to as the Respondent, is an individual whose post office address is Route 2, Box 2001, Seligman, Missouri 65745.

2. Respondent became licensed as a dealer under the Animal Welfare Act for the first time on October 12, 1983.

3. The evidence establishes that between January 1980 and April 1983, Respondent, on numerous occasions, for compensation, sold and offered for transportation in commerce between 300 and 400 dogs, without being licensed as a dealer as required by section 4 of the Animal Welfare Act (7 U.S.C. section 2134).

4. Commencing in October 1979 the Respondent sought to obtain a license and filled out an application form therefor together with the help of a friend, Mr. Hughes, whose qualifications are set forth hereinafter, which application the Respondent testified was sent into the Department of Agriculture. However, the Respondent later was advised that it was never received.

5. The Complainant maintains that on November 10, 1979, May 23, 1980, April 23, 1981, June 3, 1983, and August 16, 1983, Respondent's facilities were inspected by Animal and Plant Health Inspection Service personnel, as a prerequisite for obtaining a license. The Complainant maintains and the evidence does show that the Respondent was advised during each of these inspections that deficiencies existed that precluded licensing.

6. The Complainant's evidence shows that during the period January 1980 through April 1983, without being licensed, the Respondent sold approximately 380 dogs, representing a gross remuneration of $17,882.40 from the sale of such dogs.

7. However, this represents a gross amount and does not include the expenses which would have been incurred in association therewith. For instance, one of the witnesses testified that probably for the most part expenses would have consumed the greater part of the $17,000.00, as well as having consumed, by way of costs of doing business, the greater part of $4,000.00, representing gross income from Respondent's business year 1983–84.

8. [Omitted.]

9. After Respondent was advised that her first application was not received, again, with the help of Mr. Hughes, the Respondent submitted a second license application. Thereafter, a number of inspections occurred, referred to as prelicensing inspections, during which time the inspectors found alleged deficiencies in the Respondent's facility. The first inspection occurred on October 10, 1979, and was performed by Mr. Boyd. It was indicated thereon that: "Will re-inspect in 60 days." The next inspection occurred on May 23, 1980, at which time the inspection report referred to "license pending." This inspection was performed by Mr. Sparkman. The next inspection after that did not occur until April 23, 1981, and this was performed by Mr. Sparkman. Included in that inspection report (Complainant's Exhibit No. 16) is the statement: "Violation procedures recommended." Thereafter, the Respondent's facili-

ty was inspected on June 3, 1983, by Mr. Greenwood. On that inspection report where it asks for the date of the last inspection the word "NONE" is written. A further inspection took place of August 16, 1983, by Mr. Sparkman, at which time Respondent's facility was recommended for license.

10. [Omitted.]

11. [Omitted.]

12. The evidence shows that at a time when she was unlicensed the Respondent did sell in commerce 383 dogs.

13. The evidence further shows that the Respondent made a good faith effort to obtain a license. The Respondent did not have the ability to understand what was required on the licensing form and sought out and obtained the advice of an experienced and professional puppy broker, Mr. Hughes. He assisted the Respondent. His testimony indicates that he was well acquainted with the Respondent; that he was aware of the difficulties which she was having with the alleged deficiencies; that he believed the dogs or puppies which he obtained from her facility were among the most healthy and well-kept puppies that he knew of; that the Respondent kept very good records; and that he believed that much of the difficulty in this case could have been precluded had different judgmental factors been obtained.

14. A most credible witness, and one who was called by the Complainant, was Mr. James C. Hughes, a wholesale Puppy Broker for approximately 30 years and who sold dogs as a wholesale broker throughout the United States, Canada and Puerto Rico. He had known the Respondent for approximately 15 years. Mr. Hughes was the current Vice President of the Mid-West Professional Pet Distributors Incorporated, headquartered in Kansas City. Said organization is a nation-wide organization of breeders and brokers across the nation. Mr. Hughes was on the Board of Directors and he was a past President. Mr. Hughes has been regarded by the Judge as a most credible witness and his testimony reflects experience and knowledge in the area of breeding and selling puppies. He testified with respect to the next to the last inspection, where the alleged deficiency related to the fact that one of the little puppies had chewed a corner of his holding box and that the corner did not have the proper paint or varnish on it. It was Mr. Hughes' opinion that this was a minuscule deficiency and was simply something that, if it had to be remedied, could easily have been corrected.

15. [Omitted.]

16. The Government adduced three witnesses whose testimony related to the alleged lack of personnel and resources in order to carry out their functions and the alleged difficulty which the De-

partment was having with the State of Missouri, particularly the southeastern section with respect to unlicensed dealers.

17. [Omitted.]

18. [Omitted.]

19. The selling in commerce of the 380 puppies from January 1980 through April 1983 was a violation of the Act. . . .

20. [Omitted.]

ADDITIONAL FINDINGS OF FACT BY THE JUDICIAL OFFICER

21. On May 23, 1980, Mr. Sparkman, one of complainant's animal health technicians, found deficiencies in respondent's facilities which precluded licensing. He discussed the deficiencies with her and told her that she should not sell dogs wholesale until she was licensed. He told her to contact him for a reinspection when the deficiencies were corrected, but she failed to do so. (Tr. 83–85; CX 15)

22. On April 23, 1981, Mr. Sparkman returned to respondent's premises on his own initiative. Respondent advised him that deficiences still existed and would not permit him to make an inspection. Mr. Sparkman advised respondent that charges might be initiated against her for not permitting the inspection, and because she was selling animals without a license. He again advised her not to sell animals wholesale, and told her to contact him when the deficiencies were corrected. Respondent failed to contact Mr. Sparkman. (Tr. 85–87; CX 16).

23. On July 1, 1981, respondent was interviewed by Mr. McFather, one of complainant's compliance officers. He warned her not to make any further wholesale sales without a dealer's license. (Tr. 27–28, 64, 67, 77; CX 13B)

24. On June 3, 1983, Dr. Greenwood, Mr. Sparkman's supervisor, inspected respondent's facilities and found deficiencies that precluded licensing (Tr. 88–90; CX 17).

25. On August 16, 1983, Mr. Sparkman again inspected respondent's facilities and found a deficiency that precluded licensing. He again told her not to sell wholesale until she was licensed, and requested her to contact him when the deficiency was corrected. (Tr. 91–92; CX 18)

26. Shortly after the August 16, 1983, inspection, respondent contacted Mr. Sparkman to obtain a reinspection. He inspected the facility on September 27, 1983, and approved it for licensing. (Tr. 91–92; CX 19)

CONCLUSIONS BY THE JUDICIAL OFFICER

The undisputed evidence shows that respondent acted as a dealer between January 1980 and April 1983, as charged in the complaint. The Act defines the term dealer as follows (7 U.S.C. § 2132(f)):

> (f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—
>
> > (i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
> >
> > (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year.

It is unlawful to act as a dealer without a license from the Secretary. Specifically, the Act provides (7 U.S.C. § 2134):

> § 2134. *Valid license for dealers and exhibitors required*
>
> No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

The Act authorizes the Secretary to assess a civil penalty of $1,000 for each violation. The Act provides (7 U.S.C. § 2149(b)):

> (b) *Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order*

> Any dealer . . . that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $1,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary.

With respect to the first criterion specified by the Act, *viz.*, "the size of the business of the person involved," respondent keeps about 30 to 35 dogs in her kennel, which is a "moderate-sized facility" (Tr. 95). Accordingly, a more modest civil penalty is appropriate than would be assessed against a large-sized facility.

With respect to the second criterion, "the gravity of the violation," the record here shows that respondent made hundreds of sales without a license over a 40-month period, in violation of the Act. The violations proved in this case, operating as a dealer without a license, strike at the very heart of the regulatory program mandated by Congress in the Animal Welfare Act. *See* H.R. Conf. Rep. No. 1848, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. Ad. News 2635, 2649. If unlicensed dealers were allowed to operate without fear of serious consequences, the regulatory program could not long survive. The number of sales and extended period of the violations are further aggravating factors. Respondent was licensed as soon as she demonstrated compliance; her unlicensed sales prior to that time constitute grave violations of the Animal Welfare Act that warrant a more severe sanction than that requested by complainant.

The third factor to be considered is respondent's "good faith." Although respondent presented her efforts to obtain a license as a mitigating factor, her efforts in fact demonstrate her knowledge of the requirements of the Act.

The ALJ found that respondent did not know that she could not sell her dogs during the period her license application was pending. Specifically, the ALJ found (Initial Decision at 4, 8, 9):

> 8. Although the Complainant maintains that the Respondent was warned in April of 1980 and July of 1981, the Respondent denies this and was under the belief that

she could continue operating while her application for license was pending. The Respondent indicated that the first notice which she received and which she understood was in 1983 and that thereafter from May 1983 she did not sell any puppies until the time she became licensed.

* * * * * * *

15. Respondent denies she was given "warnings"—her belief was that each time an inspector came, she would have additional things to correct. And, in her Brief she contests the fact that Inspector McFather ever talked to her on the occasion to which he testified. He may have talked to her daughter.

Based upon an evaluation of the entire record herein, the most persuasive evidence is to the effect that Mr. Danny McFather, Compliance Officer, who allegedly made an inspection of her facility on July 1, 1981, did not give her the warnings, or explanations, as contended by the Complainant. The Respondent refutes on Brief and at the hearing (Tr. 54, 74) that she ever saw this inspector on July 1, 1981. Also, the witness's (Mr. McFather) recollection concerning this alleged inspection was premised solely upon his interview log which he had reviewed the morning of the hearing. He possessed no independent recollection of the inspection nor any of the details relating to same. Although the witness was given to testifying as to what "standard procedure" was involved, nevertheless, his uncertainty relative to this inspection gives credence to the contention of the Respondent that she did not see nor talk to Mr. McFather on July 1, 1981.

* * * * * * *

17. Although there is conflicting testimony as to what the various inspectors told Mrs. Ennes, the more persuasive evidence and based upon her credibility I am finding that she either was not told or she did not understand that while her license was pending she could not sell dogs. Mrs. Ennes testified, and I believe her, that she was under the impression that inasmuch as she had a license pending she could sell the dogs as long as she was making an effort to bring her facility up to the standards required by the inspectors.

18. Furthermore, Mr. Hughes corroborated her understanding of the situation.

It is the consistent practice of the Judicial Officer to give great weight to the findings by Administrative Law Judges since they have the opportunity to see and hear the witnesses testify.[2] However, findings of fact, even when based on the ALJ's determination as to the credibility of witnesses, may be set aside if they are "hopelessly incredible." *Fairbank* v. *Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970). In the present case, I find the ALJ's findings that respondent did not know that she was violating the law by selling dogs wholesale while her license application was pending "hopelessly incredible."

Mr. Sparkman, one of complainant's animal health technicians who inspected respondent's facilities, testified that he told respondent on three occasions that she could not sell animals wholesale until she received her license. Mr. Sparkman testified with respect to his May 23, 1980, inspection (Tr. 84–85):

> Q. Did you have occasion on that visit to discuss licensing requirements with Mrs. Ennes?
>
> A. Yes, I did. I indicated to her the need for her to correct these deficiencies and that in order to be licensed she would need to correct those, and I mentioned to her that she should not sell wholesale until she was licensed.

Mr. Sparkman further testified with respect to his attempt to inspect respondent's facilities on April 23, 1981 (Tr. 86–88):

> The WITNESS: . . . And [I] also mentioned to her that possibly violation charges might be initiated because she wouldn't allow me to make the inspection and because she was selling animals.
>
> * * * * * * *
>
> Q. Now, Mr. Sparkman, when you left after your visit of April 23, 1981, again sir, what was your understanding with Mrs. Ennes about when you would be back?

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[2] *E.g., In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Thornton*, 38 Agric. Dec. 1425, 1426–28 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of complaint where she accepted the testimony of respondent's wife, respondent's employee, and respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208–09 (1979) (remand order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d (10th Cir. 1979).

A. I told her again that she should not sell wholesale and if she got it, even at that point, if she got it in compliance that she could contact me, she should contact me.

Mr. Sparkman testified with respect to his inspection of respondent's facilities on August 16, 1983 (Tr. 92):

A. She had another deficiency, as indicated on the report. I indicated that when she corrected this and if there wasn't no other deficiencies on a return trip, that we could license her and that she still should not sell wholesale until she was licensed. And to my knowledge, she understood that.

In addition, Mr. McFather, a Compliance Officer for complainant, testified that he interviewed respondent on July 1, 1981, and warned her not to make any further wholesale sales without a dealer's license. He testified (Tr. 27-28, 64, 67, 77):

Q. And what did you do when you visited Mrs. Ennes in 1981?

A. Well, when I first arrived, I introduced myself, I informed Mrs. Ennes as to the nature of my visit and I explained to her her rights under the Miranda Rule.

Q. Was it customary to give Miranda Warnings at that time?

A. Yes, it was.

Q. And, then, what did you discuss with Mrs. Ennes?

A. Her sales of dogs.

Q. Did you discuss with her the requirements of the Animal Welfare Act in any way?

A. Yes, sir, I did.

Q. Did you discuss the licensing requirements with her?

A. I did.

Q. Was Mrs. Ennes aware of these requirements, or was this the first time she'd heard of it?

A. She told me that she was aware that she was required to have a license, a dealer's license, to sell dogs wholesale.

* * * * * * *

The WITNESS: Again, I have to go by what would be standard procedure and what I have written on my interview log.

Judge BAKER: Do you have any independent recollection of what occurred?

The WITNESS: I do remember going there and discussing with Miss Ennes her sales, warning her against not making any further sales.

* * * * * * * *

The WITNESS: As I left Mrs. Ennes' residence, I drove down the road just a short distance and I stopped and recorded the information which was later typed on an interview log, which I signed.

* * * * * * *

Judge BAKER: Do you have any other questions, Mrs. Ennes?

Mrs. ENNES: I don't guess. I just never talked to him.

The WITNESS: Your Honor?

Judge BAKER: Mr. McFather?

The WITNESS: I'd like to make a comment that more than likely at the time I was there, I was wearing a cap and also I may not have had a mustache at that time.

Judge BAKER: Could you borrow somebody's cap? Did you recognize Mrs. Ennes, Mr. McFather?

The WITNESS: Yes, I did.

Mr. McFather's interview log, which was referred to in his testimony, states (CX 13B):

After identifying myself and stating the nature of my visit, I explained to Mrs. Ennes her rights under the Miranda Rule. Mrs. Ennes stated she sold puppies to individuals and did not know what they did with them nor was it her concern. She did know that selling dogs wholesale without a dealer's license was a violation of the Animal Welfare Act and regulations. Her breeding stock consisted of approximately 30 bitches and several males. She would

like to have her kennel licensed but could not afford to fix it up to meet the requirements.

The ALJ's view as to respondent's lack of knowledge would be destroyed if she received and understood any one of the four warnings referred to by Mr. Sparkman and Mr. McFather. The evidence set forth above comes from two disinterested government employees who would have no apparent motive for giving false testimony. Respondent, on the other hand, had a clear motive for being less than candid. Moreover, her testimony as to her lack of knowledge, when carefully analyzed, is quite weak. It strongly suggests that she knew that it was unlawful to sell dogs without a license to a wholesale broker, but she did not believe that complainant would bother to prosecute her for violations while her license application was pending. Specifically, she testified (Tr. 155-61, 170; emphasis added):

Q. Did you make any calls to inquire about the status of your license?

A. No, I sure didn't. As far as me making no calls, no, I didn't. I took it as, when I filled it out, they would come back and inspect me. Maybe I didn't understand. Just like Sparkman, *I thought as long as I was trying to do these things that they told me to do, I didn't know that I would be prosecuted if I would go ahead and sell my dogs.*

Because I told him, and he will verify it, that I told him that was the only way I had of doing this work on this. I'd sell some puppies. Then I would proceed to go on with—my money went right back into them.

* * * * * * *

. . . But then, like I said, in May of '83, May the 3rd of 1983. I have the letter. And here is the letter. *They notified me*—you can read the letter—that I had been selling without a license, and *if I continued to sell the dogs without the license, I would be prosecuted. That was the first that I knew that I would be prosecuted, was May the 5th of 19 and 83.*

* * * * * * *

The WITNESS: . . . They sent me some literature [in May 1983]. Well, it was a book, a couple of books came with this altogether. And it was certified. I signed for it. It

was a certified letter. *And that is the first I knew that I would be prosecuted and then I didn't sell no more. . . .*

But I still didn't get this until '83. And that's the first time I knew—I thought as long as I was working on my kennel—that was what I was led to believe. As long as I was doing and trying to do, that I could go ahead and sell. And I had to do the kennel as my money permitted. I mean, I had no other choice or else—and there was no way I could feed the dogs.

Q. (By Judge Baker) Did Mr. Boyd know that you were selling dogs?

A. Yes. I told him I was.

Q. Did Mr. Sparkman know you were selling dogs?

A. Yes. Yes.

Q. Did Mr. Greenwood know you were selling dogs?

A. Yes, I told them. They asked me who I was selling to and I told them. I told them I was selling to Jim Hughes, except a few that I have—I still sell a few out the door, if somebody calls me. I don't advertise for them but if they do, if I don't have the puppy booked, I will sell it out the door. In fact, I probably could sell more of them out the door if I had advertised them but I didn't. I didn't feel like anything I was doing was wrong.

Q. Do you want to continue?

A. Well, other than that, that is all I know. And after I got this letter, then I didn't sell no more puppies. I just quit breeding them until I could go ahead and get my license. . . .

* * * * * * *

And then in September is when I got this deal here that I was being prosecuted. After, in May. And here it is.

Q. And you are referring to the Complaint?

A. Yes, that is the first letter I got. And that is the first thing. This letter here is the first thing I got that I would be prosecuted. The first citation or anything that anybody told me. I thought as long as I was fixing my kennel, that

it was O.K. *They didn't tell me that I would be prosecuted if I would had sold those puppies.*

If I wasn't fixing my kennel, you know. But I thought as long as I was doing like they told me to do—

* * * * * * *

Judge BAKER: Is there anything else you would like to present in this case in this matter?

Ms. ENNES: No. I do know I asked Mr. Sparkman about selling puppies out the door if I didn't have a license, at the time I got this letter [in May 1983]. And, you know, if I could sell them out the door. And he said I could. From my house, you know. And that is the only way I had to sell them. And he told me that it was O.K to do that. But I just couldn't sell them to a broker until I got my license. That was after I got this letter.

Although respondent did, at times, state that she thought that it was alright to sell dogs without a license, she stated more frequently that she thought she would not be prosecuted for selling dogs without a license. The ALJ found that respondent's testimony was corroborated by Mr. Hughes. But it is only this latter aspect of her testimony, in this respect, that was corroborated by Mr. Hughes—*viz.*, that she thought she would not be prosecuted for selling dogs without a license while her license application was pending. Specifically, Mr. Hughes testified (Tr. 21–23, 128, 136; emphasis added):

The WITNESS: . . . I think she's an honest and forthright woman that wouldn't purposely violate the law. *I think that she has been somewhat misled to the fact that people all around her are doing the same thing she has done and there's a laxity in Animal Welfare for licensing people, so it led her into a false sense of security, you might say, that nothing was going to happen about this.*

At the time she realized the seriousness of it, she started trying to get a license [in 1979]. At the time she applied for a license, when they come out and inspected her, she tried to clean up her kennel as well as possible. The Department didn't come back to re-examine her at the time they were supposed to and the things that she had done had deteriorated over a nine or ten-month period until she had to do it over again. It just was a comedy of errors, you might say, in this thing, that had the Department re-in-

spected her the way they have other people, she would have got the license many years ago.

* * * * * * *

Judge BAKER: Very well. Mr. Hughes, you have an opinion as to the desire or the manifestation of the Respondent, Mrs. Ennes' desire to comply with the law? Do you believe that she wishes to comply with the law, if she knows what it is?

The WITNESS: Yes, I really do. In fact, she has complied with the law now in the past year. And in defense of Mrs. Ennes, in all the time she was not licensed, her facility was usually equal to that of other ones that I visited that were licensed. She would have minor discrepancies in different places. But she's an honest woman, I believe.

* * * * * * *

It is kind of customary with most breeders when they apply for this license, that as long as they are working on it, these sort of actions are not instigated. *And I probably was somewhat at fault in giving her false advice because I told her as long as she continued to try to cooperate that this action would not be initiated against her.*

There were several other people that this same action was initiated again, one being June Parks, which you had a check mixed in with her stuff today. But several of these people that action could have been initiated against, were not once they applied for a license past, and received their license.

* * * * * * *

. . . This lady has not tried to avoid the Laws. She has been there since 1979, trying to get a license.

Our contention is that had the inspections been done at the time that they should have been done, she would have been in compliance. And they weren't done until 7–8–9–10 months later. At which time, the paints and the cleanup, and the cutting the weeds and fixing the wire, had deteriorated again.

Considering all of the evidence in this case, I find the ALJ's findings that respondent did not know that it was unlawful to sell dogs

without a license while her license application was pending "hopelessly incredible." I infer that she was fully aware of the requirements of the Act, and that she knowingly and intentionally continued to violate the Act by selling dogs wholesale without a license on the mistaken belief that the Department would not "prosecute" her for such violations. Accordingly, her violations were not committed in good faith but, rather, were knowingly and intentionally committed in violation of the Animal Welfare Act.

Mr. Hughes' view that respondent's facilities would have been approved much earlier if the inspections had occurred before conditions "deteriorated again" (Tr. 136) is not a mitigating circumstance. The delay in the inspections was caused by respondent's failure to contact Mr. Sparkman, as he repeatedly told her to do (Findings 21–26). Furthermore, the purpose of a pre-license inspection is to determine if an applicant can maintain minimal standards of cleanliness *at all times*; not whether on *one day* the place can be clean. Respondent's argument that "the paints and the cleanup, and the cutting the weeds and fixing the wire, had deteriorated again" (ALJ's Decision at 5) is an admission that she was properly not licensed, not a mitigating factor. (The situation may have been different if respondent ceased operations because she could not get a license and therefore her facility deteriorated; but, on the contrary, respondent continued to operate and sell dogs without a license in violation of the Act.)

The last of the criteria to be considered is the "history of previous violations." Although there were no previous violations, the hundreds of violations proven here are enough in themselves to warrant a severe sanction.

Considering the statutory criteria for determining sanctions under the Animal Welfare Act, a civil penalty of $2,500, as originally requested in the complaint, would have been very modest for the hundreds of deliberate and serious violations involved here. Complainant's recommendation after the hearing for a civil penalty of only $1,000 is too modest, and complainant's latest recommendation on appeal (interposing no objection to suspension of half of a $1,000 civil penalty based on respondent's ability to pay) is far too modest to be acceptable.[3] However, in deference to the administrative recommendation, I will assess a civil penalty of only $1,000 in

[3] The statute permits the Secretary to compromise the civil penalty if respondent cannot afford to pay it (7 U.S.C. § 2149(b)). Accordingly, there is no need to take ability to pay into consideration when assessing the civil penalty.

this case, although a greater civil penalty would have been assessed if complainant had so requested.[4]

For the foregoing reasons, the following order should be issued.

ORDER

Respondent is assessed a civil penalty of $1,000, which shall be paid not later than the 90th day after service of this order by certified check or money order, made payable to the United States Treasury and sent to Donald A. Tracy, United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, Washington, D.C. 20250.

Respondent, her agents, employees, successors and assigns, acting directly or indirectly, or through any corporation, partnership, trust or other device whatsoever, shall cease and desist from selling dogs in commerce in violation of 7 U.S.C. § 2134.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent.

In re: DEAN PAUL. AWA Docket No. 360. Decided March 6, 1986.

Sale of guinea pigs without license—Refusing to allow inspection of his premises—Penalty.

The Judicial Officer affirmed Chief Judge Campbell's order assessing a $3,000 civil penalty and a cease and desist order because respondent sold guinea pigs without a license and refused to permit an inspection of his premises. Failure to file an answer within 20 days constitutes an admission of the allegations in the complaint and a waiver of hearing. A document is not filed with the Hearing Clerk until it reaches the Hearing Clerk. Respondent has shown no basis for setting aside the default decision here. It is unlawful to act as a dealer without a license and to refuse to permit an inspection. Respondent cannot present new facts for the first time on appeal. Agencies should be free to fashion rules of procedure to enable them to discharge their multitudinous duties. Respondent's oral statement that he did not plan to file an annual report and pay the renewal license fee did not automatically terminate his license.

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[4] Where the administrative recommendation for a sanction is so lenient that it would not effectuate the purposes of the Act, the Judicial Officer will *sua sponte* increase the sanction. *See In re Esposito*, 38 Agric. Dec. 613, 623 n.7 (1979). But that is not the case here.

John A. Campbell, Administrative Law Judge.
Kevin F. Meckus, for complainant.
For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and standards issued thereunder (9 CFR § 1.1 *et seq.*). On December 3, 1985, Chief Administrative Law Judge John A. Campbell (ALJ) issued an initial Decision and Order directing respondent to cease and desist from violating the Act and regulations, and assessing a civil penalty of $3,000, because respondent sold guinea pigs without a license and refused to permit an inspection of his premises.

On January 10, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on February 6, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not difficult and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that a few minor changes are made in the order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. 2131 *et seq.*), hereinafter referred to as the "Act," and the regulations and standards issued thereunder (9 CFR 1.1 *et seq.*). A complaint issued by the Adminstrator of the Animal and Plant Health Inspection Service in accordance with the applicable Rules

[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

of Practice was duly served upon the Respondent (7 CFR 1.135, 1.147(b)).

Respondent's failure to file an answer responsive to the complaint allegations within the time specified in the complaint constitutes an admission of the facts alleged in the complaint and a waiver of hearing (7 CFR 1.136(a), 1.139). Therefore, this Decision and Order is entered according to the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Dean Daul, hereinafter referred to as respondent, is an individual whose mailing address is RFD #1, Box 265, Luxemburg, Wisconsin 54217.

2. Until January 15, 1985, respondent was licensed under the Act as a Class A dealer.

3. At the time respondent's license No. 35-A-77 was issued on November 14, 1983, respondent received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A of the Code of Federal Regulations and agreed to comply with said regulations and standards.

4. On January 15, 1985, respondent's Animal Welfare License Number 35-A-77 was officially terminated due to failure to submit the annual report and license fee required by 9 CFR § 2.5(b) (1985).

5. Respondent has been found to be in violation as follows:

a. On January 23, 1985, respondent sold and shipped 38 guinea pigs to a research facility without an effective Animal Welfare License in violation of Section 4 of the Animal Welfare Act, 7 U.S.C. 2134.

b. On February 5, 1985, respondent sold and shipped 52 guinea pigs to a research facility without an effective Animal Welfare License in violation of Section 4 of the Animal Welfare Act, 7 U.S.C. 2134.

c. On January 9, 1985, respondent refused to permit Dr. Richard Bertz and Robert Schmoll of the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, to conduct an inspection of respondent's premises during ordinary business hours in violation of the Animal Welfare Act, 7 U.S.C. 2146(a), and the regulations promulgated thereunder, 9 CFR § 2.126 (1985).

The violations set forth herein warrant the sanctions authorized under the Act (7 U.S.C. 2149(a), (b)), and contained in the following order.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file an answer with the Hearing Clerk within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)–(c), .139):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision prusuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption

thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

The rules of practice expressly state the obvious fact that any document is not "filed with the Hearing Clerk" until it "reaches" the Hearing Clerk (unless it is filed with the ALJ in appropriate circumstances). Specifically, the rules provide (7 CFR § 1.147(a), (d)):

§ 1.147 *Filing; service; extensions of time; and computation of time.*

(a) *Filing; number of copies.* . . . Any document or paper required or authorized under the rules in this part to be filed with the Hearing Clerk shall, during the course of an oral hearing, be filed with the Judge.

* * * * * * *

(d) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

The complaint in this case contained allegations identical to Findings 1–4 and paragraphs (a), (b) and (c) of Finding 5, *supra*, and advised respondent that complainant was seeking a $3,000 civil penalty and a cease and desist order. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, as follows (Complaint at 2–3):

WHEREFORE, in accordance with the Rules of Practice, this complaint shall be served upon respondent. Respondent is hereby afforded an opportunity to submit a written answer to the allegations set forth herein and to request an oral hearing on such allegations according to the Rules of Practice (7 CFR §§ 1.136, 1.141). Any such answer and/or request must be filed with the Hearing Clerk, U.S. De-

partment of Agriculture, Washington, D.C. 20250, within 20 days of the service of this complaint.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer with the Hearing Clerk within 20 days. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

The return receipt card shows that respondent was served with a copy of the complaint on September 25, 1985. Respondent's answer was, therefore, required to be filed with the Hearing Clerk by October 15, 1985. Instead, respondent's answer dated October 15, 1985 (the date it was required to be filed with the Hearing Clerk), was not received by the Hearing Clerk until October 21, 1985. Since respondent failed to file an answer within the specified time period, the default Decision and Order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,[2] respondent has shown no basis for setting aside the default decision here.[3]

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[2] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. ___ (July 18, 1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3] *See In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984);

Continued

In addition, respondent's (untimely) answer states in its entirety:

> This is in response to AWA Docket # 360. I will not set forth any explanation at this time. I request a hearing in the city of Green Bay.

Hence even if respondent's answer had been timely filed, the answer did not deny or otherwise respond to the allegations of the complaint and, therefore, the answer, even if timely filed, would have warranted the issuance of a default decision, under the rules quoted above.

Since respondent failed to file a timely answer, complainant filed a motion for a proposed decision pursuant to the rules of practice, quoted above. Complainant's proposed decision was identical to the decision subsequently signed by the ALJ. Although respondent's response to the proposed decision was due to be filed with the Hearing Clerk on November 25, 1985, again respondent waited until the due date to mail his reply, which was not received by the Hearing Clerk until November 29, 1985, i.e., 4 days late. Moreover, the response admits that "all of the allegations [of the complaint] are correct." Specifically, respondent's response states in its entirety:

> This is in regard to proceedings AWA 360.
>
> In the letter of Proposed Decision and Order you have an insinuation that my answer was late. Let me tell you that I have to respond within 20 days to the post office of my choice. My receipt #PO15-537-162 is dated Oct. 16, 1985, now don't tell me that my reply was late. As you will notice this reply will be sent by certified mail on the 20th day, don't come along with that excuse of late filing. As to making any plea, there was nothing to deny as all of the allegations are correct. The thing that needs to be resolved is whether any laws have been violated. My objection to Order and Proposed Decision is based on the fact that even though allegations may be correct, it does not make them a violation of the AWA laws. Also the fact that someone conveyed to me that there seems to be a predetermined feeling within your department that I am a Bad Ass makes me a little angry. Therefore, to deny me a hearing

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In re Buzun, 43 Agric. Dec. ___ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-397 (1980); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980).

would be denying me the basic right to defend myself and to prove that no laws have been violated.

Based on the record before him, it was entirely appropriate for the ALJ to issue the decision and order proposed by complainant. The violations charged in the complaint relate to selling animals without a license and refusing to permit an inspection during ordinary business hours, both of which are violations of the regulatory program.

As to the selling violations, it is unlawful to act as a dealer without a license from the Secretary. Specifically, the Act provides (7 U.S.C. § 2134):

§ 2134. *Valid license for dealers and exhibitors required*

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

Similarly, as to respondent's refusal to permit agents of the Secretary to conduct an inspection of his premises during ordinary business hours, that, too, violated the Act and regulations, which provide (7 U.S.C. § 2146(a); 9 CFR § 2.126):

§ 2146. *Administration and enforcement by Secretary*

(a) *Investigations and inspections*

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

§ 2.126 *Access and inspection of records and property.*

> Each dealer, exhibitor, operator of an auction sale, or research facility, shall, during ordinary business hours, permit Veterinary Services representatives, or other Federal officers or employees designated by the Secretary, to enter his place of business to examine records required to be kept by the Act and the regulations in this part, and to make copies of such records, and permit Veterinary Services representatives to enter his place of business, to inspect such facilities, property and animals as such representatives consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter. The use of a room, table, or other facilities necessary for the proper examination of such records and inspection of such property or animals shall be extended to such authorized representatives of the Secretary by the dealer, exhibitor, operator of an auction sale, or research facility, his agents and employees.

The Act authorizes the Secretary to assess a civil penalty of $1,000 for each violation of the Act or regulations. The Act provides (7 U.S.C. § 2149(b)):

> (b) *Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order*
>
> Any dealer . . . that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $1,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary.

Accordingly, the ALJ properly issued the decision and order proposed by complainant.

Respondent was served with a copy of the ALJ's decision and order on December 7, 1985. The Hearing Clerk's service letter advised him that he had "30 days from receipt of this notice in which to file with the Hearing Clerk an appeal t the Secretary." However, respondent's appeal was not filed until January 10, 1986, i.e., 4 days late. In his appeal, respondent, for the first time, set forth his defense to the violations. As to the refusal to permit an inspection of his premises on January 9, 1985, respondent states (Appeal at 1):

> Sub Part C On this matter let me call your attention to AWA No. 311 and AWA 328 Order for Voluntary Dismissal dated 3-22-85 by Dorothea A. Baker wherein it stated that I no longer had Guinea Pigs. At the time that Mr. Bertz made his appearance at my place the animals were still on my premises, as you don't move a whole colony 400 miles in the dead of winter.
>
> Mr. Bertz asked me if I wanted to file an annual report and pay license fee. According to Title 9, Sub Chapter A, Regulations #2.5 Duration of license Sub Part B. Being that Mr. Bertz was giving me notice and opportunity as stated in Sub Part B. My answer of no, amounted to automatic termination of license and automatic termination of authority. Therefore Mr. Bertz's request to inspect building amounted to nothing more than an illegal search.

These facts, which are set forth for the first time on appeal, come much too late. As explained above, respondent had an opportunity to file a timely answer explaining any allegation of the complaint and setting forth any defense asserted by the respondent. But he failed to file a timely answer, and his late answer failed to deny or explain any allegation or set forth any defense. It is well settled that respondent cannot raise new issues on appeal or present new facts for the first time on appeal.[4]

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five

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[4] *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc.* v. *Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

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ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a $10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). Last month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not file a timely answer and did not choose to "set forth any explanation at this time" when his (untimely) answer was filed.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" [5] If respondent were permitted to raise the defenses which he explained for the first time on appeal to the Judicial Officer, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to raise these defenses at this time.

But even if respondent were permitted to raise these defenses, respondent is in error in believing that when he *orally* said he did not want to file an annual report and pay the license fee, that amounted to an automatic termination of his license. The regulations provide (9 CFR § 2.5):

> § 2.5 *Duration of license.*
>
> (a) A license issued under this part shall be valid and effective unless:
>
> (1) Said license has been revoked or suspended pursuant to section 19 of the Act.
>
> (2) Said license is voluntarily terminated upon the request of the licensee in writing to the Veterinarian in Charge.
>
> (b) Failure by a licensee to pay the annual license fee as required by §§ 2.1 and 2.6 or to file the annual report as required by § 2.7 on or before the anniversary date of his license shall result in automatic termination of the license:

[5] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

Provided, however, That prior to such termination the licensee shall be given notice and opportunity to comply with the annual license fee and reporting requirements. Failure to comply with the annual license fee and reporting requirements within 60 days from receipt of such notice shall result in automatic termination of license.

(c) A license which is invalid under paragraph (a) of this section shall be surrendered to the Veterinarian in Charge in the State where the license was issued.

Under the regulation, respondent had until the anniversary date of his license in which to pay the annual license fee and file the annual report. His oral statement that he did not want to file an annual report and pay the license fee did not terminate his license prior to the anniversary date of the license.

As to selling without a license, respondent presents a fact for the first time on appeal which, if true, would seem to constitute a valid defense. Respondent states (Appeal at 1):

Sub Part A and B Correct as for number of pigs sold.

If you look at Animal Welfare Act (7 U.S.C. 2131-2156) Section 2 Sub Part f ii;

"any person who does not sell, or negotiate the purchase or sale of any wild animal, dog or cat and who derives no more than $500 gross income from the sale of other animals during any calendar year".

Being that I maintain a few pigs, along with my sons who have their own colonies each as 4-H projects for several years. So long as each of us stay below the $500 limit there is no violation.

The complete definition of the term dealer, quoted in part by the respondent, is as follows (7 U.S.C. § 2132(f)):

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

> (i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
>
> (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year.

If respondent had filed a timely answer setting forth as a defense that he was not a dealer on January 23, 1985, and February 5, 1985, when the alleged unlawful sales occurred, a hearing would have been held to determine the truth of that fact. But since respondent did not file a timely answer, and even in his late answer he did not choose to "set forth any explanation at this time," respondent cannot inject this issue into the case for the first time on appeal.

It should be noted that the complaint does not *expressly* allege that respondent was still a dealer on January 23, 1985, and February 5, 1985, when the alleged sales in violation of the Act occurred. But the fact that respondent was a dealer on those dates is alleged by implication. That is, the complaint alleges (Complaint at 2):

> a. On January 23, 1985, respondent sold and shipped 38 guinea pigs to a research facility without an effective Animal Welfare License in violation of Section 4 of the Animal Welfare Act, 7 U.S.C. 2134.
>
> b. On February 5, 1985, respondent sold and shipped 52 guinea pigs to a research facility without an effective Animal Welfare License in violation of Section 4 of the Animal Welfare Act, 7 U.S.C. 2134.

Since the complaint alleges that these sales were in violation of § 4 of the Animal Welfare Act (7 U.S.C. § 2134), and § 4 of the Act only applies to sales by dealers (or exhibitors subject to the Act), the complaint necessarily alleges, by implication, that respondent was acting as a dealer on those dates.

In addition, the complaint also alleges that respondent was licensed as a dealer from November 14, 1983, until January 15, 1985, just a few days prior to the sales alleged to be in violation of the Act. In the absence of any suggestion by respondent to the contrary, the ALJ could have properly inferred that when respondent continued to sell guinea pigs a few days after his license terminated, he was still acting as a dealer. But, in any event, as stated

above, it is too late for respondent to inject this issue into the case for the first time on appeal.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent, his agents and employees, directly or indirectly through any corporate or other device, in connection with his business as a dealer within the meaning of the Act, shall cease and desist from:

1. Selling animals in violation of 7 U.S.C. § 2134; and

2. Refusing to permit inspections of his premises in violation of 7 U.S.C. § 2146(a) and 9 CFR § 2.126.

Respondent is assessed a civil penalty of $3,000, which shall be paid not later than the 90th day after service of this order by certified check or money order, made payable to the order of the Treasurer of the United States and sent to Kevin F. Meckus, United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, Washington, D. C. 20250.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent.

In re: LETHA HAMILTON. AWA Docket No. 357. Decided March 10, 1986.

William Weber, Administrative Law Judge.
Mary Kyle Hobbie, for complainant.
Robert W. Evenson, Pineville, Missouri, for respondent.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraphs 1 and 2 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

Respondent Letha Hamilton is an individual with a mailing address of Route 1, Box 162, Goodman, Missouri 64843. The respondent, at all times material herein was licensed as a Class A dealer within the meaning of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. The respondent shall cease and desist from violating the Act and the regulations and standards issued thereunder.
2. Respondent is assessed a civil penalty of $1,000 of which all but $250 is suspended conditional upon her compliance with the regulations and standards of the Animal Welfare Act and this Decision.
3. Respondent agrees to employ two part-time or one full-time employee who will be responsible for the maintenance of proper housekeeping and sanitation in the kennel in compliance with the standards and regulations issued pursuant to the Animal Welfare Act.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: BETTY L. AALSETH d/b/a LABPETS. AWA Docket No. 365. Decided March 10, 1986.

William J. Weber, Administrative Law Judge.
Robert Frisby, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR § 1.1-3.142. This decision is entered

pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Betty L. Aalseth is an individual doing business as Labpets, and her mailing address is 89 South Backus Avenue, Pasadena, California, 91107.

2. At all times material herein, respondent was a dealer within the meaning of the Act and held a Class A license (No. 93A-123) issued pursuant to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Betty L. Aalseth shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof.

Respondent is assessed a civil penalty of $2000; such penalty to be suspended provided that she surrender her license (No. 93A-123) and refrain from operating in any capacity requiring a license under the Act for a period of three (3) years from the effective date of this decision. If, after notice and hearing, it is determined that respondent has operated in any capacity requiring a license under the Act during this three (3) year period, this $2000 civil penalty shall become due. Respondent may apply for a new license three years from the effective date of this decision.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: BRIAN WATSON d/b/a EAST COAST CAMEL CO. AWA Docket No. 362. Decided March 28, 1986.

Dorothea A. Baker, Administrative Law Judge.
Robert A. Ertman, for complainant.
Ralph C. Pino, Gloucester, Massachusetts, for respondent.

DECISION AND ORDER (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

Complainant agrees to the entry of this decision.

FINDINGS OF FACT

Respondent Brian Watson is an individual doing business as East Coast Camel Co., at Pond Street, Essex, Massachusetts 01929. Respondent, at all times material herein, was licensed and operating as an exhibitor within the meaning of the Act.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Respondent shall cease and desist from violating the Act and the regulatins and standards issued thereunder. In particular, respondent shall abide by the regulations and standards alleged to have been violated in the complaint filed in this proceeding. Further, respondent shall instruct his employees to grant entry to employees of the Animal and Plant Health Inspection Service for the inspection of his facilities, and shall provide responsible employees with the necessary keys and combinations to locks.

2. Respondent is assessed a civil penalty of $500.00, which shall be paid by a certified check or money order payable to the Treasurer of the United States.

3. Respondent's license shall be suspended for a period of 60 days and continuing until the respondent demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to the Animal and Plant Health Inspection Service that the respondent is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued upon the motion of the Animal and Plant Health Inspection Service in this proceeding terminating the suspension.

The provisions of this order shall become effective February 13, 1986.

This decision has been served upon the parties and service has been accepted.

[This decision and order became effective February 13, 1968.—Ed.]

In re: WAYNE ANDERSON. AWA Docket No. 297. Decided April 3, 1986.

Edward H. McGrail, Administrative Law Judge.
Robert A. Ertman, for complainant.
For respondent, *pro se.*

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), ("Act") by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, charging that respondent violated the regulations and standards issued under the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings (7 CFR § 1.138).

The respondent admits the jurisdictional allegations contained in the complaint, specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, and waives oral hearing and further procedure. Complainant and respondent agree for the purpose of settling this proceeding to the entry of this decision.

FINDINGS OF FACT

1. Respondent is an individual whose mailing address is Route 2, Richland Center, WI 53581.

2. At all times material herein respondent was licensed as a dealer under the Act.

CONCLUSION

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision and order, this decision and order will be entered.

ORDER

1. Respondent shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) and the standards and regulations issued thereunder (9 CFR § 1.1 *et seq.*) and shall cease and desist from any violation thereof, and in particular shall not transport dogs or cats except in approved primary enclosures and shall not place more than the approved number of animals in each primary enclosure.

2. Respondent is assessed a civil penalty of $100.

This order shall have the same force and effect as if entered after full hearing and shall become effective on the first day after service of this Decision and Order on the respondent.

In re: JAMES E. HEASLEY and EARLA M. HEASLEY. AWA Docket No. 325. Decided April 9, 1986.

Victor W. Palmer, Administrative Law Judge.
Robert Frisby, for complainant.
For respondent, *pro se*.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations issued pursuant to the Act, 9 CFR §§ 1.1–2.130. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondents admit the jurisdictional allegations of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations,

waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James E. Heasley and Earla M. Heasley, hereinafter referred to as the respondents, are partners doing business as Heasley's Trading Post. Their mailing address is R.D. 1, Lewis Run, Pennsylvania 16738.

2. Respondents, at all times material herein, were engaged in business as an exhibitor as defined in the Act but did not hold a license as required by the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents James E. Heasley and Earla M. Heasley shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondents shall cease and desist from engaging in any business requiring a license under the Act without first obtaining a license as required by the Act and the regulations.

Respondents are hereby assessed a civil penalty of $300 to be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: DORA M. DORRISS. AWA Docket No. 350. Decided April 30, 1986.

Victor W. Palmer, Administrative Law Judge.
Kevin F. Meckus, for complainant.
For respondent, *pro se*.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156 (1982), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Dora M. Dorriss, hereinafter referred to as respondent, is an individual whose mailing address is R.2, Norwalk, Iowa 50211.

2. At all times material herein respondent was licensed under the Act as a Class A dealer (License No. 42ABA).

CONCLUSION

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Dora M. Dorriss shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof.

Respondent is hereby assessed a civil penalty of $1,000.00. Of that amount, $500.00 is to be paid by certified check or money order made payable to the Treasurer of the United States. The balance of the civil penalty is hereby suspended pending respondent's

future compliance with the Animal Welfare Act and the regulations and standards issued thereunder.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: REX A. BANTZ. AWA Docket No. 199. Decided April 4, 1986.

Dorothea A. Baker, Administrative Law Judge.
Robert Frisby, for complainant.
For respondent, *pro se*.

ORDER OF DISMISSAL

Complainant has moved to dismiss the complaint initiating this proceeding because it would not be in the public interest to pursue the matter any further.

WHEREFORE: for good cause shown, it is ordered that the complaint filed April 15, 1982, be dismissed.

In re: RUDOLPH VRANA d/b/a VRANA RESEARCH ANIMALS, AWA Docket No. 380. Order issued April 25, 1986.

Edward H. McGrail, Administrative Law Judge.
Howard Haas, for complainant.
Pro se, for respondent.

ORDER OF DISMISSAL

The complainant moves to dismiss this case on the basis that further proceedings would not be in the public interest.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is hereby ordered that this complaint is dismissed without prejudice.

In re: DEAN PAUL. AWA Docket No. 360. Order issued April 29, 1986.

Donald A. Campbell, Judicial Officer.
Kevin Meckus, for complainant.
Valerie L. Marciano, Green Bay, Wisconsin, for respondent.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent's petition for reconsideration is denied for the reasons set forth in the Decision and Order filed March 6, 1986. The cease and desist provisions of the order filed March 6, 1986, shall become effective on the day after service of this order on respondent, and the civil penalty shall be paid not later than the 90th day after service of this order on respondent.

In re: S. MARCHISIO PROVISION, INC. FMIA Docket No. 94. Decided March 5, 1986.

Dorothea A. Baker, Administrative Law Judge.
Kris Ikejiri, for complainant.
William Condon, New York, N.Y., for respondent.

STIPULATION AND CONSENT DECISION AND ORDER

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. Section 601 *et seq.*), and the applicable Rules of Practice (7 CFR Section 1.130 *et seq.* and 9 CFR Section 335.1 *et seq.*), to withdraw Federal meat inspection service from S. Marchisio Provision, Inc. This proceeding was commenced by a complaint filed on October 2, 1985, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of Federal meat inspection services. The parties have agreed that this proceeding should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For purposes of this stipulation and the provisions of this Consent Decision only, S. Marchisio Provision, Inc., hereafter referred to as respondent, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision are for settlement purposes in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it violated the regulations or statues involved.

3. The respondent waives any action against the USDA under the Equal Access to Justice Act of 1980, (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is now, and at all times material herein was, a corporation which operates a meat processing establishment in Brooklyn, New York, and is a recipient of Federal meat inspection serv-

ices under Title I of the FMIA. The respondents address is 5 Brooklyn Terminal Market, Brooklyn, New York 11236.

2. On July 31, 1985, in the United States District Court for the Eastern District of New York, the respondent was convicted of two misdemeanors for the sale of adulterated and misbranded meat food products, in violation of Title 21, United States Code, Section 610(c).

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Order will be issued.

ORDER

I

Inspection service under Title I of the FMIA is, for a period of one year, withdrawn from and denied to respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate device. This one year period of withdrawal and denial will be held in abeyance, and will not become effective:

II

1. (a) For so long as, within one year from the effective date of this Order, the respondent or any of its officers, partners, employees, agents, or affiliates do not violate (as that term is defined in paragraph 1(b)) any section of the FMIA or State or local statutes, involving the preparation, sale, transportation or attempted distribution of any adulterated or misbranded meat or meat food products.

(b) The term violate, as used in paragraph 1(a) above, means a violation found upon conviction (or upon affirmation of conviction, if appealed), or upon a final decision in a formal adjudicatory proceeding before the Secretary (or upon affirmation of the Secretary's decision, if appealed), and if it is found that there is any such violation of any term of this Order, the suspension of the withdrawal and denial will become effective immediately. This shall not preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

III

1. For so long as, within five years of the effective date of this order, the conditions set forth in paragraphs 2 through 14 below, are met. During this five year period, the Secretary shall have the right to summarily withdraw inspection service upon a finding by

appropriate national headquarters staff, after a preliminary conference with respondent, of a violation of any special condition set forth in paragraphs 2 through 14. The summary withdrawal of inspection service shall be effective pending final determination of a violation in accordance with the applicable Rules of Practice. Such summary withdrawal shall have no relevance with respect to the final determination in the proceeding and will not preclude the respondent from requesting an expedited hearing.

2. Respondent does not knowingly employ or add any individual who has been convicted, in any Federal or State court of any felony, or more than one violation of any law, other than a felony, based upon the acquiring, handling, or distribution of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food; and

3. Respondent immediately terminates its connection with any such individual when that individual's conviction becomes known; and

4. Respondent does not prepare, manufacture, handle, sell or transport any sausage product which contains any prohibited or unapproved additive or any approved additive in excess of that allowed; and

5. Respondent maintains a complete listing of all nonmeat additives being used or stored at its official establishment, to include the identity of manufacturer and/or supplier; and

6. Respondent arranges for semiannual independent laboratory analysis of all additives being used or stored at the establishment for preservatives, including but not limited to sulfite, nitrite, ascorbate, sorbate, and benzoate. The results of the analyses will be provided to the on-site USDA inspector; and

7. Respondent shall designate a full-time person who has overall, daily responsibility and control of respondent's operations (i.e., plant manager or plant superintendent) to conduct daily reviews of all areas of the official establishment for sanitation. In addition, this Designee shall review daily products for condition, processing procedures, formulation, and labeling of finished products. These daily reviews shall be recorded in a hardbound Log Book, including but not limited to, the date, time, name of Designee conducting the review, the findings, suggestions and/or corrective action taken, and initialed by the Designee. The Log Book shall be available for review by USDA personnel; and

8. Respondent's Designee shall immediately notify the USDA onsite inspector of any operational or sanitation deficiencies that would or have caused work stoppage and corrective actions taken during the daily reviews; and

9. Respondent does not prepare, handle, or store custom exempt articles or game, whether for customers, employees, the owner, friends or relatives; and

10. Respondent does not accept or receive any returned product due to its condition or the condition of the carton or container without prior notice to, and approval by, the on-site USDA inspector; and

11. Respondent does not handle, prepare, separate, wash, trim, recondition, or rework any returned or off-condition product without prior notice to, and approval by, the on-site USDA inspector; and

12. Respondent maintains full, complete, and accurate written records of all other business activities applicable to the FMIA and the Poultry Products Inspection Act (21 U.S.C. Section 451 *et seq.*), which are available for review by USDA personnel; and

13. Respondent makes a detailed semiannual written report to the Meat and Poultry Inspection Office's Area Supervisor, New York, New York, concerning its adherence to this Stipulation and Consent Decision with a copy to the on-site USDA inspector. The first such report is due July 1, 1986. All following semiannual written reports shall be submitted to the Area Supervisor on June 1 and December 1 of each calendar year that this Consent Decision and Order is effective; and

14. Respondent shall afford duly authorized personnel of the USDA an opportunity to examine and to copy all such records, reports, and other documents required of the respondent in this Consent Decision and Order.

15. Nothing in this Order shall preclude the respondent from petitioning the complainant, after 30 months from the effective date of this Order and after successfully complying with all terms in this Order, to modify, amend, or terminate any or all of the special conditions set forth in paragraphs III, 1 through 14.

16. Nothing in this Order shall preclude the respondent from petitioning the complainant, at any time, to modify, amend or terminate this Order if the respondent has entered into good faith negotiations to sell or transfer the assets or corporate entity of the respondent.

This Consent Decision and Order shall become effective after being signed by an Administrative Law Judge and filed with the Hearing Clerk.

In re: TOSCONY PROVISION COMPANY, INC. FMIA Docket No. 40. Order issued March 18, 1986.

Donald A. Campbell, Judicial Officer.
Harold Reaben, for complainant.
Jon Alex Brody, Lyndhurst, New Jersey, for respondent.

ORDER DENYING PETITION FOR RECONSIDERATION AND EXTENSION OF TIME

Respondent's petition for reconsideration is denied since it was not filed within 10 days after the date of service of the Judicial Officer's decision in this case (7 CFR § 1.146(a)(3)). If the matter had been timely filed, it would have been denied on the merits.

Respondent's motion for a 3-month extension of the deadline for Henry Dei to disassociate himself from respondent is denied since he knew since the date of service of the court of appeals decision that he would have to comply with the administrative order, and the case has been pending for years.

DISCIPLINARY DECISIONS

In re: DAVID MULSO, DAVE MULSO CATTLE COMPANY, SIRLOIN, INC., ELKTON LIVESTOCK, INC., and WESLEY VAN DYKE. P&S Docket No. 6487. Decided March 3, 1986.

William J. Weber, Administrative Law Judge.
Peter Train, for complainant.
For respondent, *pro se*.

CONSENT DECISION AS TO RESPONDENTS ELKTON LIVESTOCK, INC., AND WESLEY VAN DYKE

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Elkton Livestock, Inc., and Wesley Van Dyke, admit the jurisdictional allegations in paragraph II of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Elkton Livestock, Inc., hereinafter referred to as respondent Elkton, is a corporation whose business address is R.R. 1, Box 54, Elkton, South Dakota 57026.

2. Respondent Elkton was, at all times material herein:

(a) Engaged in the business of buying and selling livestock in commerce for its own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

3. Wesley Van Dyke, hereinafter referred to as respondent Van Dyke, is an individual whose mailing address is R.R. 1, Box 54, Elkton, South Dakota 57026.

4. Respondent Van Dyke was, at all times material herein:

(a) Owner of all the corporate stock of respondent Elkton;

(b) President of respondent Elkton; and

(c) Responsible for the direction, management, and control of respondent Elkton.

5. Respondent Van Dyke was, at all times material herein, a dealer and market agency within the meaning of those terms as defined in the Act, and subject to the provisions of the Act.

CONCLUSIONS

Respondents Elkton Livestock, Inc., and Wesley Van Dyke having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Elkton Livestock, Inc., and Wesley Van Dyke, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Misrepresenting to their principals, or to other purchasers of livestock from respondents, the original purchase weights or the original purchase prices for such livestock;

2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, or any other document showing false, inaccurate or misleading weight or price entries for such livestock;

3. Collecting payment from the purchasers of livestock on the basis of false, inaccurate, or misleading weight or price entries on accounts of purchase, invoices or billings;

4. Inserting or failing to insert in accounts of purchase, invoices, billings or any other document prepared in connection with the purchase or sale of livestock, any entry, statement or information by reason of which insertion or ommission a false or misleading record is made, in whole or in part, of such livestock purchase or sale transaction;

5. Issuing checks in payment for the purchase of livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which the checks are drawn to pay the checks when presented;

6. Failing to pay, when due, the full purchase price of livestock;

7. Failing to pay for livestock; and

8. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and regulations.

Respondent Elkton Livestock, Inc., is suspended as a registrant under the Act for a period of one year and thereafter until such time as it complies fully with the bonding requirements under the Act and regulations. When respondent Elkton demonstrates that it is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the one-year period.

Respondent Wesley Van Dyke shall not engage in business as a market agency or dealer subject to the Act for a period of one year.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

In re: GREENVILLE LIVESTOCK, INC., and W. BRYAN HARGETT, JR.
P&S Docket No. 6556. Decided March 3, 1986.

John A. Campbell, Administrative Law Judge.
Ben Bruner, for complainant.
Louis Foy, Trenton, North Carolina, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Greenville Livestock, Inc., doing business as East Carolina Stockyard, hereinafter referred to as the corporate respondent, is a North Carolina corporation. The corporate respondent's principal place of business is located at Ayden-Grifton, North Carolina, and its business mailing address is P. O. Box 833, Kinston, North Carolina 28501.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the East Carolina stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency buying and selling livestock in commerce on a commission basis;

(c) Engaged in the business of a dealer buying and selling livestock in commerce for its own account; and

(d) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

3. W. Bryan Hargett, Jr., hereinafter referred to as the individual respondent, is an individual whose business mailing address is P. O. Box 833, Kinston, North Carolina 28501.

4. The individual respondent is, and at all times material herein was:

(a) President of the corporate respondent;

(b) Owner of 100% of the outstanding stock issued by the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent; and

(d) A market agency and dealer within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Greenville Livestock, Inc., its officers, directors, agents and employees, successors and assigns, and respondent W. Bryan Hargett, Jr., his agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the specific times prescribed in section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock whether or not such proceeds have been collected by respondents; and

2. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42).

The corporate respondent is suspended as a registrant under the Act, and the individual respondent is prohibited from engaging in business subject to the Act for a period of seven (7) days and thereafter until they demonstrate that the shortage in the corporate respondent's Custodial Account for Shippers' Proceeds has been eliminated. When respondents demonstrate that the shortage in the Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension and prohibition after the expiration of the seven day period.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Ten Thousand Dollars ($10,000.00).

The provisions of this order shall become effective on February 23, 1986.

Copies of this decision shall be served on the parties.

In re: ROBERT HIBBERD, P&S Docket No. 6661. Decided March 3, 1986.

Victor W. Palmer, Administrative Law Judge.
Edward M. Silverstein, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Robert Hibberd, hereinafter referred to as the respondent, is an individual whose business mailing address is Valley View Trailer Park # 192, Kearney, Nebraska 68847.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Robert Hibberd, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: BLACKFOOT LIVESTOCK COMMISSION Co. P&S Docket No. 6107.
Decided March 7, 1986.

Misuse of custodial account—Check kiting—Six-month suspension until custodial account is no longer insolvent.

The Judicial Officer affirmed Judge Weber's decision requiring respondent to cease and desist from engaging in business while insolvent; misusing its custodial account for shippers' proceeds; exchanging drafts or checks to create a false "float" in its account; permitting owners, etc., to buy out of consignment for speculation; and paying for livestock with a draft which is not a check without permission from the seller. However, the Judicial Officer *sua sponte* increased the suspension period from 35 days, which was requested by complainant and issued by the ALJ, to 6 months, primarily because of the seriousness of the check-kiting violations. The fact that the principal violator is now deceased is not a mitigating circumstance. A principal is responsible for the acts of its agents. Check kiting is serious because of potential for great harm. Severe sanction policy explained. Although complainant advised respondent prior to the hearing that it was seeking a 35-day suspension order, respondent should know that that is only a recommendation not binding on the Judicial Officer. Where previous sanctions have not been adequate, a more severe sanction is issued in the present case rather than merely an announcement made that in future cases the sanction will be increased. Harm to consignors is not considered in determining the sanction against an auction market. Consent decisions given no weight in determining sanctions in litigated cases. Complainant's investigation report is not producible under Jencks Act, and respondent's request for the report does not require the ALJ to perform an *in camera* examination.

William J. Weber, Administrative Law Judge.
Peter Train, for complainant.
Robert M. Cook, Norfolk, Nebraska, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on August 22, 1985, by Administrative Law Judge William J. Weber (ALJ) suspending respondent as a registrant for 35 days and ordering respondent to cease and desist from engaging in business while insolvent; misusing its "Custodial Account for Shippers' Proceeds"; exchanging drafts or checks to create a false "float" or balance in its account; permitting owners, officers, agents, or employees to buy livestock out of consignment for speculation; and paying for livestock with a draft which is not a check without obtaining permission from the seller.

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* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

On September 23, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On October 21, 1985, the case was referred to the Judicial Officer for decision. The Judicial Officer *sua sponte* raised the issue as to whether the suspension period should be "substantially increased, e.g., 6 months to a year" (Notice filed January 31, 1986). Additional briefs were filed by the parties.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the ALJ's findings and conclusions are adopted as the final decision in this case, with changes too minor to itemize (except that a paragraph is omitted which begins at the bottom of page 24 of the ALJ's decision). Additional conclusions by the Judicial Officer follow the ALJ's conclusions. The suspension period is increased to 6 months for the reasons set forth in the Judicial Officer's additional conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 USC § 181 *et seq.*, "Act") instituted by a complaint filed on March 1 1983.

Generally, the complaint alleged respondent violated the provisions of the Act (and implementing regulations 9 CFR 200 *et seq*) concerning insolvency, misuse of the custodial account, paying for livestock with drafts (without written permission from the seller), check-kiting and speculative purchases of cattle consigned for sale.

Specifically, the complaint charged respondent corporation wilfully violated the Act by exchanging checks or drafts with Uinta Livestock Commission Company when no sales of livestock were involved, for the purpose of creating a false "float" or balance in both bank accounts. The complaint also charged that there were in-

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** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program (December 1962–January 1971)).

sufficient funds on deposit in respondent's account to pay such drafts when they were issued.

The complaint also charged that the respondent corporation wilfully violated the Act (and the implementing regulations) when it:

> (1) continued doing business as a market agency selling livestock on a commission basis while its current liabilities exceeded its current assets;
>
> (2) failed to maintain and use properly its custodial account for shippers' proceeds; and
>
> (3) used custodial funds for purposes of its own and for purposes other than payment of lawful marketing charges and remittance of net proceeds to the consignors of the livestock sold.

Further, respondent corporation allegedly permitted its owners and officers to purchase livestock consigned to the market for sale on a commission basis for resale for their own speculative accounts.

Finally, respondent corporation was charged with issuing bank drafts in payment for its purchases of livestock without first receiving the seller's written permission for their use.

Respondent admitted the jurisdictional allegations and denied any and all alleged violations of the Act or regulations.

Trial of the issues took place on April 3-6, 1985 in Idaho Falls, Idaho.

The last briefs were filed 12/31/85. Respondent corporation by a post hearing motion seeks to submit into the record the findings of fact, conclusions of law and judgment of the U.S. District Court for the District of Utah Central Division (Civil #C-83-1211W) in litigation between a bank and respondent corporation arising out of the check-kiting activities. Also submitted is the supplemental letter of explanation dated 4/16/85, provided by the Court to the parties in that litigation. (A copy of all the material is attached to the motion).

Complainant's objections are overruled. The findings, conclusions and views of the Court are relevant and material to the issues here, are not unduly repetitious and responsible people will rely on them. 7 CFR 1.141(g)(1)(iv). Further, a relevant decision of the U.S. District Court could be cited in briefs. See also 7 CFR 1.141(g)(5) and (6).

Respondent's motion is granted. The decision of the District Court will be given whatever weight is appropriate consistent with the evidence in this record.

FINDINGS OF FACT

1. Blackfoot Livestock Commission Co., hereinafter referred to as the respondent, is a corporation whose business mailing address is P. O. Box 472, Blackfoot, Idaho 83221. (Answer) [1]

2. Respondent ("stockyard") is and has been operating a posted stockyard subject to the provisions of the Act at all times relevant here. (Answer)

3. Respondent is and has been a market agency selling livestock on a commission basis at the stockyard. (Answer)

4. Respondent is and has been registered with the Secretary of Agriculture as a (1) market agency to buy and sell livestock in commerce on a commission basis, and as a (2) dealer to buy and sell livestock in commerce for its own account. (Answer)

5. At the time relevant here (January through May 1981) the corporate officers of respondent were Delwyn Ellis, President, Paul Thompson, Vice-President, and Dennis Lake, Secretary-Treasurer, each of whom owned ⅓ of the corporate stock issued by respondent. (TR 736, 737)

6. Paul Thompson died on or about May 19 1981. (TR 321, 703)

7. Upon Thompson's death, Ellis and Lake each became 50% owners of the corporate stock issued by the respondent. (TR 613–14, 736)

8. Respondent is presently under the direction, management and control of its owners and corporate officers, Delwyn Ellis, President, and Dennis Lake, Vice-President. (TR 738)

Insolvency

9. During April 1982, Ms. Bonnie Bergers [2] and Mr. Keith Kienow of the Packers and Stockyards Administration's Portland, Oregon, Regional Office conducted a compliance review of respondent's business. (TR 141)

10. As part of the compliance review, Ms. Bergers analyzed respondent's current assets and current liabilities as of October 31 1981 and December 31 1981. (CX 8–10; TR 19–77)

11. Ms. Bergers' analysis revealed that as of October 31 1981, respondent's current liabilities exceeded its current assets. As of that date, respondent had current liabilities of approximately $827,969.00, and current assets totalling approximately $715,671.00, resulting in a deficit of approximately $112,298.00. (CX 8; TR 19–46)

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[1] Complainant's clear, record-supported brief, is in large measure used as a base for this decision and order. Not every possible reference is cited.

[2] Ms. Bergers' accounting skills are better than average in that she has successfully completed part of the examination for Certified Public Accountant.

12. As of December 31 1981, respondent's current liabilities exceeded its current assets. As of that date, respondent had current liabilities of approximately $474,979.00, and current assets totalling approximately $308,760.00, resulting in a deficit of approximately $166,219.00. (CX 10; TR 51-71)

13. A financial statement prepared by respondent's accountant showed that as of December 31, 1981, respondent's current liabilities exceeded its current assets by approximately $192,974.00, an amount even greater than that alleged by complainant. (CX 9) The figures in both CX 9 and CX 10 demonstrate that respondent's current liabilities exceeded its current assets as of December 31 1981.

14. While insolvent, Respondent operated as a market agency subject to the Act between October 31 and December 31 1981.

Custodial Account

15. Respondent, between March 30 and February 26 1982, failed to maintain its Custodial Account for Shippers' Proceeds ("custodial account") in accordance with the regulations promulgated under the Packers and Stockyards Act, in that:

(a) As of March 30, 1981, respondent had outstanding checks drawn on its custodial account in the amount of $318,825.89, and had, to offset those checks, cash in said account in the amount of $145,384.32, deposits in transit of $2,842.70, and proceeds receivable of $28,023.30, resulting in a deficiency of $142,575.57 in funds available to pay shippers their proceeds. (CX 11; TR 78-85)

(b) As of April 30 1981, respondent had outstanding checks drawn on its custodial account in the amount of $296,715.58, and had, to offset those checks, cash in said account in the amount of $276,056.40, no deposits in transit and no proceeds receivable, resulting in a deficiency of $20,659.18 in funds available to pay shippers their proceeds. (CX 12; TR 86-88)

(c) As of October 31 1981, respondent had outstanding checks drawn on its custodial account in the amount of $922,347.50, and had, to offset those checks, cash in said account in the amount of $193,366.60, deposits in transit of $97,038.28, and proceeds receivable of $611,189.77, resulting in a deficiency of $20,752.85 in funds available to pay shippers their proceeds. (CX 8; TR 36-40)

(d) As of December 31 1981, respondent had outstanding checks drawn on its custodial account in the amount of $102,044.95, and had, to offset those checks, cash in said account in the amount of $83,457.07, no deposits in transit and no proceeds receivable, resulting in a deficiency of $18,587.88 in funds available to pay shippers their proceeds. (CX 10; TR 63-66)

16. An analysis of the custodial account for April 1981 revealed that the outstanding checks drawn on the custodial account exceeded the ending bank balance for each and every day in April. (CX 13; TR 141-48)

17. The shortages were caused in part by the failure of respondent to deposit in its custodial account, within the respective times prescribed by the regulations (1) an amount equal to the proceeds from purchases of consigned livestock by Dennis Lake and Delwyn Ellis, respondent's owners and officers; and (2) an amount equal to the proceeds receivable from purchases of consigned livestock by others. (CX 8, 10-12; TR 153-155)

18. The deficiencies in the custodial account were also caused by respondent's deposit to its general account of monies which should properly have been deposited immediately in its custodial account. It was common practice for respondent to deposit proceeds from the sale of consigned livestock received on the Monday and Tuesday following the Friday sale in its general account rather than the custodial account. Between March 6 and May 29 1981, respondent had as much as $284,899.84 in its general account which should properly have been deposited in its custodial account. For the period December 11 1981 through February 19 1982 as much as $189,398.14 of consignors' money was in respondent's general account rather than its custodial account. (CX 14, 15, 16; TR 149-166)

Check-kiting

19. Uinta Livestock Commission Company, Roosevelt, Utah, was, at the time relevant here (from January 1 1981 through May 27 1981), a market agency which conducted weekly auction sales, and also purchased and sold livestock for its own account. (CX 178; TR 353)

20. Mr. Kay Andreasen, 907 Paulsen, Moses Lake, Washington 98837, was at the time material here, the owner of Uinta Livestock Commission Co.

21. Ms. Carol Kimball, Hancock Cove, Roosevelt, Utah, at the time relevant here, (from January 1 1981 through May 27 1981), was the bookkeeper and office manager of Uinta Livestock Commission Company. In that capacity she issued Uinta checks made payable to Blackfoot Livestock Commission Company totalling $8,697,664.44. (CX 17A; TR 307)

22. Ms. Kimball was also authorized by Paul Thompson (then Vice-President of Blackfoot Livestock) to sign Blackfoot Livestock Commission Company drafts made payable to Uinta Livestock Commission Company. (TR 314)

23. Between January 1 1981 and May 20 1981 more than 75 separate drafts totalling $8,629,649.58, payable to Uinta Livestock Commission Company, were drawn on Blackfoot's account. The overwhelming majority of those drafts were signed by Ms. Kimball. (CX 17A)

24. Many of these Blackfoot drafts were issued to cover Uinta's overdrafts in its account at Zions First National Bank, Roosevelt, Utah. Uinta's account was in an overdraft position on an almost daily basis.[3] (TR 309, 310)

25. An analysis of the Blackfoot drafts in CX 17B reveals that some have names and figures which purport to be true purchases of livestock while others contain no information as to the number of head, or weight or price. Many of the names and figures on the drafts were fictitious, placed on the drafts of Blackfoot LIvestock to make them appear to be legitimate transactions at the request of Paul Thompson, who was then Vice-President of Blackfoot. (TR 312-27)

26. When a Blackfoot draft made payable to Uinta was issued, an exchange check payable to Blackfoot was issued by Ms. Kimball within minutes after writing the Blackfoot drafts. (TR 313)

27. At the time the Uinta checks given in exchange for Blackfoot drafts were issued, there were not sufficient funds in Uinta's account to cover such checks. (CX 18A; TR 279-285)

28. At the time Blackfoot drafts were issued and deposited by Uinta in Uinta's bank account, there were not sufficient funds in Blackfoot's account to cover such drafts. (CX 18B; TR 285-293)

29. Prior to a Uinta exchange check being presented for payment at its bank, another Blackfoot draft would be deposited and credited to Uinta's bank. The reverse was also true, *i.e.*, a Uinta check would be deposited and credited to Blackfoot's account prior to a Blackfoot exchange draft being presented for payment. (TR 277-278)

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[3] Zions First National Bank allowed Uinta provisional use of the funds on deposit of the Blackfoot Livestock drafts, before Blackfoot Livestock, as drawee, had "accepted" the drafts for payment.

After the death of Paul Thompson, Uinta officials were told that the relationship with Blackfoot Livestock would continue. (TR 336, 346-47). But almost immediately thereafter, apparently when Blackfoot Livestock officers discovered the full extent of that relationship, Blackfoot Livestock officers refused to accept for payment any further drafts payable to Uinta.

This resulted in a loss of about $884,000.00 by Zions First National Bank which had allowed provisional use of these funds to Uinta on deposit of the drafts. (Findings of Fact 14 through 19, decision of the District Court, *Zions First National Bank* v. *Blackfoot Livestock, supra*).

30. The purpose and effect of this exchange was to create an artificial balance in both Blackfoot's and Uinta's account such that there appeared to be sufficient funds in the accounts when in fact these funds were merely "paper" money. (TR 371, 372)

31. A representative sampling of these checks and drafts appears in paragraph VII of the complaint (with minor typographical errors).

32. Dennis Lake was aware that a large number of Blackfoot drafts for large sums of money were being issued to Uinta Livestock at least as early as April, 1981. (TR 324, 312-314)

33. In late May, after the death of Paul Thompson, Dennis Lake refused to honor three Blackfoot drafts totalling $884,108.61 issued to Uinta even though Blackfoot had received and deposited a check for $84,688.94 issued by Uinta in exchange for the first of these drafts. (CX 17A; TR 369, 347)

Speculative Purchases by Respondent's Officers and Failure to Timely Deposit Funds in the Custodial Account

34. During the period November 6 1981 through February 26 1982, Dennis Lake and Delwyn Ellis purchased, purportedly in the name of Blackfoot, livestock which had been consigned to Blackfoot Livestock Commission Co., for sale on commission basis (detailed in paragraph VIII of the complaint).

35. In purchasing these livestock, Lake and Ellis actively competed with other bidders. (TR 663)

36. Separate "deal sheets," that is, documents which show the details of the purchase of livestock by Lake and Ellis, including the number, weight and price on the top half of the sheet, and its subsequent resale to include the purchaser, the number, weight and price on the bottom half of the sheet, were kept for Lake and Ellis. (CX 20; TR 438, 750)

37. On virtually every deal sheet, there was a figure in the center of the sheet on the bottom which represented the difference between the price paid for the livestock at the top and the price purportedly received from the subsequent resale of these livestock, i.e., gross profit. (CX 20; TR 440, 446)

38. Certain of the livestock purchased from consignment by Lake and Ellis in the name of Blackfoot were sold to Dennis Lake and Delwyn Ellis for their ranching or feeding operations. These purchases were not paid for by the close of business on the day following the sale. (TR 756-64; CX 20)

39. The percentage of livestock purchased out of consignment by Blackfoot ranged from a low of 3% on December 18 1981, to highs

of 28% on February 5 1982; 25% on February 12 1982; and 21% on February 19 1982. (CX 20A)

40. Although Lake and Ellis did not make a profit on the resale of their purchases out of consignment on every sale day, significant profits were made on most days. (CX 20A) These purchases were made with the hope and intention of making a profit on resale.

41. Lake and Ellis knew, prior to the Friday sale, the kind and quality of most of the livestock which was being consigned to their market for that sale. (TR 659, 788)

42. Dennis Lake and Joe Shrader had conversations every Friday morning prior to the Blackfoot sale concerning the heifers being consigned, the market and price for heifers in Colorado. (TR 518-519)

43. After the sale, Dennis Lake called Shrader and offered the livestock to Shrader. Shrader, in fact, purchased many heifers from Lake. (CX 20; TR 521)

Unauthorized Use of Drafts

44. Blackfoot issued bank drafts in payment for its purchases of livestock without prior written permission from the sellers. (CX 21; TR 463-464)

DISCUSSION AND CONCLUSIONS

I

Respondent Wilfully Violated The Act By Operating As A Market Agency While Its Current Liabilities Exceeded Its Current Assets

7 USC § 204 provides, in part, that ". . . whenever, after due notice and hearing, the Secretary finds any registrant is insolvent, he may issue an order suspending such registrant for a reasonable specified period."

In the absence of a statutory definition of solvency, the Secretary has adopted the test of insolvency as being whether current liabilities exceed current assets. If a registrant's current liabilities exceed its current assets, it is deemed to be insolvent. (9 CFR § 203.10; TR 16). In *Bowman* v. *U.S. Department of Agriculture, et al.*, 363 F2d 81 (5th Cir. 1966), the Fifth Circuit, in approving the Secretary's test, stated:

> "having in mind the remedial purposes of the Act, we hold that the test used for determining solvency or insolvency under the circumstances here was reasonable. A financial status where current assets exceed current liabilities would be the *sine qua non* of prompt payment."

Bowman, 363 F2d at 85.

It is well-established that operating as a market agency or dealer subject to the Act while insolvent is an unfair and deceptive practice in violation of section 312(a) of the Act (7 USC § 213(a)). *See e.g., In re Southern Buyers, Inc.,* 14 Agric. Dec. 811 (1955); *In re John L. Cooper, et al. d/b/a Cooper Commission Company,* 19 Agric. Dec. 160 (1960). Respondent admits that it operated during the period in question, but denies that it was insolvent.

Ms. Bonnie Bergers, an auditor with the Portland, Oregon Regional Office of the Packers and Stockyards Administration, testified concerning the results of her analysis of respondent's financial condition. Her analysis as of October 31 1981, shows that respondent's current liabilities exceeded its current assets by approximately $112,298.00. (FF. 11) For December 31 1981, Ms. Bergers' figures show an excess of current liabilities over current assets of approximately $166,219.00. (FF. 12) An analysis done by respondent's own accountants also demonstrated that respondent was insolvent as of December 31 1981. (FF. 13)

Respondent argues that complainant improperly characterized respondent's secured line of credit, or operating loan, with the Idaho Bank and Trust Co. as short-term and, therefore, a current liability. Ms. Bergers testified that the note payable was considered a current liability because the note itself was a demand note. (TR 43, 44) The May 5 1981 note states, in pertinent part, "For value received, the undersigned, hereinafter referred to as Borrower, promises to pay to the order of IDAHO BANK AND TRUST CO. (Bank), *on demand,* or if no demand is made, then on April 1, 1982 . . ." (CX 8, p. 51 A; Emphasis added)

Mr. Mooney, a Vice-President and Manager of the Blackfoot, Idaho office of the Idaho Bank and Trust Company testified that because this note was a demand note, the bank had the right to, and would, demand immediate payment of the note if the bank felt that it was in its best interest to do so. (TR 569) In fact, the bank did not call the note due. But, this cannot, does not, convert a demand note into a note payable more than 12 months in the future.

Accordingly, the note was properly classified as a current liability on the analyses for both October 31 1981, and December 31 1981, done by Ms. Bergers. Interestingly, respondent's accountants also classified this note as a current liability. (*cf.,* CX 9, p. 6, Notes payable-bank, unsecured-$185,343)

Once insolvency has been established, it is presumed to be continuing. *In re Koenig,* 24 Agric. Dec. 1213, 1219 (1965). Respondent did not show that its financial condition between October 31 1981

and December 31 1981 was materially different from Ms. Bergers' figures. Respondent operated subject to the Act while insolvent.

Respondent did, however, introduce a statement purporting to demonstrate that as of December 31 1983, its current assets exceeded its current liabilities by approximately $61,000. (RX 143) No documentation was proffered to support any of these figures. In fact, Mr. Lake testified that these were figures given him over the telephone by his accountant. (TR 717) This evidence is too abstract and conclusory to warrant much probative value. It does not overcome the presumption of continuing insolvency based on final detailed accounting analysis. Thus, the suspension will necessarily have to continue until such time as respondent clearly and persuasively demonstrates that it is currently solvent.

II

Respondent Failed To Maintain And Use Properly Its Custodial Account

A. *As of March 30 1981, April 30, 1981, October 31, 1981, and December 31 1981, there were shortages in respondent's custodial account.*

Ms. Bergers, as part of her audit of respondent's financial condition, analyzed its custodial account for March 30 1981, April 30, 1981, October 31 1981, and December 31 1981. Each analysis is supported by complete documentation and shows that on each date, respondent's custodial account had a shortage in the amount of funds available to pay consignors the net proceeds from the sale of their livestock on a commission basis.

Based on the bank statement for respondent's custodial account, the analysis as of March 30 1981, shows cash in the amount of $145,384.32 in the account on that date. Also debited to the account in the analysis were deposits in transit in the amount of $2,842.70 and proceeds receivable in the amount of $28,023.30. This resulted in a total of $176,250.32 in custodial funds available to pay shippers their proceeds.

As of March 30 1981, there were, however, outstanding custodial account checks in the amount of $318,825.89 drawn on the account. This resulted in a shortage of funds available to pay consignors their proceeds in the amount of $142,575.57. (CX 11; TR 83-85)

Respondent did not contest the accuracy of these figures or the data contained in Ms. Bergers' analysis (and supporting schedules) of the custodial account as of March 30 1981. Accordingly, it is not disputed that there was a shortage in custodial account funds available to pay consignors the proceeds from the sale of their livestock.

Respondent's custodial account was similarly analyzed as of April 30 1981, October 31 1981, and December 31 1981. Respondent introduced no evidence challenging the figures contained in complainant's analyses.

Ms. Bergers' analysis of the custodial account as of April 30 1981, demonstrates that there was a shortage in funds available to pay shippers their proceeds as of that date. The bank statement shows that there was a balance of $276,056.40 in the account. There were no deposits in transit, proceeds receivable or any other debits. (CX 12; TR 87) There were outstanding checks drawn on the custodial account in the amount of $296,715.58, resulting in a shortage in the custodial account of $20,659.10 as of April 30 1981. (CX 12; TR 88)

The analyses for October 31 1981, reflects similar results. On October 31 1981, there were outstanding checks drawn on the custodial account in the amount of $922,347.50. (CX 8, p. 26; TR 40) To offset these checks, respondent had total debits of $901,594.65, consisting of a bank balance of $193,366.60, deposits in transit of $97,038.28, and current proceeds receivable of $611,189.77. Comparing the total debits to the amount of outstanding checks shows a shortage of $20,752.85. (CX 8, p. 26; TR 36-40)

On December 31 1981, there were outstanding checks drawn on the custodial account in the amount of $102,044.95. (CX 10, p. 24, 27-28; TR 64) The bank statement showed a balance of $83,457.07. (CX 10, p. 24, 26; TR 63) There were no other debits to offset the outstanding checks. (CX 10, p. 24; TR 63) Comparing the bank balance with the outstanding checks reveals a shortage of $18,587.88 in funds available to pay shippers their proceeds on December 31 1981.

Respondent did not dispute the accuracy of complainant's figures, but was, apparently, content to point out that a few of the outstanding checks were issued to respondent or to businesses run by its owners (TR 131), and that no custodial account checks were ever returned for insufficient funds. (TR 134)

This is not a meritorious defense for, as the Judicial Officer specifically noted in *In re Bowman and Reynolds,* 23 Agric. Dec. 1605 at 1071, quoting *Harry C. Daniels, d/b/a Harry C. Daniels and Co.* v. *United States,* 242 F2d 39, 41-42 (7th Cir. 1957), *cert. denied,* 345 U.S. 939 (1957):

> "The argument that there is no evidence of any particular shipper not being paid is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required. *Federal Trade Commission* v. *Rala-*

dam Co., 316 U.S. 149, 152, 62 S. Ct. 966, 86 L. Ed. 1336; *Fashion Originators Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 466, 668, 61 S. Ct. 703, 85 L. Ed. 949."

While it is true that respondent did make a supplemental deposit into its custodial account to correct the deficiency, this was not done until May, 1982, and only after the shortage had been pointed out by Packers and Stockyards Administration officials. (TR 688)

B. *Respondent's failure to maintain and use properly its custodial account is a violation of the Act and regulations.*

Every market agency subject to the Packers and Stockyards Act is required to establish and properly maintain a Custodial Account for Shippers' Proceeds (9 CFR § 201.42(b)). Section 201.42(c) of the regulations (9 CFR § 201.42(c)) in effect at the time of the alleged violations gives detailed instructions on how to properly maintain a custodial account:

> "(c) *Deposits in Custodial Accounts.* Before the close of the next banking business day after consigned livestock . . . is sold, the market agency . . . shall deposit in its custodial account the proceeds from the sale of consigned livestock . . . that are collected or received on the date of sale, and an amount equal to the proceeds receivable from the sale of consigned livestock . . . that are due from (1) the market agency . . .; (2) any owner, officer, or employee of the market agency . . .; or (3) any buyer to whom the market agency has extended credit. On or before the third day following the sale of consigned livestock . . . (or the next banking business day after the third day if such third day is a nonbanking business day), the market agency . . . shall deposit in the custodial account an amount equal to all the proceeds receivable from the sale of consigned livestock . . ., whether or not such proceeds have been collected or received by the market agency . . . ."

The evidence in the record of this proceeding clearly shows that respondent did not maintain its custodial account in accordance with the requirements of section 201.42 of the regulations.

Ms. Bergers' analyses show convincingly that the respondent permitted substantial shortages to develop in the amount of custodial account funds available to pay the outstanding custodial account checks issued to the consignors of livestock. (CX 8, 10–12)

Blackfoot Livestock, or its owners, made substantial purchases of consigned cattle on several occasions ranging well over $100,000.00. (CX 14 and 15)

Under section 201.42(c) of the regulations (9 CFR § 201.42(c)), Blackfoot is required to reimburse the custodial account for its purchases or for the purchases of its owners or officers, Dennis Lake and Delwyn Ellis, by the close of business on the next business day following the sale (Monday). (TR 164)

Regularly and habitually, respondent failed to timely reimburse the custodial account for these purchases. (CX 14 and 15)

Respondent also violated the Act by depositing some of the sale proceeds in its general account—not the custodial account. For example, on each Monday during the period examined, amounts of trust funds from a low of $32,469.12 on Monday, December 21 1981, to a high of $284,899.84 on Monday, March 9 1981, were deposited not to the custodial account as required but into respondent's general account. (CX 14, 15; TR 155)

As trust funds, the proceeds from the sale of livestock sold on a commission basis may be used only to pay consignors the net proceeds from the sale of their livestock, after deducting the market's lawful charges. Properly maintaining such funds in a custodial account prevents them from being commingled with the firm's general operating funds and thereby endangered.

Mr. Griffin Bonham, Branch Chief, Marketing Practices Branch, Packers and Stockyards Administration, testified concerning his personal experience with situations where banks had offset funds in a market's general account to cover the market's indebtedness to the bank, but had been prevented from attaching custodial funds since those funds belonged to the consignors, not the market. (TR 537-38) *See also, Union Stock Yards Bank* v. *Gillespie,* 137 US 411 (1890); *Steere* v. *Stockyards National Bank,* 113 Tex 387, 256 S.W. 586 (1923)

Additionally, each consignor who has money in the custodial account is entitled to FDIC coverage up to $100,000.00 rather than the account itself being subject to a single FDIC coverage of $100,000.00. (TR 156)

Consignors are entitled to rely on the market's compliance with the regulations promulgated under the Packers and Stockyards Act (9 CFR §§ 201.40, 201.42) to ensure that their funds are being properly safeguarded in a custodial account. Rather than safeguarding these funds in a custodial account, however, Blackfoot diverted a significant portion of these funds each week to its general account where it was used for Blackfoot's own purposes.

During the period when Blackfoot had a substantial amount of trust funds in its general operating account rather than in its custodial account, Blackfoot was regularly making payments on its line of credit or operating loan from Idaho Bank & Trust Co. (*cf,* CX 16; TR 167-182)

While Blackfoot was depositing trust funds into its general operating account, even that was insufficient to prevent the general account from being overdrawn.

It was standard operating procedure for Blackfoot to divert custodial funds into its general account in order to enable it to more easily make payments on its operating loan.

In effect, Blackfoot was borrowing money from its consignors (without their permission) to help Blackfoot pay back the bank. In many cases, the custodial account was not reimbursed until the Wednesday or Thursday following a Friday sale. Blackfoot used its consignors' money for its own purposes and has endangered consignors' proceeds.

The Secretary has consistently held, and the courts have sustained, that the failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 is a violation of sections 307 and 312(a) of the Act (7 USC §§ 208, 213(a)), as well as a violation of section 201.42 of the regulations. (9 CFR § 201.42) *In re Arab Stock Yard,* 37 Agric. Dec. 293, 301-02, 310-11 (1978); *In re Breckenridge Auction & Sales Co,* 36 Agric. Dec. 1522 (1977); *In re Sechrist Sales Co.,* 36 Agric. Dec. 665, 666, 671-75 (1977); *In re Hardy,* 33 Agric. Dec. 1383, 1398-1406 (1974); *In re Miller,* 33 Agric. Dec. 53, 60-62 (1974), *aff'd sub. nom., Miller* v. *Butz,* 498 F2d 1088 (5th Cir. 1974); *In re Lufkin Livestock Exchange, Inc.,* 27 Agric. Dec. 596, 605-10 (1968); *In re Anderson,* 26 Agric. Dec. 615, 619-20 (1967); *In re Koenig,* 24 Agric. Dec. 1213, 1219-20 (1965); *In re Bowman,* 23 Agric. Dec. 1074, 1086-89 (1964), *aff'd, Bowman* v. *United States Department of Agriculture,* 36 F.2d 81 (5th Cir. 1966); *In re Bowman and Reynolds,* 23 Agric. Dec. 1065, 1068-71 (1964); *In re Daniels,* 14 Agric. Dec. 903, 913-17 (1955), *aff'd, Daniels* v. *United States,* 242 F2d 39 (7th Cir. 1957), *cert. denied,* 345 U.S. 939 (1957).

Further, the Secretary has repeatedly determined that a market agency's failure to make deposits to its custodial account in the manner and within the times prescribed in section 201.42 is an unfair and deceptive practice. "It is deceptive because shippers do not know that their money is being used to extend credit to buyers. It is unfair because it is using trust money for their own purposes (to extend credit to themselves and others.)" *In re Hardy,* 33 Agric. Dec. at 1400.

It should be noted that Blackfoot had previously been placed on notice as to the requirements governing reimbursement of the custodial account in a letter dated November 17 1975. (CX 5) Blackfoot was aware of the requirements and the regulations are clear, yet, as Mr. Lake testified, it was standard practice to deposit funds into the general account and to reimburse the custodial account for those deposits and Blackfoot's own purchases at a later date. (*cf.*, TR 771)

Therefore, Blackfoot has failed to maintain and use properly its custodial account and has used custodial funds for its own purposes in violation of sections 307 and 312(a) of the Act (7 USC §§ 208, 213(a)), and the regulations (9 CFR §§ 201.40, 201.42).

III

Respondent Blackfoot Wilfully Violated The Act By Engaging In An Exchange Of Checks (Check Kiting) With Uinta Livestock For The Purpose Of, Or With The Effect Of, Creating A False "Float" Or Balance In Both Companies' Bank Accounts

During the period from January 7 1981 through May 20 1981, respondent Blackfoot issued in excess of 75 drafts made payable to Uinta Livestock Commission Company. These drafts totalled $8,629,649.58. (FF 23; CX 17A) Uinta Livestock issued checks made payable to Blackfoot during the same period in the amount of $8,697,664.44. (FF 21; CX 17A) It is clear that whenever a Blackfoot draft was given to Uinta, a Uinta check for the same amount was issued, almost always on the same day, to Blackfoot.

Both Ms. Kimball [4] and Mr. Andreasen, office manager and owner, respectively, of Uinta, testified that Uinta had been given a Blackfoot draft book and was authorized, by Paul Thompson, who was at that time an owner and officer of Blackfoot, to issue Blackfoot drafts to Uinta. (TR 334) Both individuals further testified that many of the Blackfoot drafts were used to cover Uinta's almost daily overdraft position in its bank account. (FF 24; TR 309–10) Ms. Kimball testified that she immediately informed Kay Monson, a Blackfoot employee, whenever she issued a Blackfoot draft. (TR 338)

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[4] Ms. Kimball's testimony is entitled to great weight and probative value. Her participation was described by her in a most direct, unhesitating, frank manner. She was completely open, sincere, and cooperative.

She had carried out her instructions as an employee of Uinta, and she took pains to describe accurately what was done.

Courage was required to so testify. She had been given no promise of any immunity of any kind. (TR 306)

In late April or early May 1981, many of the drafts began to show notations as to the names of sellers, number of head and weight of the livestock purportedly purchased and paid for by the particular draft. Ms. Kimball admitted that these entries were fictitious and that there were no livestock involved. (FF 25; TR 312) These entries were made at the request of Paul Thompson to allay Dennis Lake's concerns about the large amount of money involved. (TR 312, 332)

Respondent would like everyone to believe that it was simply financing Uinta's livestock purchases. Such a conclusion, however, ignores the clear dictates of all the evidence and defies all logic, since, at the time Blackfoot issued drafts to Uinta, there were not sufficent funds in Blackfoot's account to cover the drafts. (CX 18B; TR 285–293) Only the check given by Uinta in exchange permitted the Blackfoot draft to be honored. It is simply not possible for a person without funds to finance another.

Furthermore, both Kimball and Andreasen testified that they used many of these drafts solely to correct the overdraft position of Uinta's bank account and that Paul Thompson, at least, knew it. (TR 309, 346, 350) The sheer volume of the purchases, in excess of $8.6 million in a five-month period, suggests that these drafts were not for livestock purchases. It is virtually impossible that Uinta bought such a large amount of livestock on an almost daily basis. It is ludicrous to assert that Blackfoot was legitimately financing Uinta when Uinta was writing a check in exchange for Blackfoot's draft within minutes. (FF 26, TR 313) If Uinta could immediately repay Blackfoot, then there was no reason to borrow the money in the first place.

It is clear, therefore, that this arrangement between Blackfoot and Uinta was not a financing arrangement as Blackfoot would have us believe, but a deliberate attempt on the part of both Uinta and Blackfoot, with the full knowledge and complicity of each, to manipulate uncollected funds in their bank accounts.

An analysis shows Uinta's "net bank balance" (between 1/2/81 and 6/2/81) was in an overdraft position on each and every day except two. (CX 18A) Obviously, since some Blackfoot drafts were used to cover overdrafts in Uinta's account, Mr. Andreasen knew he did not have sufficient funds in his account to pay the Uinta checks issued in exchange for, or to repay, the Blackfoot drafts. Clearly, he was relying on being credited with the deposit of another Blackfoot draft into the Uinta account prior to that check being returned.

An analysis of Blackfoot's daily bank balances, based on the bank statements, with the Uinta checks which have been credited

to Blackfoot's account although not yet presented for payment at Uinta's bank, and the amount of Blackfoot drafts issued to Uinta, but not yet presented to Blackfoot's bank for payment (TR 285, 286) shows a daily "net bank balance" for Blackfoot's account during the period January 2 1981 through May 29 1981 which, with few exceptions, was in an overdraft position. (CX 18B)

Tracing the following example of the exchange shows how the scheme operated. The first Blackfoot draft listed on CX 17A is draft #4449, dated January 7 1981, in the amount of $217,472.32. (CX 17B, p.1) Uinta deposited this draft in its account at Zions First National Bank on January 7 1981. (CX 17C, p. 1) On January 8 1981, Uinta issued its check #2583 to Blackfoot in the same amount, $217,472.32. (CX 17B, p. 2) Blackfoot deposited Uinta's check in its account at Idaho Bank and Trust Co. on January 12 1981. (CX 17D, p. 1) On January 7 1981, when Blackfoot's draft was issued in the amount of $217,472.32, Blackfoot had $45.27 in its bank account. (CX 18B, p. 1; CX 17G, p. 1) Clearly, when Blackfoot's draft was issued on January 7 1981, it did not have sufficient funds to cover the draft.

On January 8 1981, when Uinta issued its check for $217,472.32 in repayment of the Blackfoot draft, it had an account balance according to the bank statement of only $2,679.78. (CX 17E, p. 1) Its net bank balance after subtracting Blackfoot drafts credited to its account but not yet honored was an overdraft of $424,140.29. (CX 18A, p. 1) Uinta, too, had insufficient funds to cover its check.

Despite the fact that neither party had sufficient funds in their accounts, the drafts and checks were honored when presented because their account balances on the day of presentment appeared to be sufficient. By the time a draft or check arrived for payment, another check or draft had already been deposited. This creation of an artificial balance is the purpose of a check exchange. (TR 294)

During these five months, over 8.6 million dollars in checks and drafts, none of which had sufficient funds available in support of the instrument when issued, were issued and negotiated. This is commonly known as a check exchange, check kiting, or a manipulation of uncollected funds. (TR 294)

Mr. Angus Belliston, Senior Vice-President of Zions First National Bank, explained a manipulation of uncollected funds arrangements as follows:

> "Q: . . .[c]ould you explain what a manipulation of uncollected funds arrangements is?

A: Yes, I think so. When a person or company deposits someone else's checks into their own account at our bank, or any bank, what we really have is just paper.

We have a deposit of checks which represent money, but it isn't really money; it's just paper until we send those checks to the bank they're drawn on and receive the actual collected funds in the account.

And between the time the funds are deposited in the account at our bank and the time we actually get the funds from the bank they were drawn on, that's a time that we refer to as "float."

It's not real money, it's just uncollected funds. It's funds that are there on their account, and we have entered them on our ledger, but they really aren't charged yet, so we call them uncollected funds.

Sometimes, people try to manipulate those uncollected funds between banks to make it appear that there's real money there, and they spend the uncollected money, and we occasionally get caught. It's one of the risky parts of banking."

(TR 371-72)

In fact, the bank did get caught when Dennis Lake refused to honor certain drafts. The damage to Uinta's bank was approximately $800,000.00 (TR 369).

Paul Thompson, Respondent's Vice-President during the period of the check-kiting activities (until his death about May 19 in an automobile accident) was the key and main link between Blackfoot Livestock and Uinta during the check-kiting activities. However, other Blackfoot Livestock employees were aware of the relationship with Unita, e.g., Kay Monson was called by Carol Kimball every time Carol wrote a Blackfoot draft in favor of Uinta and gave Kay Monson the numbers and date. In addition, Dennis Lake was aware of the relationship and was becoming concerned about it. (TR 338)

Furthermore, it should be noted that Ms. Kimball testified that the reason she put fictitious names and entries on the entries on the Blackfoot drafts was because Dennis Lake was concerned as to how Blackfoot's bank would view all these drafts issued to Uinta. (TR 323) Additionally, it was clear from Mr. Lake's testimony at the hearing that he is extremely knowledgeable as to the oper-

ations of Blackfoot. Mr. Lake has an accounting background up to and including some graduate level work in accounting. (TR 616, 617) Mr. Ellis has no formal education beyond high school. (Tr. 737) Mr. Lake noted that Paul Thompson was not a well-educated man; he was not even a high school graduate. (TR 738).

It is naive to believe, therefore, that Blackfoot's other part owners decided that Paul Thompson, a part owner without an accounting background, would have sole responsibility for monitoring and maintaining the records of a "financing" arrangement involving over 8.6 million dollars while Dennis Lake, the part owner with the accounting and financial background, knew nothing of this arrangement. Mr. Lake, in fact, admitted he supervised the maintenance of the books and records. (TR 738)

But, in any event, the respondent corporation is ultimately responsible for the acts of its officers in carrying out their functions on behalf of the respondent corporation. The extent of knowledge that any particular officer had at any particular point of time may be debatable, but not relevant for purposes here. Respondent corporation is responsible for the actions of its officers and employees in carrying out their duties. The evidence here clearly shows that more than one officer knew or should have known what was taking place. Respondent corporation bears the full and ultimate responsibility.

The evidence adduced at the hearing clearly demonstrates that Blackfoot was engaged in check-kiting with Uinta. As a result of its actions, Blackfoot created an artificial balance in its bank account which increased the financial exposure to sellers or consignors of livestock to Blackfoot. Blackfoot was relying on the "float." (TR 294, 371)

Accordingly, Blackfoot has engaged in an unfair and deceptive practice in violation of section 312(a) of the Act which warrants a severe sanction. *cf., In re Lynn Rose and Twin Falls Livestock Commission Co.*, 41 Agric. Dec. 1557 (1982) (Rose), 41 Agric. Dec. 1386 (1982) (Twin Falls); *In re Menchhofer Cattle Co., Lyle Menchhofer, Edward Wendel and Ronald Egbert*, 40 Agric. Dec. 1324 (1981) (Menchhofer Cattle Co. and Menchhofer), 41 Agric. Dec. 464 (1982) (Egbert).

IV

Blackfoot Has Wilfully Violated The Act And Regulations By Permitting Dennis Lake And Delwyn Ellis, Its Owners And Officers, To Purchase Livestock Out Of Consignment For Resale For Their Own Speculative Accounts.

A market agency selling livestock on a commission basis has a fiduciary duty to each of its consignors to market his livestock in a manner best designed to enable the consignor to obtain the highest possible price for his livestock. Section 201.58 of the regulations promulgated under the Act requires the market to sell livestock in such a manner as to promote the interest of the consignors. (CFR § 201.58)

It is the responsibility of a market agency such as Blackfoot to obtain the true market value of the livestock for its consignors. The market should purchase livestock itself only to assure that the consignor gets the true market value of those livestock. (TR 462) Section 201.57(a) of the regulations in effect at the time of the transactions in question specifically provided that "[n]o market agency engaged in selling consigned livestock at auction shall permit its owners, officers, agents, or employees to purchase livestock from consignments for resale for their own speculative accounts . . . ." (9 CFR § 201.57(a)).

The regulation is designed to insure that the market agency fulfills its fiduciary duty to further the interests of its consignors. A market which purchases livestock out of consignment for speculative purposes, or permits its owners to do so, has a conflict of interest. If it begins speculating, it erodes its loyalty to the consignor; it is no longer seeking the highest possible dollar for the consignor, but rather acting in its own interest in order to maximize its potential profit on resale. (TR 539)

Whether a particular purchase is a purchase to support the market, and therefore consistent with fulfilling the market's fiduciary responsibility to its consignors, or a purchase for speculative resale depends upon an analysis of all the circumstances surrounding the case. No one single factor is dispositive.

Market support purchases are purchases made by the market when it feels that the highest bid does not reflect the true market value of the livestock. (TR 478)

Speculation out of consignment, on the other hand, is defined as purchasing livestock from consignment with the expectation or the intention of making a profit on the prompt resale of these animals, whether or not a profit is realized. (TR 461)

A market which purchases livestock out of consignment for speculative resale or permits its owners and officers to do so has breached its duty to its consignors in violation of the Act. *See, e.g., In re Smithfield Livestock Market, Inc.*, 36 Agric. Dec. 1546, 1562–67 (1977).

The evidence in this case clearly demonstrates that Dennis Lake and Delwyn Ellis, the owners and officers of Blackfoot, consistently purchased large numbers of livestock consigned to Blackfoot, for sale on a commission basis, with the intent or expectation of promptly reselling them at a profit. Mr. Lake and Mr. Ellis regularly purchased a large volume of the consigned livestock. Such regular and voluminous purchases are not consistent with market support purchases and is a factor indicating that these purchases were made with the intent or expectation of making a profit. (TR 461)

Not only did Lake and Ellis purchase a large volume of livestock each week, but their purchases were treated in Blackfoot's records like any other transaction in which livestock was purchased for speculative resale, and not as market support purchases. Separate deal sheets were maintained for both Lake and Ellis. The livestock was invoiced to Lake and Ellis—not Blackfoot. There was no journal or other record kept showing these to be market support purchases. (TR 498, 499)

Significantly, even those cattle that Lake and Ellis could not resell and which were, therefore, sold through auction the following week were noted on the individual deal sheets as sales by Lake and Ellis. *cf* CX 20E, p. 5, 18 (11 head from Lake), and CX 20E, pp. 20, 29 (2 head from Ellis).

The purchases made by Mr. Lake and Mr. Ellis were their own individual purchases, kept totally separate as to purchase and resale. The profit, if any, generated by the transaction was noted on each deal sheet. *See, e.g.,* the profit figure of $1,869.95 on CX 20E, p. 20.

In addition to having the purchases of Lake and Ellis kept as separate and individual transactions and not those of the market, Lake and Ellis handled these as dealer transactions. Mr. Blaine Ramey, a former owner of Blackfoot, testified that he still attends the Blackfoot sales most of the time and is familiar with the roles fulfilled by Mr. Lake and Mr. Ellis. (TR 662) He noted that Lake and Ellis compete with other bidders for cattle that they want to buy. (TR 663) They will bid on these cattle more than once in order to obtain them. (TR 663)

Actively bidding on cattle in competition with other bidders is the act of a person who is trying to get cattle for resale, presum-

ably at a profit. If there are other bidders, Blackfoot should not want these cattle. Blackfoot should not bid on these cattle once the cattle are started unless and until the last bid is in and Blackfoot believes it is lower than true market value.

This, however, is not what Mr. Lake and Mr. Ellis did; when there were livestock in the ring which either sought, they actively bid on the cattle. (TR 663) They wanted these cattle for their own individual accounts, for profit on resale.

Mr. Lake, for example, had extensive dealings with a Joe Shrader, a dealer from Colorado. Mr. Shrader testified that he discussed Blackfoot consignments with Dennis Lake every Friday prior to the sale. (TR 518) During the course of these conversations, Mr. Shrader and Mr. Lake discussed the demand for heifers in Colorado and the prices dealers were willing to pay for them. (TR 519, 520) Generally, according to Mr. Shrader, Mr. Lake would call Shrader after the sale and ask him whether he would be willing to buy cattle that Lake had purchased that day at the sale. (TR 521)

In fact, Mr. Lake sold over 1700 head of cattle to Mr. Shrader, often at substantial profit. (CX 20A–P) For example, on February 5 1982, Lake sold 99 heifers to Mr. Shrader for $25,775.78 when he purchased these heifers earlier in the day out of consignment at a cost of $25,548.43. Mr. Lake made a profit of almost $2.30 per head in this transaction. (CX 20M,pp.5–9)

Dennis Lake was not trying to dispose of cattle he was forced to purchase because the last available bid did not reflect true market value. It appears more than likely that he was trying to purchase these cattle at the lowest possible price and resell them at the highest possible price—dealer behavior.

Unlike any other dealer, however, Lake had the advantage of knowing what livestock was being consigned to his market prior to sale day. While Mr. Ramey testified that the typical auction market knows approximately 85 percent of the cattle being consigned prior to sale day (TR 659), Lake testified that over 50 percent came on sale day. (TR 788) Regardless of which figure is used, it is clear that the market owners have an unfair advantage over outsiders who do not have similar information. *See, e.g., In re Smithfield Livestock Market*, 36 Agric. Dec at 1563.

Mr. Lake knew generally what Mr. Shrader was looking for and the price Shrader was willing to pay, before each auction began. He took advantage of this knowledge to buy significant numbers of livestock himself and resell to Mr. Shrader at a profit. This is more characteristic of a dealer buying and selling livestock for his own account. It is not market support.

Mr. Ellis, too, had his customers. James Paulsen testified that at the time of the transactions in the complaint, he was a co-owner and vice president of Bachman Cattle Company and, in that capacity, often bought feeder cattle from Mr. Ellis. (TR 391) During the heavy trading season, they would be in contact with each other several times a day. (TR 391)

Mr. Paulsen often "partnered" on an ad hoc basis with Mr. Ellis on cattle. Some of these "partnered" deals were on cattle consigned to Blackfoot market for sale. (TR 393)

Mr. Paulsen, at one point, indicated that they were operating at Ellis' "cost," consistent with their "partnering" relationship. Later, however, he hedged and eroded the point.

But, in any event, the records indicate that Mr. Ellis made $7.58 to $12.50 paper profit per head and $5.00 per head commission, totalling $805.00 on a transaction with Paulsen.

This transaction occurred about an hour after the auction ended. Surprisingly, Paulsen said he had been in attendance at that auction, but had not bid on those cattle. (TR 397) (Earlier, he had given an affidavit that he had not been at that sale, and that Mr. Ellis had phoned him describing the cattle and pricing them at Ellis' cost plus commission) (TR 398; RE 109, p. 4)

But, regardless of which version is correct, one fact is self-evident. The consignors who paid Blackfoot a commission to sell their livestock for the best possible price, very likely did not receive true market value if Ellis resold them at such an increased price within an hour. Blackfoot's fiduciary duty to its consignors suffered.

Another factor which indicates that Lake and Ellis were speculating out of consignments rather than supporting the market is that on most of these transactions they made a profit. Profit is not the sole criterion here, but it is a key element in the picture. (TR 494)

Excessive or consistent profit on the subsequent sale of livestock which the market or its owners purchase out of consignment is a strong indication that the market was not fulfilling its fiduciary duty to sell the livestock at the highest possible price for its consignors. The profits should belong to the consignors and the market receives a commission as its sole compensation for its selling services.

The circumstances surrounding the purchase of livestock out of consignment by Mr. Lake and Mr. Ellis demonstrates that these purchases were not market support purchases as Blackfoot contends, but rather were speculative purchases made with the intent or expectation of making a profit, whether or not a profit was realized.

If it were true market support, there would be no reason to maintain separate deal sheets for Mr. Lake and Mr. Ellis; there would only be a record for Blackfoot purchases. In true market support, one would not find the consistently large volume of purchases.

While market support purchases may result in a profit (if the market changes), one would not expect to find consistent and substantial profits on market support purchases, and certainly not profits of between $7.50 and $12.50 per head within an hour.

The evidence establishes that Blackfoot permitted its owners and officers to purchase livestock out of consignment for speculative resale in violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.57(a) of the regulations (9 CFR § 201.57(a)).

Blackfoot Wilfully Issued Drafts In Payment For Livestock In Violation Of The Act

There was no dispute at the oral hearing that Blackfoot issued drafts rather than checks in payment for its livestock purchases. (CX 21; TR 463) Mr. Lake's testimony was that while they used drafts in the past, they had discontinued using drafts at the time of the hearing. (TR 733)

Mr. Mooney, Blackfoot's banker, described the difference between a draft and a check as follows:

> "A draft is written for payment of something but it has to be accepted by the people who are drafting . . . When that draft is cleared, assuming the cattle are delivered, they have the option of paying it or not paying it. A check is drawn and has to be paid on presentment, unless you stop it."

(TR 478)

Mr. Mooney further explained that since the draft has no account number and the issuer has to be contacted to ascertain whether he accepts the draft, the bank must handle each draft manually. (TR 579) Mr. Mooney admitted that the extra time necessary to process the draft can take an additional day before the draft is honored. (TR 580)

Section 409(a) of the Act (7 U.S.C. § 288b(a)) requires each packer, market agency or dealer purchasing livestock to pay for his purchases before the close of the next business day following purchase and transfer of possession of the livestock. Payment may be made by check or wire transfer.

The legislative history pertaining to passage of section 409 of the Act in 1976 clearly demonstrates that payment by use of a draft does not satisfy the prompt payment requirements of section 409(a). H.R. Rep. No. 94-1043, 94th Cong., 2nd Sess. 7 (1976) Under section 409(b), the parties may agree to payment in a manner other than that required in subsection (a). Such an agreement, however, must be in writing.

Blackfoot admitted it did not have any written agreements to pay for livestock purchases with drafts. (TR 463-64) Blackfoot, by using drafts, effectively granted itself extra time in which to pay for livestock without the seller's permission.

Issuing drafts in payment for livestock purchases without first obtaining a written extension of credit is an unfair and deceptive practice in violation of sections 312(a) and 409(a) of the Act (7 U.S.C. §§ 213(a), 288b), and section 201.43(b) of the regulations (9 CFR § 201.43(b)).

VI

Jencks Act

At the conclusion of the direct testimony of most of complainant's witnesses, respondent's counsel requested, pursuant to the Jencks Act, 18 U.S.C. § 3500, all statements of the witness, including the investigation reports or any document in the possession of the United States, and relating in any way to the issues. (TR 91)

Counsel repeatedly sought complainant's investigative report. "I assume that there was some kind of investigative report prepared and we'd like a copy of it." (TR 92) " . . . it is respondent's position, and we respectively [sic] move at this time, that the investigative report—investigation report is a subject of Jencks and a proper subject of a motion and we move the Court for an order demanding of the United States that it be turned over to us." (TR 185)

During the hearing, several memoranda prepared by various witnesses were given to respondent. However, complainant never conceded that the investigation report was a "statement" of a witness as defined under the Jencks Act, and refused to voluntarily give the report to respondent. (*See, e.g.,* TR 98, 185)

The disposition of this issue is governed by section 1.141(g)(1)(iii) of the Department's rules of practice (7 CFR § 1.141 (g)(1)(iii)) which provides that:

> "After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which

> relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed by the Jencks Act (18 U.S.C. § 3500)"

7 CFR § 1.141(g)(1)(iii)

Pre-trial discovery is not generally permitted in administrative hearings. *See, Ubiotica Corporation* v. *Food and Drug Administration*, 427 F2d 376, 381 (6th Cir. 1970). Neither the Packers and Stockyards Act nor the Department's rules of practice provide for discovery.[5] *Fairbank* v. *Hardin*, 429 F2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Machado and Cozzi*, 42 Agric. Dec 820 (October 20 1983) (decision as to respondent Cozzi) *aff'd* 749 F2d 36 (CA 9 1984); *McClelland* v. *Andrus*, 606 F2d 1278, 1285 (D.C. Cir. 1979); *Moore* v. *Administrator, Veterans Administration*, 475 F2d 1283, 1286 (D.C. Cir. 1973).

Respondent is entitled only to statements producible under the Jencks Act. The Jencks Act provides, in pertinent part:

> "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use. 18 U.S.C. § 3500(b)"

The Jencks Act sets forth the requisite factors to lay a foundation for the production of material in the possession of the United States. A proper foundation requires:

(1) that the defendant make a motion,

(2) *after* a government witness has testified on *direct examination,*

(3) for the production of a *statement,*

(4) *as defined* in the Act,

(5) *which relates* to the testimony on *direct* examination.

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[5] Very limited exchange of information and proposed exhibits as authorized by section 1.140(a) of the Rules of Practice (7 CFR 1.140(a) may arguably be labeled "discovery," but the point is not relevant nor material here.

A. Respondent is not entitled to complainant's entire investigative report

Respondent's concept of what constitutes a statement as defined in the Jencks Act is much too broad. As noted by the Judicial Officer in *In re Machado and Cozzi*, although the Jencks Act reaffirms the *Jencks* decision (353 U.S. 657, 665–69 (1957)) that a defendant is entitled to certain material in the possession of the government relating to the witness' testimony:

> "[t]he principal purpose of the Jencks Act is to prevent defendants from roving at will through Government files as a result of misinterpretation of the *Jencks* decision. *Goldberg* v. *United States*, 475 U.S. 94, 104 (1976); *Palermo* v. *United States*, 360 U.S. 343, 350, 354 (1959); *United States* v. *Pope*, 574 F.2d 320, 324 (6th Cir.), *cert. denied*, 439 U.S. 868, 436 U.S. 949, 436 U.S. 929 (1978); *United States* v. *Nickell*, 552, F.2d 684, 688–89 (6th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978); *United States* v. *Smaldone*, 544 F.2d 456, 460 (10th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); *United States* v. *Catalano*, 491 F.2d 268, 274 (2nd Cir.), *cert. denied*, 419 U.S. 825 (1974); and *see, Foster* v. *United States*, 308 F.2d 751, 755–56 (8th Cir. 1962)."

In re Machado and Cozzi, supra, at page 840.

It is important to note exactly what respondent requested. Respondent specifically sought complainant's entire investigative report. For example, after Ms. Bergers, an auditor with the Packers and Stockyards Administration, testified as to the results of her investigation of respondent's financial condition, respondent made its purported Jencks Act request. "I assume that there was some kind of investigative report prepared and we'd like a copy of it." (TR 92) Respondent did not seek specific statements of Ms. Bergers, but rather "all statements, . . . including the investigation report . . . or *any other [relevant] document* which is in the possession of the United States . . . ." (TR 91, emphasis added).

After Mr. Kienow testified, respondent renewed his claim for the entire investigative report. "To the extent that this man was the [assistant] regional supervisor, at that time, of that particular office, I believe the entire report would be in his possession . . . and I would make a motion to the Court of such a thing [the investigative report]." (TR 183)

Respondent's counsel in pressing his argument for the entire file explained why he wanted it:

". . . I know Mr. Jones; I know that he's the ultimate officer that's charged by statute to sign these administrative disciplinary complaints. I understand that, but what—up to that time, there were many subtle and some not-so-subtle kinds of decision made within the agency, within the office of general counsel, within the financial protection branch which the P&SA, totally to the decision that it was going to bring this action . . . " (TR 187)

The following colloquy is significant:.

"The COURT: You're looking for the motivation for the complaint to be filed?

Mr. COOK: Yes, sir."

(TR 188) Respondent was seeking the agency's internal review of the case, the legal reasoning of complainant's attorneys, and the analysis of the evidence, not only of Ms. Bergers or of Mr. Kienow, but of the entire agency and the Office of the General Counsel. In order to prevent a chilling effect on the agency's deliberative privilege, such material has been held to be not a "statement" producible under the Jencks Act. *United States* v. *Dark*, 597 F.2d 1097, 1099 (6th Cir.), *cert. denied*, 444 U.S. 927 (1979); *Ubiotica Corp.* v. *Food and Drug Administration*, 427 F.2d at 381-82; *In re Machado and Cozzi, supra*, at page 840.

The Jencks Act does not authorize fishing expeditions by the defendant or an unrestrained search through government files. *In re Machado and Cozzi, supra*, at page 840, citing *United States* v. *Graves*, 428 F.2d 196, 199 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970); *United States* v. *O'Brien*, 444 F.2d 1082, 1085 (7th Cir. 1971); *United States* v. *Catalano*, 491 F.2d at 274. An unlimited request for production of the entire investigative file was too broad in scope and character to be seriously considered under the Jencks Act.

B. Affidavits and memoranda of interviews with individuals not called as government witnesses are not producible under the Jencks Act.

Mr. Kienow testified respondent permitted its owners or officers to purchase livestock consigned to the market for sale on a commission basis. Respondent then requested any statements of specifically named persons who were interviewed by Mr. Kienow. (TR 465; RX 144) The request was later expanded beyond the affidavits of these individuals to include any memoranda or notes made by Mr. Kienow concerning the interviews of these witnesses. (TR 474)

None of these individuals listed on RX 144 were called as witnesses by complainant. Accordingly, by its terms the Jencks Act or the Department's rules of practice are not applicable since they provide that the respondent is entitled only to statements of a witness called by complainant. (7 CFR § 1.141(g)(1)(iii))

Respondent's argument that Mr. Kienow's taking affidavits from interviewees make that affidavit Kienow's statement, and thus a "statement" under Jencks (TR 469), is simply wrong.

An affidavit of another person, or a memorandum in which the interviewer writes down what the interviewee told him, is clearly not the "statement" of the interviewer. It is the statement of the person interviewed and producible under Jencks or the Department's rules of practice only if that person was called as a witness by complainant. Accordingly, the respondent's request for these affidavits and the memoranda pertaining to the interviews was properly denied as material facially not within the scope of the "Jencks" limitations here.

C. Job applications listing investigations not Jencks Act material

Respondent also requested that the SF 171 submitted by Mr. Kienow in applying for his present position as Regional Supervisor of the Omaha, Nebraska regional office of the Packers and Stockyards Administration be given it. (TR 222) The purported basis for respondent's motion was that Mr. Kienow testified that he listed his investigation of Blackfoot on his application as one of the investigations he had conducted while assigned to the Portland regional office. (TR 222)

The Department's rules of practice in adopting the Jencks Act definitions and limitations require that any statement of the witness to be producible must relate to the witness' direct testimony. (18 U.S.C. § 3500(b); *In re Machado and Cozzi, supra*, and cases cited therein)

Mr. Kienow's direct testimony concerned the schedules he prepared from his examination of respondent's records, the evidence supporting his schedules and the conclusions he drew as to whether the schedules and supporting documentation demonstrated violations of the Act and the regulations.

Essentially, respondent engaged in the broadest possible fishing expedition in the hope of helpful material or legal error. Respondent patently sought anything and everything for these two purposes. Respondent's focus, emphasis, persistence and intensity, was consistent, and did not distinguish between material arguably within the Jencks Act and far-out demands. The record fails to show that any Jencks Act material was withheld from respondent.

In fact, to the contrary, it shows that more than Jencks material was given to respondent in a futile attempt to satiate it's demands and timely move the process forward.

The record fails to show any arguable Jencks Act material which was not provided to respondent and nothing to warrant an in camera inspection of complainant's files and records.

A trial judge without a jury must exercise caution when requested to rummage through the non-evidentiary material in possession of complainant. The potential for prejudicial material is both bilateral and real.[6]

The record fails to lay a foundation to establish that demanded material came within the scope of the Jencks Act limitations so as to warrant an in camera inspection.

VII

Respondent's Violations of the Act and Regulations Are Wilful, Flagrant and Seriously Jeopardize the Interests of the Consignors of Livestock to Respondent's Market and the Industry

Respondent had previously been placed on notice concerning the prohibition against engaging in each of the violations alleged in the complaint, with the exception of the exchange of checks or check-kiting scheme. (CX 1–6)

The violations proven here were not accidental or inadvertent, but were, rather, committed with full knowledge that they were prohibited by the Act and regulations.

Respondent cannot avoid responsibility for exchanging some 75 drafts and checks with Uinta totalling $8.6 million.

As noted by the Judicial Officer in *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 609 (1968):

> "The term "willful" is one of many meanings. It is often used to denote an act which is intentional or knowing, or voluntary, as distinguished from accidental. *In Great Western Food Distributors* v. *Brannan*, 201 F.2d 476 (7th Cir. 1953), acts done intentionally were held to have been done willfully. Conduct is willful if a person intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or if he acts with careless

[6] Here, the investigators were out to investigate possible violations. Raw material suggesting possible violations (but which did not mature into complaint allegations) is probable. See, for example, RE #105, re possible tariff violations. Such matters may be highly prejudicial to respondents. On the other side, the file may contain material prejudicial to complainant, e.g., disagreements as to how the law should be interpreted/applied, potential factual or credibility weaknesses highlighted, etc.

disregard of statutory requirements. *Goodman* v. *Benson*, 286 F.2d 896 (9th Cir. 1961)."

Here respondent acted intentionally in careless disregard of the statutory requirements. Respondent, therefore, wilfully violated sections 307, 312(a) and 409(a) of the Act (7 USC §§ 208, 213(a), 228b), and sections 201.42, 201.43(b), and 201.57(a) of the regulations (9 CFR §§ 201.42, 201.43(b), 201.57(a)). *See, e.g., Smithfield Livestock Market, Inc.*, 36 Agric. Dec. 1546 (1977); *In re Hardy*, 33 Agric. Dec. 1383 (1974); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596 (1968).

The requirement that a market's current assets exceed its current liabilities is not frivolous. The prompt pay provision of the Act (7 USC § 228b) and the custodial account regulations requiring the market to pay the consignors the net proceeds from the sale of consigned livestock before the close of business on the day following sale (9 CFR § 201.43) mandate that the firm's current assets exceed its current liabilities. As noted by the Fifth Circuit, in *Bowman*, 363 F.2d at 85, current assets exceeding current liabilities is the *sine qua non* of prompt payment.

Blackfoot's solvency problems were compounded by the fact that on four separate dates analyzed by Packers and Stockyards Administration officials, there was a shortage in its custodial account. On those dates, the outstanding checks drawn on its custodial account exceeded its money in the bank, deposits in transit and current proceeds receivable. If all the outstanding checks had been presented for payment on the dates analyzed, there would have been insufficient funds available to pay the checks. The fact that no checks were returned is no defense. *See*, pp. 20–23, *supra*.

The bank could call the loan due at any point the bank felt it was in the best interest of the bank to do so. Problems of a serious magnitude would ensue.

The importance of registrants properly maintaining their ratio of current assets to current liabilities cannot be over-estimated where the agency is unable to routinely audit every market agency in the country. There are 1800 auction markets and approximately 6000 dealers throughout the country registered with the Secretary of Agriculture. (TR 533) It is, therefore, impossible to closely monitor the financial condition of all of them. (TR 534) The agency must rely on sanctions imposed in disciplinary proceedings to help effect voluntary compliance with the Act by respondents and others.

As was stated by the Judicial Officer in *In re Miller*, 33 Agric. Dec. 53, *aff'd sub. nom, Miller* v. *Butz*, 498 F.2d 1088 (5th Cir. 1974):

> "The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effect of sanctions only on the respondents and not on others. It is well recognized that persons regulated by a governmental agency keep abreast of administrative proceedings. The actions of potential violators could be significantly affected by the sanctions imposed against other persons . . . ."

In re Miller, 33 Agric. Dec. at 66.

In addition to jeopardizing consignors' proceeds by operating with shortages in the custodial account, Blackfoot used consignors' funds for purposes of its own. By depositing proceeds received from the sale of consigned livestock in its general account, Blackfoot effectively used consignors' funds to finance its operations. There were numerous occasions where there were consignors' funds in Blackfoot's general account when Blackfoot was repaying loans extended it by its bank.

Blackfoot also engaged in a check exchange or kiting scheme with Uinta which enabled Blackfoot to create an artificial balance in its account by relying on the "float" or the time necessary for the checks and drafts to move through banking channels. The artificial balance gives Blackfoot the potential to buy more livestock than it would be able to if it had to have the funds already available in the account.

Purchasing livestock without having sufficient "real" funds as opposed to "paper money" (TR 371, 372) obviously poses an increased risk that the sellers would not be paid should the check-kiting scheme collapse. In this case, the sellers were not harmed because Blackfoot abruptly stopped the scheme leaving Uinta's bank to suffer the loss of $800,000.00. Had the bank first discovered the check-kiting and stopped honoring checks or drafts, the losses would very likely have been shifted to livestock sellers/cattlemen.

A market agency such as Blackfoot is the agent for the individuals who consign livestock for sale on a commission basis. Blackfoot's fiduciary duty to obtain the highest possible prices for each and every consignor's livestock is paramount. Blackfoot breached this duty by allowing its owners and officers, Dennis Lake and Delwyn Ellis, to consistently purchase large volumes of livestock out of consignment for resale on a speculative basis.

The evidence strongly indicates that Lake and Ellis rated their speculative profit opportunities over their duty to obtain the best price for their consignors. The consignors thus did not receive full

value for their livestock. *See, e.g., In re Smithfield Livestock Market, Inc.*, 36 Agric. Dec. at 1563.

Blackfoot introduced evidence that a suspension of its operations would not harm it or its owners, but would adversely affect the people it serves. (TR 735) Such an argument has no merit. Respondent's own witnesses indicated that there were numerous other markets in the area where producers can sell their livestock—seven (7) in the immediate area (RX 153; TR 649) and 49 others available to the sellers. (TR 464)

Moreover, in *In re Red River Livestock Auction Inc.*, 36 Agric. Dec. 980, 989 (1977), the Judicial Officer stated that "the argument as to the hardship to the community resulting from a suspension order has repeatedly been rejected in determining sanctions under the Act." *See also, In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978).

Operating while insolvent and while its custodial account was not in balance, using custodial funds for purposes of its own, engaging in a check-kiting scheme, and purchasing livestock out of consignment for speculative resale demonstrates clearly that Blackfoot deliberately and wilfully placed its own interests ahead of those of its consignors and others in the livestock industry with whom it dealt. These practices go to the essence of a market agency's responsibilities. Respondent has repeatedly demonstrated an indifference to, if not outright contempt for, its mandated responsibilities.

Consideration has been given to the fact that the investigation did not show that any of respondent's checks or drafts were ever rejected for insufficient funds by the processing banks. Also, respondent points out that none of its livestock sellers ever went unpaid for livestock sold to respondent.

Respondent also had a significant line of credit (1 million dollars) and its officers had substantial personal assets. The fact that respondent cooperated with investigators and produced records and employees to explain them has also been considered. Respondent notes that there were no complaints filed by industry people against respondent. Also, respondent did not conceal anything from the investigators.

Respondent also capitalizes on the fact that it has operated its accounting system in the fashion described here for a long time without prior complaints.

However, these matters individually and cumulatively do not carry great weight.

It is also noted that respondent has stonewalled throughout these formal proceedings in the face of strong, clear, persuasive evidence

of the violations. Respondent refuses to recognize its deficiencies and attempts to put complainant's witnesses on trial.

The evidence here on all points is both clear and convincing on each of the violations and it is almost beyond a reasonable doubt with reference to the check-kiting, insolvency and custodial account violations, if, in fact, it is not beyond a reasonable doubt on those points. The standard preponderance of the evidence is more than met in every instance here.

Respondent has violated sections 307, 312(a) and 409(a) of the Act (7 USC §§ 208, 213(a), 228(b), and sections 201.42, 201.43(b) and 201.57(a) of the regulations (9 CFR §§ 201.42, 201.43(b), 201.57(a)), as alleged.

The requested cease and desist order and suspension is appropriate, necessary, and well justified.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Leaving aside the check-kiting violations, the 35-day suspension order issued by the ALJ would have been very modest for the other violations, particularly since respondent had received prior warning letters as to the other violations. However, the check-kiting violations are so serious by themselves that they warrant more than the 6-month suspension being imposed.

The check-kiting violations involved more than 75 drafts (and corresponding checks) issued from January 7, 1981, through May 20, 1981, totalling $8.6 million. As the ALJ explains, there is no possibility that this could have been regarded by Blackfoot (or Uinta) as a financing arrangement rather than a check-kiting arrangement. Neither Blackfoot nor Uinta had sufficient funds to have the checks and drafts honored except for the "float" generated by the phony paper previously issued by Blackfoot and Uinta.

In addition, as explained by the ALJ, Blackfoot could hardly have believed that it was financing Uinta since Blackfoot usually deposited Uinta's check in Blackfoot's account on the same day (or 1 to 4 days *earlier*) than Blackfoot paid the corresponding draft.[7] To illustrate, the following table shows the dates on which Blackfoot drafts were deposited by Uinta with Zion Bank (which gave

[7] Drafts were also drawn on Blackfoot payable to a number of persons and firms other than Uinta, and Blackfoot would pay for a number of drafts by a single check drawn from Blackfoot's General Account payable to its bank. For example, Blackfoot's General Account bank statement shows that on January 13, 1981, Blackfoot issued a check for $358,868.96 (CX 17G, p. 1) (left-hand column, 10th item down). That check paid for draft No. 4449 to Uinta for $217,472.32 issued on January 7, 1981 (CX 17B, p. 1), discussed by the ALJ, and seven other drafts not involving Uinta (CX 17F, p. 1).

Uinta immediate credit for the drafts), the amount of the Blackfoot drafts to Uinta, the dates on which Blackfoot paid (by its check) the drafts drawn payable to Uinta, the dates on which Blackfoot deposited Uinta's corresponding checks (drawn on Zion Bank), the number of "plus" days, i.e., the number of days between Blackfoot's payment of the drafts and Blackfoot's *later deposit* of the corresponding Uinta *checks*, and the number of "minus" days, i.e., the number of days between Blackfoot's deposit of the corresponding Uinta checks and Blackfoot's *later payment* of the *drafts* (see CX 17A; Tr. 261-78). (Where there are zeros, Blackfoot paid the drafts on the same day it deposited the corresponding Uinta checks.)

1	2	3	4	5	6
Draft Deposited by Uinta (1981)	Amount of Blackfoot Draft Payable to Uinta	Date Blackfoot Paid Draft by Check	Date Blackfoot Deposited Corresponding Uinta Check	Number of "Plus" Days (Col. 4 Minus Col. 3)	Number of "Minus" Days (Col. 4 Minus Col. 3)
1/7	$217,472.32	1/12	1/12	0	0
1/8	209,347.75	1/13	1/16	3	
1/14	227,468.35	1/19	1/22	3	
1/20	256,495.36	1/23	2/2	10	
1/27	216,743.88	2/2	2/10	8	
2/5	84,561.35	2/10	2/19	9	
2/5	42,614.60	2/10	2/13	3	
2/5	89,313.40	2/10	2/23	13	
2/5	43,656.00	2/10	2/13	13	
2/23	93,593.44	2/26	2/26	0	0
2/24	55,500.00	2/27	2/26		1
2/25	56,286.82	3/2	2/27		3
2/25	104,427.93	3/2	2/27		3
2/26	47,500.00	3/4	3/2		2
2/27	49,000.00	3/4	3/5	1	
3/3	160,000.00	3/6	3/5		1
3/4	165,502.00	3/9	3/6		3
3/6	62,500.00	3/11	3/10		1
3/6	20,233.17	3/13	4/6	25	
3/10	131,605.44	3/13	3/13	0	0
3/10	89,747.33	3/13	3/13	0	0
3/10	103,437.86	3/13	3/13	0	0
3/10	106,814.81	3/13	3/13	0	0
3/12	25,000.00	3/17	3/16		1
3/12	105,925.08	3/17	3/16		1
3/17	99,498.00	3/23	3/19		4
3/17	165,502.00	3/23	3/19		4
3/18	185,000.00	3/23	3/23	0	0
3/19	96,321.47	3/24	3/23		1
3/24	179,348.97	3/30	3/31	1	
3/24	94,828.79	3/30	3/30	0	0

1 Draft Deposited by Uinta (1981)	2 Amount of Blackfoot Draft Payable to Uinta	3 Date Blackfoot Paid Draft by Check	4 Date Blackfoot Deposited Corresponding Uinta Check	5 Number of "Plus" Days (Col. 4 Minus Col. 3)	6 Number of "Minus" Days (Col. 4 Minus Col. 3)
3/26	165,504.43	3/31	3/31	0	0
3/26	110,734.00	3/31	3/31	0	0
4/1	93,105.31	4/6	4/6	0	0
4/2	166,826.30	4/8	4/6		2
4/3	288,401.07	4/8	4/6		2
4/8	48,650.80	4/13	4/13	0	0
4/9	165,502.13	4/14	4/13		1
4/9	197,428.93	4/14	4/13		1
4/9	28,354.07	4/14	4/13		1
4/10	99,567.84	4/15	4/13		2
4/10	68,990.35	4/15	4/13		2
4/13	24,828.53	4/16	4/15		1
4/15	67,455.96	4/20	4/20	0	0
4/15	77,981.37	4/20	4/20	0	0
4/15	72,018.63	4/20	4/20	0	0
4/16	89,731.47	4/21	4/20		1
4/16	67,989.76	4/21	4/20		1
4/16	78,437.92	4/21	4/20		1
4/16	132,809.79	4/21	4/20		1
4/20	19,533.15	4/23			
4/22	214,703.90	4/27	4/27	0	0
4/22	231,514.87	4/27	4/27	0	0
4/22	136,134.74	4/27	4/27	0	0
4/27	40,924.70	4/30	5/4	4	
4/29	60,457.85	5/4	5/4	0	0
4/29	334,264.87	5/4	5/4	0	0
4/29	192,461.70	5/4	5/4	0	0
5/4	74,865.64	5/7	5/7	0	0
5/6	97,971.07	5/11	5/13	2	
5/6	231,514.87	5/11	5/13	2	
5/6	233,386.40	5/11	5/14	3	
5/6	39,979.20	5/11	5/14	3	
5/11	27,337.71	5/14	5/18	4	
5/13	44,768.75	5/18	5/18	0	0
5/15	52,345.75	5/20	5/19		1
5/15	58,818.50	5/20	5/19		1
5/15	25,672.39	5/20	5/19		1
5/15	185,541.20	5/20	5/19		1
5/15	35,376.29	5/20	5/19		1
5/18	329,486.04	5/22	5/21		1
5/19	70,614.11	5/22	5/26	4	
5/20	84,688.94	not hon-ored	5/26		
5/21	91,600.53	5/28	5/26		2

1 Draft Deposited by Uinta (1981)	2 Amount of Blackfoot Draft Payable to Uinta	3 Date Blackfoot Paid Draft by Check	4 Date Blackfoot Deposited Corresponding Uinta Check	5 Number of "Plus" Days (Col. 4 Minus Col. 3)	6 Number of "Minus" Days (Col. 4 Minus Col. 3)
5/21	74,294.87	5/28	5/26		2
5/21	96,515.70	5/28	5/26		2
Total	$8,629,649.58*				

* Total does not include the dishonored draft of May 20, 1981, for $84,688.94.

On the 18 "Plus" days (Column 5 of the table), Blackfoot could have been regarded as financing Uinta (if Blackfoot had had sufficient funds in its General Account, excluding the check-kiting "float"), since Blackfoot paid the drafts before Blackfoot deposited Uinta's corresponding check.

However, on the 23 days in which zeros appear in Columns 5 and 6 in the table set forth above, and the 33 "Minus" days (Column 6 of the table), Blackfoot could not have been regarded as financing Uinta because Blackfoot either deposited Uinta's check on the same day on which Blackfoot paid the draft payable to Uinta (the "zero" days), or Blackfoot actually had deposited Uinta's check in Blackfoot's General Account from 1 to 4 days *before* Blackfoot paid the corresponding draft (the "Minus" days in Column 6 of the table).

Respondent relies on the fact that Blackfoot was held not liable to Uinta's bank, Zions First National Bank, in a case decided by a United States District Judge (*Zions First National Bank* v. *Blackfoot Livestock Commission Co.*, Civ. No. C-83-1211W (D. Utah Apr. 16, 1985)). But the case is not only irrelevant, but the findings are more helpful to complainant than to respondent.

In the first place, the District Judge was applying the Uniform Commercial Code—not the Packers and Stockyards Act. In the second place, we do not know whether the District Judge had before him the evidence introduced here showing that Blackfoot was not really financing Uinta but, rather, was engaged in a check-kiting scheme with Uinta. In the third place, the District Judge decided only that Blackfoot was not liable for dishonoring three drafts drawn after Paul Thompson's death on May 17, 1981, *viz.*, a draft for $84,688.94, dated May 20, 1981, a draft for $329,486.04, dated May 22, 1981, and a draft for $469,933.63, dated May 27, 1981. Hence the District Judge did not have before him any issue

as to whether Blackfoot would have been liable for dishonoring drafts drawn while Paul Thompson was alive.

Moreover, the Judge's findings show that Paul Thompson, vice president and one-third owner of Blackfoot, allowed Uinta to draw drafts on Blackfoot and knew that the information about cattle on the face of the drafts was false. Specifically, the District Judge found:

> 35. From approximately 1977 and until his death, Thompson furnished Blackfoot draft books to Andreasen [of Uinta] and allowed Andreasen, and later Carol Kimball, to draw drafts on Blackfoot which drafts would be deposited in Uinta's bank account and which drafts after being forwarded by Uinta's bank to the Idaho bank would be accepted by Blackfoot. This would be done by the Idaho bank advising Blackfoot that a certain number of drafts in a certain amount had been received for payment and Blackfoot's bookkeeper would then go to the bank and examine the drafts. If the drafts were found to be acceptable the bookkeeper would advise the bank of Blackfoot's acceptance. Blackfoot would then issue its check to the Idaho bank in an amount to cover the drafts.
>
> * * * * * * *
>
> 37. From March 1980 through May 16, 1981, Zions [Uinta's bank] processed many drafts drawn on Blackfoot signed for Uinta by Andreasen or Kimball and all of those drafts were accepted by Blackfoot on its Idaho bank with that bank remitting payment to Zions for Uinta.
>
> 38. . . . Andreasen [of Uinta] dealt exclusively on matters between Uinta and Blackfoot with Thompson prior to the latter's death.
>
> * * * * * * *
>
> 41. In approximately early April of 1981 and after Blackfoot had become concerned about various of its practices relating to Uinta, Thompson instructed Andreasen that on any Blackfoot drafts executed by Uinta in the future that there should be listed on the face of the draft a description of the cattle including the number and weight thereof and the name of the seller of the cattle. After being given these instructions, Uinta did thereafter list that information on the face of the drafts.

42. In order to obtain money from Blackfoot to finance Uinta's operations after early April 1981, Andreasen and Kimball listed certain fictitious information about the cattle on the face of the drafts presented to the Idaho bank for Blackfoot and Thompson allowed these drafts to be accepted even though he knew of the fictitious cattle purchase information thereon. Thompson requested this fictitious information for the benefit of satisfying the packers and stockyards law and also for the purpose of deceiving others at Blackfoot. Only Thompson at Blackfoot knew that the information listed on the drafts presented by Uinta was false.

The foregoing findings by the court fully support complainant's position here that Blackfoot, through the actions of Paul Thompson, Blackfoot's vice president and one-third owner, engaged in an unfair and deceptive practice until the time of Thompson's death on May 17, 1981.

The basis for the court's decision in favor of Blackfoot is that after Paul Thompson's death, Uinta had no further authority to draw drafts on Blackfoot without permission, which was not given after May 17, 1981. Specifically, the court found and concluded:

44. Very shortly after the death of Thompson on May 17, 1981, Andreasen [of Uinta] and Lake [of Blackfoot] spoke by telephone. In that conversation, Lake informed Andreasen that Blackfoot would continue to finance Uinta. Andreasen advised Lake that he knew something had to be done and that he acknowledged that if Uinta needed to use any of Blackfoot's money that Andreasen would call Lake and let him know the amount that was needed and get Lake's okay before any further of Blackfoot's money was used. Whatever authority Andreasen or others at Uinta had to issue drafts on Blackfoot granted by Thompson terminated on the latter's death and the authority Uinta had after the conversation between Lake and Andreasen was conditioned on Uinta's obtaining approval from Blackfoot before writing drafts on its account.

45. Following this conversation on or about May 17, 1981 between Lake and Andreasen, the First, Second and Third Drafts referred to elsewhere in these Findings [which were the only drafts at issue in the court proceeding] were signed by Carol Kimball payable to the order of Uinta drawn on Blackfoot payable through the Idaho bank and deposited with Zions. At the time these three drafts were

deposited with Zions and at all times thereafter until their acceptance was refused by Blackfoot, neither Kimball nor Andreasen nor anyone else with Uinta had sought or received from Lake or anyone else at Blackfoot agreement that such drafts would be accepted by Blackfoot when presented to its Idaho bank. To the extent it is relevant to any issue in this case, no person at Uinta after May 17, 1981, had any authority either express, apparent or implied to bind Blackfoot to acceptance on any drafts issued on that company.

* * * * * * *

51. On or about May 26, 1981, Lake and Ellis of Blackfoot became suspicious for the first time about Uinta's activities in using their drafts, and instructed the Idaho bank not to accept or pay on the First and Second Drafts.

52. On or about May 26, 1981, the Idaho bank, following an instruction of non-acceptance by Blackfoot, refused to pay the First and Second Drafts and pursuant to that instruction thereafter refused to pay the Third Draft.

53. Blackfoot did not act in bad faith in connection with its handling of its arrangement with Uinta.

54. Blackfoot had no intent to deceive or harm Zions.

* * * * * * *

4. Blackfoot did not sign the drafts within the meaning of UCC § 3-403(1).

5. Blackfoot is not the drawer of the drafts because Kimball did not have actual authority to sign the three drafts.

* * * * * * *

7. Blackfoot has no liability on the three drafts in question in this case.

8. Blackfoot is not estopped to refuse to accept the three drafts.

* * * * * * *

11. By its course of conduct in accepting drafts prior to May 20, 1981, Blackfoot made no actionable misrepresenta-

tion to Zions regarding the nature of its relationship with Uinta, the terms of its financing arrangement with Uinta or its actions with respect to accepting drafts in the future.

* * * * * * *

14. Blackfoot committed no fraud upon Zions either actual or constructive as it relates to the three drafts in question.

Although I infer from the record here that Lake, who supervised the maintenance of respondent's books and records and had an extensive accounting background, knew that respondent was engaging in a check-kiting arrangement with Uinta, and did not first become suspicious about the arrangement on May 26, 1981 (when Blackfoot dishonored the First and Second Drafts involved in the court litigation), Lake's prior knowledge is totally irrelevant in this disciplinary proceeding. Under the Packers and Stockyards Act, the "act, omission, or failure of any agent, officer, or other person acting for or employed by" any registrant, "within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure" of such registrant (7 U.S.C. § 223). Accordingly, as the ALJ concluded, Blackfoot is fully responsible for the unfair and deceptive practices involved here even if Paul Thompson were the only individual who had knowledge of the check-kiting arrangement.

Furthermore, the fact that Paul Thompson is now deceased is not a mitigating circumstance which would lessen the sanction imposed on the corporation (even if he were the only one with knowledge of the check-kiting arrangement). This Department has repeatedly refused to lessen the sanction because a principal was unaware of the actions of its agents, or violations by a corporation were caused by one individual who is no longer with the corporation. *In re Veg-Mix, Inc.*, 44 Agric. Dec. ____ (Aug. 21, 1985), *appeal docketed*, No. 85-1771 (D.C. Cir. Nov. 22, 1985); *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 273 (1983); *In re Esposito*, 38 Agric. Dec. 613, 621-22 (1979). For example, in *In re Veg-Mix, Inc., supra*, it is stated (slip op. at 27):

> The case here is, in some respects, similar to *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 272-73 (1983), in which certain persons caused payment violations by a corporation, and then skipped out, causing other innocent persons who were "responsibly connected" (7 U.S.C. § 499a(9)) with the corporation to be adversely affected by the disciplinary order issued against the corporation. But anyone who be-

> comes responsibly connected with a firm subject to the Perishable Agricultural Commodities Act takes the risk that he or she will be adversely affected if the firm fails to pay for produce. That is an unfortunate consequence that is necessary if the remedial purposes of the Act are to be achieved.

Similarly, in *In re Old Virginia, Inc.*, 42 Agric. Dec. 270, 273 (1983), it is stated:

> Respondent argued in its original brief, pages 8–13, that the corporate veil should be pierced, and that an order should be issued only against the guilty individuals who managed the corporation, rather than against the corporation.
>
> However, the "doctrine of piercing the corporate veil is a sword—not a shield." *In re Casca*, 34 Agric. Dec. 1917, 1933 (1975). It may be used to prevent a person from using the corporate fiction as a shield to escape the statutory penalty for misconduct, but not to protect a person (individual or corporate) from the statutory penalty for misconduct. *Id* 1930–33.

It should be noted that it makes no difference in this disciplinary proceeding whether the names written on the drafts purporting to represent livestock sellers were phony or not, or whether Paul Thompson knew that they were phony. Carol Kimball, who wrote the names on the Blackfoot drafts, testified that many of the names were phony, and that Thompson knew that phony names were being used. For example, with respect to the names on Draft No. 2760 dated April 16, 1981 (CX 17B, p. 90), Nielsen is Ms. Kimball's karate instructor, Dunmor is her girlfriend, and Foster is made up (Tr. 320–21). On Draft No. 2830 dated May 6, 1981 (CX 17B, p. 113), the name Jensen is a town, Paulus is Ms. Kimball's sister's married name, and Buffrey is her mother's maiden name (Tr. 321–23). (That draft not only gives the names of the three individuals but, also, gives the number of head and weight of the steers and heifers purportedly involved in the transaction.) But irrespective of whether the drafts were issued to enable Uinta to buy livestock or to enable Uinta to cover overdrafts in its bank account, respondent's violations are just as serious because respondent was not actually financing Uinta but was merely kiting checks with Uinta. (Since the check-kiting scheme was in connection with respondent's livestock business, the violations are, of course, subject to the Act.)

It should be further noted that respondent's check-kiting arrangement with Uinta was a serious and flagrant violation of the Act not because of the actual loss that may have occurred as a result of the arrangement,[8] but, rather, because a check-kiting arrangement of that size over an extended period of time has the *potential* for great harm. Considering the severe consequences that could result to livestock sellers or other innocent parties as a result of a check-kiting arrangement of the size and scope involved here, a suspension order of more than 6 months would be appropriate to serve as an effective deterrent against similar violations not only to respondent, but, also, to other potential violators.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs adminstered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g., In re Worsley,* 33 Agric. Dec. 1547, 1556–71 (1974),[9] which is set forth as Appendix A to this decision.[10] The Department's sanction policy is also discussed at length in *In re Esposito,* 38 Agric. Dec. 613, 624–65 (1979).

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[8] The synopsis of complainant's Investigation Report, introduced by *respondent,* states that Uinta went out of business owing about $1 million, of which nearly $200,000 was owed to livestock sellers (RX 101, p. 7). We have no way of knowing how much of the loss, if any, was caused by the check-kiting arrangement with respondent.

[9] The Department's severe sanction policy did not originate with *Worsley,* but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner,* 30 Agric. Dec. 1151, 1263–64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller,* 33 Agric. Dec. 53, 64–80 (1974), *aff'd per curiam,* 498 F.2d 1088 (5th Cir. 1974).

[10] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.,* in *In re Collier,* 38 Agric. Dec. 957, 971–72 (1979), *aff'd per curiam* (unpublished), 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.,* 37 Agric. Dec. 1336, 1362–63 (1978), *aff'd,* No. 78–3134 (D.N.J. May 25, 1979), *aff'd mem.,* 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler,* 37 Agric. Dec. 313, 330–32, 337–52, *aff'd mem.,* 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.,* 37 Agric. Dec. 547, 549–51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland,* 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.,* 36 Agric. Dec. 1114, 1133–34 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.,* 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam,* 558 F.2d 748 (5th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978); *In re Catanzaro,* 35 Agric. Dec. 26, 31–32 (1976), *aff'd,* No. 76–1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.,* 34 Agric. Dec. 773, 796, 801 (1975), *aff'd,* 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.,* 34 Agric. Dec. 700, 750, 762 (1975), *aff'd,* 549 F.2d

Continued

Complainant originally recommended a 35-day suspension of respondent's registration, and that recommendation was adopted by the ALJ. However, on respondent's appeal, the Judicial Officer *sua sponte* raised the issue as to whether the suspension period should be substantially increased because the suspension period seemed so far out of line with the Department's sanction policy.

In its brief responding to the issue raised by the Judicial Officer as to whether the suspension period should be substantially increased, complainant continues to recommend a 35-day suspension period. Although complainant now recognizes that a check-kiting scheme "would normally warrant a suspension for a minimum of six months," and states that "[w]ere this case to be brought today, complainant would likely seek a suspension greater than 35 days" (Complainant's Brief at 4), complainant continues to recommend a 35-day suspension period here for a number of reasons.

First, complainant relies on the fact that complainant advised respondent of the sanction it would seek if a hearing were held, and this is a factor which respondents consider in deciding whether or not to settle a case. However, respondents should know (or guess) that the recommendation of complainant as to a sanction, although entitled to great weight, is not controlling. Although the Judicial Officer for many years adhered to the self-imposed limitation that he would never increase the sanction requested by administrative officials, in 1981 he overruled that portion of the Department's sanction policy which provided that the Judicial Officer would never increase the sanction recommended by administrative officials (in order to achieve uniformity in sanctions for comparable violations). *In re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983). Accordingly, at the time the complaint was issued in this case in 1983, a respondent had no guarantee that the Judicial Officer would not increase a sanction recommended by complainant.

Furthermore, the Judicial Officer had long before announced the view that in any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction would be imposed

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830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145–60, *aff'd per curiam, 524 F.2d 977 (5th Cir. 1975)*; *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913–14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539–50 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64–80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

in the pending case, rather than merely announce that in future cases the sanction would be increased. *In re Worsley*, 33 Agric. Dec. 1547, 1569–70 (1974) (Appendix A at 22a–26a).

Accordingly, I give no weight to the facts that complainant's sanction policy in effect when this complaint was brought did not provide for a lengthy suspension order, and that complainant advised respondent prior to the hearing as to the sanction complainant would seek.

Complainant also considered three other "mitigating" circumstances when it originally decided to recommend a 35-day suspension period. First, complainant states (Complainant's Brief at 4–5):

> While the evidence introduced at the oral hearing clearly showed that Dennis Lake, as the owner with the accounting background, must have been and was aware of the check-kiting scheme, Paul Thompson was obviously the official most intimately involved with the scheme. Mr. Thompson died prior to the complaint being issued and while Blackfoot is responsible for his actions, a severe sanction for the check-kiting would not punish the most involved perpetrator.

However, for the reasons set forth above, it would be inconsistent with prior decisions to give any weight to that circumstance.

Complainant also states (Complainant's Brief at 5):

> Another factor was the Uinta Livestock Commission Company, the other participant in the scheme, was never charged because the evidence of the scheme was not discovered until months after Uinta's demise and it was determined that no useful purpose would be served by including a defunct and bankrupt corporation as a respondent.

The fact that a proceeding was not brought against Uinta is not a relevant consideration here, and to use that circumstance as a basis for reducing the sanction imposed here would be contrary to the Department's settled policy to impose severe sanctions for serious violations to serve as an effective deterrent to the respondent and to other potential violators.

Complainant further states (Complainant's Brief at 5):

> Still another factor was that the ultimate victim of the scheme was the Zions First National Bank, which was at the time vigorously seeking redress against Blackfoot in federal district court.

This, again, is not a circumstance that would be consistent with the Department's sanction policy, and, in addition, Zion was unsuccessful in its action against Blackfoot.

Complainant further states that "[s]uspending an auction market inevitably hurts local consignors" (Complainant's Brief at 5), but it has consistently been held that any hardship to the respondent's community, customers, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interests which might be temporarily damaged as a result of a suspension order.[11] (In addition, Mr. Kienow, Regional Supervisor of Complainant's Omaha office, testified that there were seven other auction markets in the Blackfoot region that were competitors of Blackfoot (Tr. 464)).

Complainant cites a number of consent decisions involving check-kiting schemes in which the suspension period varied from 30 days (held in abeyance) to 4 months (Complainant's Brief at 5). But it is well settled that consent decisions are given no weight in determining sanctions in litigated cases. *In re Worsley,* 33 Agric. Dec. 1547, 1569 (1974) (Appendix A at 23a–24a). In the only contested case cited by complainant, a 90-day suspension order was imposed. *In re Amaral & Brazil,* 36 Agric. Dec. 872, 894 (1977). However, in the most recent check-swapping case, *In re Farmers & Ranchers Livestock Auction, Inc.,* 45 Agric. Dec. ____ (Feb. 27, 1986), a 5-year suspension order was imposed. In that case, as in the present case, there were a number of other violations in addition to the check-kiting violations, but, in view of the similarity between this case and *Farmers & Ranchers,* a suspension order of 1 year or more

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[11] *In re Gilardi Truck & Transp., Inc.,* 43 Agric. Dec. ____ (Jan. 27, 1984); *In re Oliverio, Jackson, Oliverio, Inc.,* 42 Agric. Dec. ____ (Aug. 31, 1983); *In re Melvin Beene Produce Co.,* 41 Agric. Dec. 2422, 2441–42 (1982), *aff'd,* 728 F.2d 347 (6th Cir. 1984); *In re Powell,* 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.,* 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher,* 41 Agric. Dec. 662, 670–71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.,* 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.,* 37 Agric. Dec. 1699, 1737–38 (1978); *In re Arab Stock Yard, Inc.,* 37 Agric. Dec. 293, 302, 311, *aff'd mem.,* 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.,* 36 Agric. Dec. 1114, 1128–29, 1136 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.,* 36 Agric. Dec. 980, 989–90 (1977); *In re Livestock Marketers, Inc.,* 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam,* 558 F.2d 748 (5th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.,* 34 Agric. Dec. 1808, 1851–52 (1975); and *see In re L.R. Morris Produce Exch., Inc.,* 37 Agric. Dec. 1112, 1120–21 (1978); *In re Armour & Co.,* 37 Agric. Dec. 109, 112 (1978); *In re Catanzaro,* 35 Agric. Dec. 26, 34–35 (1976), *aff'd* No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977).

would have to be imposed in the present case to be consistent with *Farmers & Ranchers*. However, in deference to complainant's continued recommendation for a lenient sanction in this case, and since this issue is raised *sua sponte* by the Judicial Officer on respondent's appeal, only a 6-month suspension order will be imposed here.

In respondent's brief as to the issues raised *sua sponte* by the Judicial Officer, respondent contends that the findings by the district court in *Zions*, discussed above, to the effect that Blackfoot was engaged in a financing arrangement with Uinta, are res judicata. However, the Department was not a party to the action brought by Zions First National Bank against Blackfoot Livestock Commission Company and, therefore, the action cannot be binding against the Department in this administrative proceeding. In addition, as set forth above, we do not know whether the district judge had before him the massive evidence that we have here showing that Blackfoot was engaged in a check-kiting scheme, rather than a financing arrangement. Moreover, as shown above, the district court's findings are fully supportive of complainant's position here that Blackfoot was engaging in an unfair and deceptive practice in violation of the Packers and Stockyards Act. Accordingly, the record fully supports the increase in the suspension period, which issue was raised *sua sponte* by the Judicial Officer.

The Department's practice which permits the Judicial Officer to increase *sua sponte* the sanction on respondent's appeal is stated in Campbell, "The Packers and Stockyards Act Regulatory Program," 1 Davidson, *Agricultural Law*, § 3.24 (1981 and Aug. 1985 Supp.), as follows:

> In addition, the judicial officer may raise additional issues on appeal sua sponte with notice to the parties [footnote omitted]. In one case, in which the judge suspended a registrant for 30 days, and the respondent appealed seeking to reduce the sanction, the judicial officer sua sponte raised the issue of whether the suspension should be for a longer period, and ultimately suspended the registrant for 60 days.[149]
>
> An appeal filed by a party cannot be withdrawn as a matter of right [footnote omitted]. Accordingly, a respondent planning to file an appeal in a case in which complainant does not appeal should consider whether the sanction in the initial decision is consistent with the sanctions imposed by the judicial officer in previous cases. The present judicial officer has frequently increased sanctions on

> appeal [footnote omitted], but has only rarely reduced sanctions on appeal [footnote omitted].

[149] *In re* Mid-States Livestock, Inc, 37 Agric Dec 547, 549-52 (1977), *affd sub nom* Van Wyk *v* Bergland, 570 F2d 701 (8th Cir 1978). However, that action was taken only because the sanction originally imposed was "so far out of line" with what the judicial officer regarded as appropriate. *In re* Esposito, 38 Agric Dec 613, 623 n 7 (1979); and *see In re* Unionville Sales Co, 38 Agric Dec 1207, 1207-10 (1979) (remand order), *final decision*, 40 Agric Dec 736 (1981). *In re* Rowland, 40 Agric Dec 1934, 1952-53 (1981), *affd*, 713 F2d 179 (6th Cir 1983). It does not violate due process or the equal protection clause of the Constitution for the judicial officer to increase the sanction when the respondent appeals, either *sua sponte* or at the request of complainant in its response to respondent's appeal. *In re* Thornton, 41 Agric Dec 870, 909-12 (1982), *affd*, 715 F2d 1508 (11th Cir 1983).

The authority of the Judicial Officer to raise the issue *sua sponte* as to whether the sanction should be increased, when only the respondent appeals, stems from the rules of practice, which provide (7 CFR § 1.145(e)):

> (e) *Scope of Argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

The authority of the Judicial Officer to increase *sua sponte* the sanction on respondent's appeal has been very sparingly exercised. It was never exercised during the 30 years the Department's first Judicial Officer served in this position, and it has been exercised on only two other occasions during the 15 years the present Judicial Officer has served in this position. On the first occasion in *Mid-States*, referred to in the preceding quotation, the sanction was increased from 30 days to 60 days by the Judicial Officer. On the other occasion, although the Judicial Officer *sua sponte* raised the issue as to whether the sanction should be increased under certain factual circumstances, he also explained that the sanction should be reduced under other factual circumstances. He remanded the case to the ALJ to determine the facts, which ultimately resulted in a *reduction* in the sanction. *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1209-10 (1979) (remand order), *final decision*, 40 Agric. Dec. 736 (1981).[12]

[12] In three other cases, the Judicial Officer increased the sanction on respondent's appeal because complainant had filed a cross-appeal in each case. In the latter

Continued

In *Thornton* v. *USDA*, 715 F.2d 1508, 1512–13 (11th Cir. 1983), the court expressly held that the Judicial Officer has the power to increase the sanction where respondent has appealed. The court held (*id.*):

> *III. PENALTY ENHANCEMENT*
>
> Relying upon the rationale of *North Carolina* v. *Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969) ("the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal . . . would be . . . a violation of due procees of law"), respondent Thornton maintains that the Judicial Officer's enhancement of his penalty to include a one year disqualification violates his fifth amendment right to due process. He reasons that the severe sanction of disqualification is punitive rather than remedial and, because it could not have been imposed upon him had he not exercised his right of appeal, that the disqualification is actually a punishment for having appealed.
>
> We are not persuaded by respondent's argument. To the extent that the disqualification is punitive, it is punishment for the offense of soring and not for the appeal. Under section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 557(b), "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision." As the ninth circuit recognized in *Containerfreight Transport Co.* v. *ICC*, 651 F.2d 668, 670 (9th Cir. 1981), the review provision of the Administrative Procedure Act authorizes the agency "to decide all issues *de novo*." The review is actually a species of retrial. The Supreme Court recognized in *North Carolina* v. *Pearce*, 395 U.S. at 723, 89 S.Ct. at 2079 that a judge "is not constitutionally precluded . . . from imposing a new

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two of those cases, the Judicial Officer also *sua sponte* raised the issue as to whether the sanction should be increased as a precautionary tactic in the event that the court should erroneously hold that the issue could not be raised in a cross-appeal. *In re McConnell*, 44 Agric. Dec. ___ (Mar. 8, 1985); *In re Thornton*, 41 Agric. Dec. 870, 900–13 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983). That tactic was utilized since in *In re Wall*, 38 Agric. Dec. 1437 (1979), *aff'd in part and rev'd in part*, No. 79-3714 (6th Cir. July 10, 1981) (unpublished order), *printed in* 40 Agric. Dec. 927 (1981), the court set aside the Judicial Officer's increase of the sanction on the erroneous view that complainant had not filed a cross-appeal. (Since complainant had in fact filed a cross-appeal in *Wall*, the Judicial Officer did not notify the parties that he was *sua sponte* raising any issue as to the sanction.)

> sentence, whether greater or less than the original sentence" upon such a retrial. The only constitutional limitation upon this right is that any penalty already suffered prior to retrial must be "credited" towards the subsequent sentence so that the actual penalty imposed does not exceed the maximum limits for a single commission of the offense. *Id.* at 718, 89 S.Ct. at 2077. No such constitutional violation was committed in this case. The disqualification provision is supplementary to, not an alternative for, the imposition of a fine. 15 U.S.C. § 1825(c). It was lawfully imposed by the Judicial Officer.

In *Wall* (note 12, *supra*), the court, in addition to failing to recognize that complainant had filed a cross-appeal, relied upon *North Carolina* v. *Pearce,* which is distinguished by the court in *Thornton,* just quoted. Specifically, the court stated in *Wall* (slip op. at 2–3, *reprinted in* 40 Agric. Dec. 927, 927–28):

> Plaintiff also challenges the propriety of the Secretary's remedial order. After hearing the evidence in this case, the ALJ fined plaintiff $2,000.00 and ordered him disqualified from exhibiting any horse in a show for a period of two years. Plaintiff appealed the ALJ's decision to the Department of the Agriculture Judicial Officer. No cross-appeal was taken by the Secretary. In his decision, the Judicial Officer enhanced the penalties assessed by the ALJ and ordered plaintiff to pay $2,000.00 and to be disqualified from exhibiting any horse in a show for a period of five years [the minimum permitted by the statute for a second offense, which was the case here]. Absent notice by cross-appeal that the Secretary sought to augment the remedial order of the ALJ, the Judicial Officer's decision to do so is an abuse of discretion. The ALJ heard the evidence and his findings of fact in support of his remedial order are not clearly erroneous. *Cf. North Carolina* v. *Pierce,* 395 U.S. 711 (1969) (augmented sentence predicated upon pursuit of statutory right of appeal of criminal conviction is a denial of due process).

The erroneous reliance on *North Carolina* v. *Pearce* by the court in *Wall* is set forth at greater length by the Judicial Officer in *Thornton, supra* (41 Agric. Dec. at 909–12):

> Finally, the court's reliance in *Wall* on *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), is misplaced. The Court held in *Pearce* that where a defendant successfully appeals a

criminal conviction and is retried, the "original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean" (395 U.S. at 721); and, accordingly, there is no constitutional prohibition against increasing the penalty after the new trial (*id.* at 719–23), so long as the defendant is credited with the punishment already exacted on the basis of the original trial (*id.* at 717–19).

To the very limited extent, if any, to which *Pearce* is analogous to *Wall*, the *Pearce* case indicates that when Wall appealed the [ALJ's] initial decision, the slate was "wiped clean" (395 U.S. at 721), the initial decision was no longer in effect, and an increased sanction could constitutionally be imposed (395 U.S. at 719–23).

In *Pearce*, it was argued that the imposition of a more severe sentence upon retrial creates an invidious classification violative of the Equal Protection Clause of the Fourteenth Amendment. (This is analogous to the argument in the present case that the imposition of a more severe sanction after an appeal by a respondent creates an invidious classification upon those who choose to avail themselves of their appellate rights. See Brief and Argument of Respondent Thornton in Opposition to Complainant's Cross Appeal 2–3). In rejecting that argument, the Court held (395 U.S. at 722–23):

> The other argument advanced in support of the proposition that the Constitution absolutely forbids the imposition of a more severe sentence upon retrial is grounded upon the Equal Protection Clause of the Fourteenth Amendment. The theory is advanced that, since convicts who do not seek new trials cannot have their sentences increased, it creates an invidious classification to impose that risk only upon those who succeed in getting their original convictions set aside. The argument, while not lacking in ingenuity, cannot withstand close examination. In the first place, we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials. Putting that conceptual nicety to one side, however, the problem before us simply cannot be rationally dealt with in terms of 'classifications.' A man who is retried after his

> first conviction has been set aside may be acquitted. If convicted, he may receive a shorter sentence, he may receive the same sentence, or he may receive a longer sentence than the one originally imposed. The result may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a State has invidiously 'classified' those who successfully seek new trials, any more than that the State has invidiously 'classified' those prisoners whose convictions are *not* set aside by denying the members of that group the opportunity to be acquitted. To fit the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.

In cases before the Department as in *Pearce* (see 395 U.S. at 722, just quoted), when a respondent appeals to the Judicial Officer, he has the opportunity to have the complaint dismissed (*e.g., In re Hygrade Food Products Corp.,* 35 Agric. Dec. 129 (1976)), to have the sanction drastically reduced (*e.g., In re Alex's Produce,* 41 Agric. Dec. [287] (Feb. 3, 1982)), to receive the same sanction (*e.g., In re Fleming,* 40 Agric. Dec. 1521 (1981), *appeal docketed,* No. 82-3095 (6th Cir. Feb. 1, 1982)), or to have the sanction increased (*e.g., In re Mid-States Livestock, Inc.,* 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk* v. *Bergland,* 570 F.2d 701 (8th Cir. 1978)). *Pearce* suggests [21] that any of those possibilities are permitted by the constitution.

[21] *Pearce* is not directly in point since *Pearce* deals with a new trial (after appeal) whereas here [i.e., in *Thornton*], as in *Wall,* we are dealing with the same case on the initial appeal.

The concluding part of the decision in *North Carolina* v. *Pearce,* 395 U.S. 711, 723-26 (1969), which may have been relied on by the court in *Wall,* is not remotely in point or analogous to *Wall.* In that section of the *Pearce* opinion, the Court explains that it is a violation of due process to impose a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for having successfully appealed. Specifically, the Court held (395 U.S. at 723-26):

> It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice

of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. . . .

Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.[20] (Footnote omitted).

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

That portion of the Court's opinion in *Pearce* has no relevancy to the present [*Thornton*] case or to the *Wall* case. When the Judicial Officer issued his decision in *Wall,* it was not after Wall had appealed an earlier order and had it set aside. Rather, Wall was appealing to the Judicial Officer for the first time. Hence there could be no possibility that the Judicial Officer had the motive of punishing the respondent for having succeeded in getting the Judicial Officer's original order set aside.

Furthermore, the concluding part of *North Carolina* v. *Pearce* merely holds that to assure the absence of motivation to penalize the defendant for having succeeded in getting his original conviction set aside, the judge imposing a more severe sentence after a new trial must affirmatively

show his reasons for doing so. As stated above, the Judicial Officer affirmatively set forth the strongest possible reason for increasing the sanction in *Wall, viz.*, the statute requires that any disqualification order for a repeat offender be for a minimum of five years.[22]

[22] Some of the decisions cited by the Court in *North Carolina* v. *Pearce*, 395 U.S. 711, 724-25 (1969), refer to the constitutional need not to "chill" the right of appeal. But the cases refer to procedural impediments to appeals, or to substantive policy to punish persons who exercise their right of appeal. No case holds that the constitution is violated merely because the defendant knows from past decisions that a particular judge (or Judicial Officer) imposes severe sanctions for serious violations in every case, irrespective of who appeals. The Judicial Officer will readily concede that it does not take an acute or legally trained mind, or much reading in Agriculture Decisions, to perceive that the present Judicial Officer imposes severe sanctions for serious or repeated violations in every case (generally including minimum disqualification orders in Horse Protection Act cases), so as to achieve the remedial purposes of the regulatory programs administered by the Department of Agriculture. If this uniform policy chills a respondent's desire to appeal, that does not present a constitutional issue. In the present case, respondent Thornton was not deterred from appealing to the Judicial Officer notwithstanding the fact that the Judicial Officer's severe sanction policy, and his application of the policy in Horse Protection Act cases, is set forth fully in *In re Rowland*, 40 Agric. Dec. 1934 (1981), *appeal docketed*, No. 82-3015 (6th Cir. Jan. 8, 1982), which was attached to Judge Weber's initial decision in the present case.

For the foregoing reasons, there is no procedural impediment to the increase in respondent's sanction by the Judicial Officer.

Respondent urges that the ALJ erred in denying its frequent requests for alleged Jencks Act material, and in failing to perform an *in camera* examination of complainant's documents (see Tr. 91-109, 183-223, 256-57, 304-05, 315-17, 349, 376, 401, 426-27, 464-78, 513-14, 610c-11, 792-98). However, for the reasons stated by the ALJ, no error was committed in this respect. See *In re Machado*, 42 Agric. Dec. ____ (Oct. 20, 1983) (decision as to respondent Cozzi), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (attached as Appendix B to this decision).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Blackfoot Livestock Commission Co., its officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while its current liabilities exceed its current assets;

2. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of its own or for purposes

other than the payment of lawful marketing charges and the remittance of net proceeds to shippers, and making such other use of shippers' proceeds in its possession or control as well endanger or impair the faithful and prompt accounting therefor and payment of the portions thereof due to the person or persons entitled thereto;

3. Failing to deposit in its "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

4. Failing to otherwise maintain its "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

5. Exchanging drafts or checks with any person for the purpose or with the effect of concealing the true amount of funds available in any checking or other bank account, or of creating a false "float" or balance in any such account;

6. Permitting owners, officers, agents, or employees to buy livestock out of consignment for resale for their own speculative accounts; and

7. Paying for livestock with a draft which is not a check unless the seller expressly agrees in writing before the transaction that payment may be made by such a draft.

Respondent is suspended as a registrant under the Act for a period of 6 months and thereafter until it demonstrates that it is no longer insolvent and that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated. When respondent demonstrates that it is no longer insolvent and that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 6-month period.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent. The suspension provisions shall become effective on the 30th day after service on respondent.

APPENDIX A

Excerpt from *In re Worsley,* 33 Agric. Dec. 1547, 1556–71 (1974).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

APPENDIX B

Decision in *In re Machado*, 42 Agric. Dec. 820 (1983) (remand order as to respondent Cozzi), *final decisions*, 42 Agric. Dec. ____ (Oct. 20, 1983), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished).

In re: DWAIN A. WAGONER. P&S Docket No. 6440. Decided March 12, 1986.

William J. Weber, Administrative Law Judge.
Allan Kahan, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Dwain A. Wagoner, hereinafter referred to as respondent, is an individual whose business mailing address is Route #3, Box 368, Idaho Falls, Idaho 83401.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce for his own account and as a market agency buying livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Dwain A. Wagoner, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: JERRY GOETZ. P&S Docket No. 6599. Decided March 17, 1986.

John A. Campbell, Administrative Law Judge.
Peter Train, for complainant.
Lynn Hursh, Overland Park, Kansas, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jerry Goetz, hereinafter referred to as the respondent, is an individual whose business mailing address is R. R. 1, Park, Kansas 67751.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Goetz, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: RICK LUNDT and LUNDT, INC. P&S Docket No. 6584. Decided March 20, 1986.

Edward H. McGrail, Administrative Law Judge.
Allan Kahan, for complainant.
For respondent, *pro se.*

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lundt, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing in the State of Kansas. Corporate respondent's business mailing address is 2411 Sue Lane, Independence, Kansas 67301.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Not registered with the Secretary.

3. Rick Lundt, hereinafter referred to as the individual respondent, is an individual whose mailing address is 2411 Sue Lane, Independence, Kansas 67301.

4. The individual respondent is, and at all times material herein was:

(a) Responsible for the direction, management and control of the corporate respondent;

(b) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Rick Lundt, his agents and employees, directly or through any corporate or other device, and respondent Lundt, Inc., its officers, directors, agents, employees, successors and assigns, in connection with their business subject to the Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent Rick Lundt is suspended as a registrant under the Act, and respondent Lundt, Inc., is prohibited from operating subject to the Act, until such time as they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Four Hundred Dollars ($400.00), which shall be payable by the effective date of this order.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: JERRY MENZ and SHARON MENZ d/b/a PUXICO STOCKYARDS & AUCTION CO. P&S Docket No. 6523. Decided March 21, 1986.

John A. Campbell, Administrative Law Judge.
Peter Train, for complainant.
Donald Rhodes, Bloomfield, MO, for respondents.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondents does not meet the requirements of the Act and that the

respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jerry and Sharon Menz, hereinafter referred to as the respondents, are partners doing business as Puxico Stockyards & Auction Company. Respondents' principal place of business is located at Puxico, Missouri, and their business mailing address is Highway 51 North, Puxico, Missouri 63960.

2. The respondents, at all times material herein, were:

(a) Engaged in the business of conducting and operating the Puxico Stockyards & Auction Co. stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in the business of a market agency, selling livestock on a commission basis at the stockyard; and

(c) Engaged in the business of a dealer, buying and selling livestock in commerce for their own account.

3. The respondents are, and at all times material herein were, registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Jerry and Sharon Menz, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Operating while insolvent, *i.e.,* while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the proceeds due consignors from the sale of their livestock;

3. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock or the payment of amounts due the respondents for lawful marketing charges;

4. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

5. Issuing checks to consignors in payment of the net proceeds resulting from the sale of their livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

6. Failing to remit, when due, to consignors the net proceeds resulting from the sale of their livestock;

7. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

8. Failing to pay, when due, the full purchase price of livestock; and

9. Failing to pay the full purchase price of livestock.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their business subject to the Packers and Stockyards Act including: (1) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (2) a complete and accurate accounts receivable ledger; (3) a detailed record of all deposits to their custodial account and monthly reconciliations of that account; (4) a complete and accurate record of the purchase and resale of all livestock purchased in support of the market; and (5) a complete and accurate livestock inventory record.

The respondents are suspended as registrants under the Act for 120 days and thereafter until they demonstrate that they are no longer insolvent and that the deficit in their Custodial Account for Shippers' Proceeds has been eliminated. When respondents demonstrate that they are no longer insolvent and that the deficit in their Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 120-day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: VIRGIL P. MILLER and E.K. CORRIGAN Co. P&S Docket No. 6557. Decided March 21, 1986.

Edward H. McGrail, Administrative Law Judge.
Peter Train, for complainant.
Victor J. Lich, Jr., for respondent.

CONSENT DECISION WITH RESPECT TO E.K. CORRIGAN CO.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent E. K. Corrigan Co. admits the jurisdictional allegations in paragraph I of the complaint as they pertain to it and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. E. K. Corrigan Co., hereinafter referred to as respondent Corrigan, is a corporation whose mailing address is 812 Livestock Exchange Building, Omaha, Nebraska 68107.

2. Respondent Corrigan at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for its own account and as a market agency buying livestock in commerce on a commission basis, and providing clearing services for others; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and a market agency buying livestock on a commission basis and providing clearing services.

CONCLUSIONS

Respondent E. K. Corrigan Co. having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Corrigan, its officers, agents and employees, directly or through any corporate or other device, in connection with its activities subject to the Packers and Stockyards Act, shall not fail to pay for the livestock purchases of its clearees.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Corrigan is assessed a civil penalty in the amount of one thousand dollars ($1,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on respondent.

Copies of this decision shall be served on the parties.

In re: JAEGERS LIVESTOCK AUCTION MARKET. P&S Docket No. 6511. Decided March 27, 1986.

Edward H. McGrail, Administrative Law Judge.
Roberta Swartzendruber, for complainant.
Stephen Roseman, Newton, New Jersey, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jaegers Livestock Auction Market, hereinafter referred to as the respondent, is a corporation whose principal place of business is located in Sussex, New Jersey. Respondent's mailing address is P. O. Box 345, Sussex, New Jersey 07461.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Jaegers Livestock Auction Market stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Jaegers Livestock Auction Market, its officers, directors, agents, successors and assigns, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Hundred Dollars ($300.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: JOHN T. BUFORD. P&S Docket No. 6632. Decided March 27, 1986.

Victor W. Palmer, Administrative Law Judge.
Peter Train, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. John T. Buford, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 447, Celina, Tennessee 38551.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Buford, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining

an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand Dollars ($2,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: YUMA MEAT CO. INC., RICHARD LISKA and FRED LUECK. P&S Docket No. 6636. Decided March 27, 1986.

Edward H. McGrail, Administrative Law Judge.
Roberta Swartzendruber, for complainant.
For respondent, *pro se*.

CONSENT DECISION WITH RESPECT TO FRED LUECK

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Lueck admits the jurisdictional allegations in paragraph III of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Fred Lueck, hereinafter referred to as respondent Lueck, is an individual whose business address is 12700 Somerton Avenue, Yuma, Arizona 85365.

2. Respondent Lueck, at all times material herein was:

(a) Vice President of the corporate respondent;

(b) Owner, in combination with his wife, of 50% of the outstanding stock of the corporate respondent;

(c) Responsible, in combination with respondent Liska, for the direction, management and control of the corporate respondent; and

(d) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent Lueck having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Lueck, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented; and

2. Failing to pay, when due, the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Liska is assessed a civil penalty of One Thousand Dollars ($1,000.00).

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon the respondent.

Copies of this decision shall be served upon the parties.

In re: CLARENCE "BUTCH" BUSSE. P&S Docket No. 6638. Decided March 27, 1986.

William J. Weber, Administrative Law Judge.
Peter Train, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated

the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Clarence "Butch" Busse, doing business as Busse Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is 305 First Street, Prairie du Sac, Wisconsin 53578.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Busse, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay the checks when presented; and

3. Failing to pay, when due, for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of three (3) weeks.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Thousand Dollars ($3,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: TOM NIX. P&S Docket No. 6656. Decided March 27, 1986.

John M. Campbell, Administrative Law Judge.
Peter Train, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Tom Nix, doing business as Tom Nix Cattle Company, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 3, Box 149 Anson, Texas 79501.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Nix, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

Respondent has demonstrated his present compliance with the bonding requirements of the Act and Regulations. Therefore, no suspension is being imposed.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: JIM BEARD, O.W. (WAYNE) GOODALL, MIKE WADE and LEON WALLACE, d/b/a CARROLL COUNTY LIVESTOCK AUCTION CO. P&S Docket No. 6489. Decided March 31, 1986.

John A. Campbell, Administrative Law Judge.
Ben Bruner, for complainant.
Kent Coxsey, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remain-

ing allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jim Beard, O.W. (Wayne) Goodall, Mike Wade, and Leon Wallace, doing business as Carroll County Livestock Auction, hereinafter referred to as the respondents, were partners with a business mailing address of P. O. Box 371, Berryville, Arkansas 72616.

2. Respondents at all times material herein were:

(a) Engaged in the business of conducting and operating the Carroll County Livestock Auction Co. stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Jim Beard, O.W. (Wayne) Goodall, Mike Wade, and their agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) and the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Two Thousand Dollars ($2,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: L.L. PETERS and RONALD H. WHEATLEY. P&S Docket No. 6600. Decided March 31, 1986.

William J. Weber, Administrative Law Judge.
Allan Kahan, for complainant.
Jerry Deskins, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. L. L. Peters and Ronald H. Wheatley, hereinafter referred to as the respondents, are partners doing business as The Lee Farmers Livestock Market. Respondents' business mailing address is P. O. Box 426, Jonesville, Virginia 24263.

2. Respondents are, and at all times material herein were:

(a) Engaged in the business of conducting and operating The Lee Farmers Livestock Market stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of buying and selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents L. L. Peters and Ronald H. Wheatley, their agents and employees, directly or through any corporate or other device, in connection with their business subject to the Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Seven Hundred and Fifty Dollars ($750.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: JAMES L. PAULSEN. P&S Docket No. 6652. Decided March 31, 1986.

Victor W. Palmer, Administrative Law Judge.
Roberta Swartzendruber, for complainant.
James P. Fitzgerald, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James L. Paulsen, hereinafter referred to as the respondent, is an individual whose business mailing address is 13918 Arbor Street, Omaha, Nebraska 68144.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, as a clearee through LaVern Paulsen, d/b/a Paulsen Cattle Co., Exira, Iowa.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

James L. Paulsen, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent shall prepare and maintain accounts, records and memoranda which fully and correctly disclose all transactions in his business subject to the Act including (1) a purchase and sales journal; (2) complete sales invoices; and (3) complete purchase invoices and weigh sheets.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand Dollars ($2,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: B. D. GREER d/b/a CAPITAL STOCKYARD. P&S Docket No. 6520. Decided April 2, 1986.

William J. Weber, Administrative Law Judge.
Ben Bruner, for complainant.
Ernest Van Hoosen, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. B. D. Greer, hereinafter referred to as the respondent, is an individual doing business as Capital Stockyard with his principal place of business located at Montgomery, Alabama. Respondent's business mailing address is Capital Stockyard, P. O. Box 4007, Montgomery, Alabama 36101.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Capital Stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of buying and selling livestock on a commission basis at the stockyard; and

(c) Engaged in the business of buying and selling livestock for his own account in commerce.

3. The respondent is, and at all times material herein was, registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent B. D. Greer, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit to his Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the proceeds due consignors from the sale of their livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of his own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of livestock or the payment of amounts due the respondent for lawful marketing charges; and

3. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations (9 CFR § 201.42).

Respondent is suspended as a registrant under the Packers and Stockyards Act for a period of seven (7) days and thereafter until he demonstrates that the deficiency in his Custodial Account for Shippers' Proceeds has been eliminated. When respondent demonstrates that the deficiency in his Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the seven (7) day period.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Ten Thousand Dollars ($10,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: CARTER-KIRCHHOFF FEED YARD, INC., and BOB CARTER. P&S Docket No. 6611. Decided April 2, 1986.

Edward H. McGrail, Administrative Law Judge.
Dennis Becker, for complainant.
R. Byrn Bass, Jr., for respondent.

CONSENT DECISION WITH RESPECT TO CARTER-KIRCHHOFF FEED YARD AND BOB CARTER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Carter-Kirchhoff Feed Yard, Inc., hereinafter referred to as the corporate respondent, is a Texas corporation with its principal place of business at Plainview, Texas. Its business mailing address is 1503 West 5th Street, Plainview, Texas 79072.

2. At all times material herein corporate respondent was:

(a) Engaged in the business of conducting and operating a custom feed lot;

(b) Engaged in the business of a dealer buying and selling in commerce livestock either for its own account or as the agent of the vendor or purchaser; and

(c) Not registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. Bob Carter, hereinafter referred to as the individual respondent, is an individual whose business mailing address is 1503 West 5th Street, Plainview, Texas 79072.

4. At all times material herein individual respondent was:

(a) Owner of 32 of 422 outstanding shares and operator of corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent; and

(c) A dealer within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents, directly or through any corporate or other device, in connection with their business as a dealer or market agency subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks which remit the net proceeds due owners of livestock sold by respondents without having and maintaining sufficient funds to pay such checks upon presentment;

2. Failing to remit to the owners of livestock sold by respondents the net proceeds due such owners;

3. Using proceeds due to the owners of livestock for purposes of their own or for any purpose other than the prompt remittance of such proceeds to the owners; and

4. Selling livestock on behalf of their feedlot customers without the prior consent of such customers.

The corporate respondent shall post a bond for the protection of users of its services. The amount of the bond shall be determined by dividing the total dollar value of livestock sold during the preceding business year for the accounts of others by 130. The amount so determined shall be increased to the next multiple of $5,000. The bond shall contain the following clauses:

> (1) If the said principal shall pay when due to the person or persons entitled thereto the purchase price of all livestock purchased by said principal for the account of others, and if the said principal shall safely keep and properly disburse all funds, if any, which come into his hands for the purpose of paying for livestock purchased for the accounts of others; and
>
> (2) If the said principal shall pay when due to the person or persons entitled thereto the gross amount, less lawful charges, for which all livestock is sold for the accounts of others by said principal.
>
> Then this bond shall be null and void, otherwise to remain in full force and effect.

The Administrator of the Packers and Stockyards Administration may attach such other terms, conditions and limitations as are appropriate for bonds required of dealers and packers under the Packers and Stockyards Act, 1921, as amended.

The corporate respondent shall establish and maintain a custodial account which conforms to the requirements set forth in section 201.42 of the regulations (9 CFR § 201.42)) pertaining to custodial accounts to be maintained by market agencies selling on commission.

In accordance with section 312(b) of the Act, the corporate respondent and individual respondent are assessed jointly and severally a civil penalty of one hundred thousand dollars ($100,000.00), with the proviso that the civil penalties will be waived if full restitution is made to the parties named in paragraph II(a) of the complaint within 90 days of the entry of this order.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: JOHNNY MERRIWETHER. P&S Docket No. 6648. Decided April 4, 1986.

William J. Weber, Administrative Law Judge.
Peter Train, for complainant.
For respondent, Kpro se.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Johnny Meriwether, hereinafter referred to as the respondent, is an individual whose mailing address is Route 2, Box 100 JM, Rusk, Texas 75785.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis. This registration has been inactive since July 15, 1983.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Merriwether, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Hundred Dollars ($300.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: TOP-LINE PACKING CO. INC., VERN SLAGH and WADE SLAGH, P&S Docket No. 6554. Decided February 20, 1986.

William J. Weber, Administrative Law Judge.
Ben Bruner, for complainant.
Pro se, for respondent.

DECISION AND ORDER WITH RESPECT TO VERN SLAGH AND WADE SLAGH UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents Vern Slagh and Wade Slagh have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing as they pertain to respondents Vern Slagh and Wade Slagh, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Top-Line Packing Co., Inc., hereinafter referred to as the corporate respondent, is a corporation whose business mailing address is 3061 Shaffer Road, S.E., Grand Rapids, Michigan 49508.

(b) The corporate respondent at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(c) Vern Slagh and Wade Slagh, hereinafter referred to as the individual respondents, are individuals whose business mailing address is 3061 Shaffer Road, S.E., Grand Rapids, Michigan 49508.

(d) The individual respondents at all times material herein were:

(1) President and Vice-President, respectively, of the corporate respondent;

(2) Owners of 100% of the outstanding stock of the corporate respondent; and

(3) Jointly responsible for the direction, control and management of the corporate respondent.

(e) The individual respondents at all times material herein were packers within the meaning of and subject to the provisions of the Act.

2. The corporate respondent, under the direction, control and management of the individual respondents, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the Complaint and Notice of Hearing, issued checks in purported payment for the purchase of livestock, which checks were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay the checks when presented.

3. The corporate respondent, under the direction, management and control of the individual respondents, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the Complaint and Notice of Hearing and also on or about the dates and in the transactions set forth in Paragraph III of the Complaint and Notice of Hearing, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. § 192(a)).

By reason of the facts found in Finding of Fact 3 herein, respondents have wilfully violated sections 202(a) and 409(a) of the Act (7 U.S.C. §§ 192(a), 228b(a)).

ORDER

Respondents Vern and Wade Slagh, individually or as officers, agents or employees of respondent Top-Line Packing Co., Inc., directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented; and

2. Failing to pay, when due, for livestock purchases.

In accordance with section 203(b) of the Act (7 U.S.C. # 193(b), the individual respondents are jointly and severally assessed a civil penalty in the amount of Five Thousand Dollars ($5,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR # 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 7, 1986.—Ed.]

In re: SCHEPMANN CATTLE CO. P&S Docket No. 6580. Decided February 24, 1986.

John A. Campbell, Administrative Law Judge.
Roberta Swartzendruber, for complainant.
For respondent, *pro se.*

DECISION AND ORDER UPON ADMISSION OF FACT BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Schepmann Cattle Co., hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Kansas, whose principal place of business is located in Claflin, Kansas. Respondent's business mailing address is 217 B Street, Box 363, Claflin, Kansas 67525.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for its own account, and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail on May 15, 1985, that $65,000.00 surety bond it maintained to secure the performance of its livestock obligations under the Act was being terminated on June 12, 1985. Respondent was further notified that if it continued its livestock operations under the Act without providing adequate bond coverage or its equivalent, it would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for its own account and the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Schepmann Cattle Co., its officers, directors, agents and employees, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until it complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that it is in full

compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Thousand Dollars ($3,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 7, 1986.—Ed.]

In re: ENSHALLAH CATTLE COMPANY, INC., A.A. "BUD" CERVANTES III, and DWIGHT JEFCOAT. P&S Docket No. 6622. Decided April 8, 1986.

John A. Campbell, Administrative Law Judge.
Dennis Becker, for complainant.
For respondent, *pro se*.

CONSENT DECISION WITH RESPECT TO ENSHALLAH CATTLE COMPANY, INC., AND A.A. "BUD" CERVANTES, III

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Enshallah Cattle Company, Inc., and A.A. "Bud" Cervantes, III, admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Enshallah Cattle Company, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated under the laws of the State of Mississippi, with its principal place of business in Poplarville, Mississippi. The business mailing address of the corporation is P.O. Box 209, Poplarville, Mississippi 39470.

2. Corporate respondent is, and at all times material herein was engaged in the business of buying and selling livestock in commerce for its own account.

3. A.A. "Bud" Cervantes III, is an individual whose business address is Route 2, Carriere, Mississippi 39426.

4. A.A. "Bud" Cervantes is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock for his own account;

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account;

(c) President/Director of the corporation; and

(d) Jointly responsible for the direction, management and control of the corporate respondent with Dwight Jefcoat.

CONCLUSIONS

Respondent Enshallah Cattle Company, Inc., and respondent A.A. "Bud" Cervantes, III, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Enshallah Cattle Company, Inc., its successors, officers, directors, agents and employees, directly and through any corporate or other device, and respondent A.A. "Bud" Cervantes III, his agents or employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds to pay such checks upon presentment;

2. Failing to pay, when due, for livestock purchases;

3. Failing to pay for livestock purchases; and

4. Engaging in business in any capacity for which bonding is required under the Act without having and maintaining an adequate bond or bond equivalent.

Respondent Enshallah Cattle Company, Inc. and respondent A.A. "Bud" Cervantes, III, shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in any business in which they are subject to the Packers and Stockyards Act, including purchases invoices, accounts of sale, scale tickets, contracts, agreements, livestock advances, health records, freight bills, feed bills, load make-up records, worksheets, records of accounts payable, inventory records, a general ledger, a cash receipts journal, and a cash disbursements journal.

The corporate respondent is prohibited from operating subject to the Act for a period of six months and thereafter until such time as it complies fully with the registration and bonding requirements under the Act and the regulations. When the corporate respondent demonstrates that it is in full compliance with such registration and bonding requirements, a supplemental order will be issued in this proceeding terminating this prohibition.

Respondent A.A. "Bud" Cervantes is suspended as a registrant for a period of six months and thereafter until he complies fully with the bonding requirements under the Act and the regulations. When respondent Cervantes demonstrates that he is in full compliance with such registration and bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: KENNETH DEE SORRELS. P&S Docket No. 6590. Decided February 24, 1986.

Dorothea A. Baker, Administrative Law Judge.
Ken Vail, for complainant.
For respondent, *pro se*.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in

the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Kenneth Dee Sorrels, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 131, Atkins, Arkansas 72823.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

2. The Packers and Stockyards Administration notified respondent on June 5, 1985, that the $10,000.00 trust fund agreement he maintained to secure the performance of his livestock obligations under the Act was inadequate and that it was necessary to increase such trust fund agreement to $20,000.00. Respondent failed to increase his trust fund agreement. Respondent was notified on July 2, 1985, that his trust fund agreement would terminate on August 1, 1985, and that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a market agency buying livestock in commerce on a commission basis, without maintaining bond coverage or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Kenneth Dee Sorrels, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 10, 1986.—Ed.]

In re: RALPH B. SHAW. P&S Docket No. 6627. Decided February 25, 1986.

John A. Campbell, Administration Law Judge.
Roberta Swartzendruber, for complainant.
For respondent, *pro se.*

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Ralph B. Shaw, hereinafter referred to as the respondent, is an individual whose business mailing address is Route #5, Box 294, Athens, Alabama 35611.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail on July 9, 1985, that the $35,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was being terminated on July 31, 1985. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account and the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Ralph B. Shaw, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Eight Hundred Dollars ($1,800.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 10, 1986.—Ed.]

In re: ROBERT MCCORNACK and RANDY CROOK. P&S Docket No. 6683. Decided April 10, 1986.

John A. Campbell, Administrative Law Judge.
Jory M. Hochberg, for complainant.
For respondent, *pro se.*

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Robert McCornack, hereinafter referred to as respondent McCornack, is an individual whose business mailing address is Box 410, Ringling, Oklahoma 73456.

(b) Randy Crook, hereinafter referred to as respondent Crook, is an individual whose business mailing address is Box 410, Ringling Oklahoma 73456.

(c) Respondents McCornack and Crook, at all times material herein, were doing business as Ringling Livestock Auction, a partnership or joint venture, and in that capacity were:

(1) Engaged in the business of conducting and operating the Ringling Livestock Auction stockyard, a posted stockyard subject to the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as market agencies to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decison, such decision will be entered.

ORDER

Respondents McCornack and Crook, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondents as compensation for services rendered or for other lawful marketing charges;

3. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;

4. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

5. Issuing checks to owners or consignors of livestock in payment of the net proceeds due from the sale of their livestock without having sufficient funds on deposit and available in the account upon which they are drawn to pay such checks when presented; and

6. Failing to remit to the owners or consignors of livestock, when due, the net proceeds derived from the sale of their livestock.

Respondents McCornack and Crook are suspended as registrants under the Act for a period of twenty eight days and thereafter until they demonstrate that the deficit in the custodial account has

been eliminated. When respondents demonstrate that the deficit in the custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the twenty eight day period of suspension. Respondents acknowledge and agree that during the initial twenty eight day period of their suspension, they are prohibited from acting as employees or agents of any dealer or market agency subject to the Act, or from acting as a packer-buyer subject to the Act.

The provisions of this order shall become effective on the day it is filed.

Copies of this decision shall be served upon the parties.

In re: YUMA MEAT CO. INC., RICHARD LISKA and FRED LUECK. P&S Docket No. 6636. Decided April 11, 1986.

Edward H. McGrail, Administration Law Judge.
Roberta Swartzendruber, for complainant.
Pro se, for respondent.

CONSENT DECISION WITH RESPECT TO RICHARD LISKA

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Richard Liska admits the jurisdictional allegations in paragraph II of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Richard Liska, hereinafter referred to as respondent Liska, is an individual whose business mailing address is 4647 Gloria, Prescott, Arizona 86301.

2. Respondent Liska, at all times material herein, was:

(a) President and Manager of the corporate respondent;

(b) Owner of 50% of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent; and

(d) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent Liska having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Liska, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented; and

2. Failing to pay, when due, the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Liska is assessed a civil penalty of One Thousand Dollars ($1,000.00).

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon the respondent.

Copies of this decision shall be served upon the parties.

In re: KATHY JONES. P&S Docket No. 6671. Decided April 11, 1986.

William J. Weber, Administrative Law Judge.
Eric Paul, for complainant.
For respondent, *pro se*.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision pro-

visions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Kathy Jones, hereinafter referred to as the respondent, is an individual doing business as K Cattle Company. Respondent's principal place of business is located in Camilla, Georgia, and her business mailing address is Route 1, Bainbridge Highway, Camilla, Georgia 31730.

2. The respondent, at all times material herein, was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for her own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for her own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Kathy Jones, her agents and employees, directly or through any corporate or other device, in connection with her activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, for livestock purchased; and

3. Failing to pay for livestock.

The respondent is suspended as a registrant under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration a supplemental order may be issued terminating this suspension at any time after the expiration of 30 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided fur-

ther that the suspension of respondent shall not constitute a bar on her employment by any other registrant under the Act after the completion of the first 30 days of the suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: H.J. KEITH, JR., and PEARSALL LIVESTOCK MARKET, INC. P&S Docket No. 6491. Decided April 14, 1986.

William J. Weber, Administrative Law Judge.
Peter Train, for complainant.
For respondent, *pro se.*

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). The complaint was subsequently amended to add an additional party. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the amended complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations,waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. H. J. Keith, Jr., hereinafter referred to as the individual respondent, is an individual whose address is P. O. Box 1049, Pearsall, Texas 78061.

2. The individual respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Pearsall Livestock Market stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for his own account; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis in commerce.

3. Pearsall Livestock Market, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated under the laws of the State of Texas, with its principal place of business in Pearsall, Texas. The corporate respondent's business mailing address is P.O. Box 1049, Pearsall, Texas 78091.

4. The corporate respondent is:

(a) Engaged in the business of conducting and operating the Pearsall Livestock Livestock Market stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for his own account; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis in commerce.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent H. J. Keith, Jr. and Pearsall Livestock Market, Inc., their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for purposes other than the payment of net proceeds to the owners, consignors or shippers of such livestock and the payments of amounts due respondents for lawful marketing charges;

4. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented;

5. Issuing drafts in payment for livestock without having or maintaining sufficient funds on deposit and available to pay such drafts when presented;

6. Failing to honor drafts, drawn and issued in payment for livestock, when presented for payment;

7. Failing to pay, when due, the full purchase price for livestock;

8. Failing to pay the full purchase price for livestock; and

9. Issuing drafts which are not checks in payment for livestock without obtaining, prior to the transaction, the express written consent of the sellers that payment may be made by such draft.

Respondents are suspended as registrants under the Act for a period of three (3) months, and thereafter until such time as they demonstrate that the shortage in their custodial account for shippers' proceeds has been eliminated. When respondents demonstrate that the shortage in their custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the three month period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: STEVE A. MICKELSON. P&S Docket No. 6566. Decided February 24, 1986.

Edward H. McGrail, Administrative Law Judge.
Kenneth Vail, for complainant.
For respondent, *pro se*.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the re-

spondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Steve M. Mickelson, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 2, Box 284A, Minong, Wisconsin 54849.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and the accounts of others; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. (a) As of March 28, 1985, the respondent's current liabilities exceeded his current assets. As of that date, the respondent had current liabilities in the amount of $124,962.51 and current assets in the amount of $300.00, resulting in an excess of current liabilities over current assets of $124,662.51.

(b) The respondent's current liabilities presently exceed his current assets.

3. The respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased livestock and in purported payment for such livestock, issued checks which were returned unpaid by the bank on which they were drawn. Certain of the checks were returned because respondent did not have sufficient funds on deposit and available in the account on which they were drawn to pay such checks when presented and others because the account had been closed.

4. (a) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of April 17, 1985, there remained unpaid a total of $114,277.78 for such livestock purchases.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the financial condition of the respondent does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts alleged in Findings of Fact 3 and 4 herein, the respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Steve M. Mickelson, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the accounts upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of six (6) months, and thereafter until such time as he demonstrates that his financial condition meets the requirements of the Act, that is, that his current assets exceed his current liabilities. When the respondent demonstrates that his current assets exceed his current liabilities, a supplemental order will be issued in accordance with the terms of this decision, terminating the suspension after the expiration of the six (6) month period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 14, 1986.—Ed.]

In re: FARMERS LIVESTOCK AUCTION, INC. P&S Docket No. 6266. Decided April 15, 1986.

Order dismissing appeal.

The Judicial Officer dismissed respondent's appeal at respondent's request, making Chief Judge Campbell's initial decision the final Decision and Order in the proceeding.

Donald Campbell, Judicial Officer.
Jory Hochberg, for complainant.
Gerard Eftink, Kansas City, MO, for respondent.

DECISION AND ORDER DISMISSING APPEAL

Pursuant to a conference telephone call between the Judicial Officer and attorneys for complainant and respondent, respondent requests that its appeal be dismissed. Accordingly, the appeal should be dismissed, with the initial Decision and Order of the ALJ becoming the final Decision and Order of the Secretary, with an appropriate change in the effective dates of the provisions in the order.

ORDER

Pursuant to its request, respondent's appeal is dismissed.

The initial Decision and Order filed in this proceeding on November 14, 1985, shall become the final Decision and Order of the Secretary, except that the effective date of the cease and desist provisions of the order shall be the day after service of this order upon respondent, and the suspension period shall begin on April 27, 1986.

In re: FARMERS LIVESTOCK AUCTION, INC. P&S Docket No. 6266. Decided November 14, 1985.

Dealer & Market Agency—Custodial account, failure to use and maintain properly—Guaranteeing prices to consignors—Providing free or reduced transportation costs to consignors—Suspended as a registrant.

Barbara S. Harris, for complainant.
Gerard D. Eftink, Kansas City, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, hereafter referred to as the "Act",) instituted by a complaint filed on February 23, 1984.

The complaint alleges that the respondent willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 CFR § 201.42), in that respondent failed to maintain and use properly its custodial account for shippers'

proceeds. The complaint also charged respondent with willfully violating sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.64 of the regulations (9 CFR § 201.64) by guaranteeing certain consignors of livestock the minimum price they would receive from the sale of their livestock at the stockyard. A third allegation charged that respondent willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) by providing free or reduced trucking of livestock to consignors.

Respondent filed an answer on March 6, 1984, admitting the jurisdictional allegations of the complaint, but denying each of the substantive allegations of the complaint. On May 9, 1985, the parties filed stipulations wherein the respondent admitted the factual allegations of the complaint and stipulated to the authenticity and admissability of complainant's exhibit numbers 1–47.

An oral hearing was held on May 15, 1985, in Fort Smith, Arkansas. Respondent was represented by Gerard D. Eftink, Esquire, Kansas City, Missouri. Complainant was represented by Barbara S. Harris, Office of the General Counsel, United States Department of Agriculture. At the close of the hearing, the time was set for the filing of briefs.

FINDINGS OF FACT

1. Farmers Livestock Auction, Inc., hereafter referred to as the respondent, is a corporation with its principal place of business located at Springdale, Arkansas. Its business mailing address is 1301 East Emma Avenue, Springdale, Arkansas 72764.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Farmers Livestock Auction, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis, and as a dealer to buy and sell livestock for its own account.

3. Mr. Harold Sargent is the president of Farmers Livestock Auction, Inc.

4. *Custodial Account*

Market agencies are required to establish and maintain an account in which are placed funds received from the sale of consigned livestock. Such account must be maintained apart from the market agency's other accounts, as a separate bank account and trust fund.

Such account may be used only to pay the livestock sellers and to reimburse the market for its lawful marketing charges.

All funds received from the sale of consigned livestock are deposited directly to the custodial account. The market agency is required to reimburse that account by the close of the next business day for livestock sold to owners, officers, agents, employees, and anyone to whom the market has extended credit. The market agency is required to reimburse that account within seven days of the sale date for any uncollected proceeds receivable.

A market agency is required to maintain a custodial account because such agency sells livestock on commission for others. It receives funds from the sale of livestock, which are proceeds due to the livestock sellers. The custodial account is established so that such funds are protected for the benefit of the livestock sellers, as trust funds.

If the account is not properly maintained there will be insufficient funds in the account to pay the livestock sellers. Funds not properly maintained in the account lose their trust nature, and are not available for the benefit of the livestock seller, in the event of a financial failure of the market agency. Where the market agency has the funds properly protected, as trust funds in the custodial account, a lending bank has no right of offset against those funds, since it is a trust account. Custodial funds are protected by the federal deposit insurance corporation for the full limits of the insurance coverage for each individual consignor. In other words each individual consignor, who has funds in that account is protected to the limits of $100,000.00, FDIC insurance.

When the market agency deposits its proceeds from a sale to its general account, rather than the custodial account, the funds are not protected as trust funds for the benefit of the livestock sellers, and lose the full benefits of the FDIC insurance.

The market agency is required to reimburse the custodial account for its owners, officers, and employees' purchases by the close of the next business day, rather than in seven days, as other buyers, because they are generally subject to the provisions of the Packers and Stockyard Act and subject to the payment requirements by section 409 of the Act. (7 U.S.C. 228 b). Further, such persons are involved with the market itself, and there is no need to allow additional time to collect the funds for the custodial account.

On the other hand, the market agency has seven days to reimburse the account for uncollected funds in order to give the market the opportunity to collect the funds from the buyer, rather than reimbursing the account from its own funds. (TR 9-12).

5. Prior to August 30, 1982, regulations were in effect which required that a market agency deposit to its custodial account on or before the third day after the sale of consigned livestock an amount equal to all uncollected proceeds receivable. The effect of this regulation was to require a market agency to borrow significant sums of money to put into the custodial account to cover uncollected proceeds. A task force, chaired by Mr. Harold Davis and composed of other employees of Complainant and attorneys from the Office of General Counsel reviewed this regulation along with others, and in a task force report made the following observations:

> "The current requirements of section 201.42 that market agencies establish and maintain a separate account designated as a custodial account for shippers' proceeds were reviewed at length by the task force. All of the task force members were convinced of the necessity and reasonableness of a custodial account requirement. The task force members were of the singular view, based upon their experiences with the marketing of livestock through stockyards and auction markets, that the primary basis for the protection afforded by custodial or trust accounts is the *requirement that market agencies deposit to the account, directly and as soon as possible after receipt, the proceeds from the sale of consigned livestock.* The principles that *each payment made by a buyer for livestock is a trust fund, and that funds deposited into the custodial account are also trust funds* are fundamental to this protection. The *task force does not recommend any change in these concepts.*
>
> We are also of the opinion that market agencies must be required to reimburse the custodial account, at some point in time, in the amount of the *uncollected receivables.* Our discussions focused on making a determination as to the appropriate and reasonable time to require such reimbursement. The task force concluded that a market agency should be allowed a period of *7 days following the sale of consigned livestock within which to reimburse the account for uncollected receivables.* We were acutely aware in formulating this recommendation of two factors. The first is our firm conviction that it is necessary to have a reimbursement requirement to afford a reasonable measure of protection to consignors. The second factor is the current high cost of borrowed money.

We do not believe a 7-day period would significantly diminish the level of protection of consignors' funds. The recommended 7-day period gives market agencies adequate time to collect from the buyers of consigned livestock. Thus our recommendation, if adopted, should reduce substantially the amount of funds market agencies must, under current requirements, either maintain on hand or borrow in order to reimburse the account. These savings will reduce the cost of doing business, or alternatively will be released for new investment. We believe the savings can be significant for small businesses and for the industry as a whole.

If a market agency chooses to extend credit to its buyers, then it should *continue to be required to reimburse the account by the close of the next business day.* We believe strongly that consignors should not be made to bear the risks associated with such extensions of credit. . . . (Emphasis added)"

6. Pursuant to this recommendation, the regulation was changed, effective August 30, 1982, so that market agencies thereafter were allowed seven days in which to put money into the custodial account to cover uncollected receivables. 9 CFR 201.42.

7. On or about September 16, 1982, Jack Bellew, Regional Supervisor of the Packers and Stockyards Administration, sent a letter to respondent, which respondent received. That letter read as follows:

Dear Sirs:

Section 201.42 of the regulations issued under the Packers and Stockyards Act, 1921, was amended effective August 30, 1982. This regulation sets forth the current requirements for the establishment and maintenance of custodial accounts for shippers' proceeds.

The principle changes in the regulation:

1. Provide for reimbursement of the custodial account for uncollected proceeds within 7 calendar days instead of 3 business days as was previously required;

2. Provide for maintenance of custodial funds in interest-bearing savings accounts as well as certificates of deposit (the savings account or certificate of deposit must be in the same bank in which the custodial account is maintained and the market agency must maintain sufficient funds in the custodial account to pay all checks as they are presented);

3. Clarify the requirement that the proceeds received be deposited directly to the custodial account unless the account has been reimbursed in full for the uncollected proceeds; and

4. Eliminate the net method of handling custodial funds.

A copy of the amended regulation is enclosed for your information. If you have any questions, please feel free to contact this office. (Rx. 1)

8. In the spring 1983, Ms. Loretta Bailey, an auditor with the Packers and Stockyards Administration's Memphis, Tennessee, Regional Office, conducted an audit of the respondent's business records. Ms. Bailey's analysis of respondent's custodial account for shippers' proceeds revealed that as of May 3, 1983, respondent had a shortage in its custodial account in the amount of $9,764.92. As of that date, respondent had proceeds due shippers in the amount of $0.30 and issued and outstanding custodial account checks in the amount of $237,742.39, and had, to offset the outstanding checks, balances in its custodial bank accounts totalling $195,460.61, no deposits in transit or proceeds on hand, and current proceeds receivable in the amount of $32,517.16.

9. An analysis of respondent's general account as of May 3, 1983, revealed that respondent had insufficient funds in that account on that date to reimburse the custodial account for its shortage. As of May 3, 1983, respondent's general account had a balance per bank statement of $3,140.11, and outstanding checks totalling $46,253.15, resulting in a shortage of $43,113.04.

10. As of March 29, 1983, respondent had a shortage in its custodial account in the amount of $62,482.85. As of that date, respondent had issued and outstanding custodial account checks in the amount of $335,980.43, and had, to offset the outstanding checks, balances in its custodial bank accounts totalling $255,871.94, no deposits in transit, and current proceeds receivable in the amount of $17,625.64.

11. An analysis of respondent's general account as of March 29, 1983, revealed that respondent had insufficient funds in that ac-

count on that date to reimburse the custodial account for its shortage. As of March 29, respondent's general account had a balance per bank statement of $92,658.20, and outstanding checks totalling $240,935.67, resulting in a shortage of $148,277.47.

12. The shortages in respondent's custodial account described above were caused in part by the failure of respondent to deposit in its custodial account, within the respective time prescribed by the regulations an amount equal to the proceeds from purchases of consigned livestock by Harold Sargent, respondent's president.

13. The deficiencies in the custodial account were also caused by respondent's deposit to its general account of sale proceeds which should properly have been deposited immediately to its custodial account.

14. Respondent, during the period March 29, 1983, through May 3, 1983, failed to maintain and use properly its custodial account for shippers' proceeds thereby endangering the faithful and prompt accounting therefor and the payment of the portions thereof due the owners and consignors of livestock.

15. On December 9, 1969, the Judicial Officer of the United States Department of Agriculture issued a consent order against the respondent (*In re* Farmers Livestock Auction, Inc., P. & S. Docket No. 4240). The respondent was ordered, *inter alia*, to cease and desist from (1) using funds received as proceeds from the sale, in commerce, of livestock handled on a commission basis for purposes of its own and purposes other than the remittance of net proceeds to shippers; (2) using funds received as proceeds for the sale, in commerce, of livestock handled on a commission basis in such manner as to endanger or impair the faithful and prompt accounting therefor and payment of the portions thereof due owners and consignors of livestock; and (3) failing to maintain its custodial account for shippers' proceeds in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42).

16. Respondent, for the purpose of inducing certain owners to consign their livestock to the stockyard for sale, guaranteed to such owners or consignors of livestock the minimum price or prices which they would receive from the sale of their livestock at the stockyard, and in connection with such guarantees made payments or rebates to some consignors in addition to the net proceeds due from the sale of their livestock. A tabulation of consignors receiving price guarantees for their livestock is set forth in paragraph III of the complaint.

17. Respondent, for the purpose of inducing certain owners to consign their livestock to the stockyard for sale, provided free transportation of livestock or paid half the transportation charges

to certain consignors. A tabulation of consignors receiving free or reduced cost transportation of livestock is set forth in paragraph IV of the complaint.

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence, and it is concluded that respondent has willfully violated the Act in that respondent:

a. has failed to maintain and use properly its custodial account; and

b. has committed unfair and unjust discriminatory practices in guaranteeing prices and providing free or reduced transportation costs to consignors.

Further, the order proposed by complainant is appropriate in view of the record evidence and is issued herewith.

CUSTODIAL ACCOUNT

The evidence introduced at the oral hearing establishes that on May 3, 1983, and March 29, 1983, respondent had shortages in its custodial account in the amounts of $9,764.92, and $62,482.85 respectively. By allowing such shortages to arise, respondent failed to maintain and use properly its custodial account in violation of the Act and regulations.

Every market agency subject to the Packers and Stockyards Act is required to establish and properly maintain a Custodial Account for Shippers' Proceeds (9 CFR § 201.42(b)). Section 201.42(c) of the regulations (9 CFR § 201.42(c)) in effect at the time of the alleged violations gives detailed instructions on how to properly maintain a custodial account:

> (c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of

> the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

Respondent urges that the failure to properly use and maintain the custodial account resulted from a misunderstanding of the task force report (Finding 5) and of the letter sent to him by the Packers and Stockyards Administration (Finding 7) which summarized the changes in the custodial account regulation. Respondent asserts that after reading the letter, respondent thought it had seven days to reimburse the custodial account, and thereafter, began waiting until the Thursday or Friday following the Friday sale to make full reimbursement.

The letter is short, unambiguous and to the point. It makes no attempt to set out the new regulation in full, but states clearly that it is pointing out only the changes in the regulation. Where a provision of the regulation was left intact, it was not outlined in the letter. Since the provision of section 201.42, which requires that proceeds due from owners be deposited by the close of thenext business day was not specifically mentioned in the letter, it was unchanged by the amendment.

A copy of the amended regulation was enclosed with the letter and neither Mr. Sargent or Ms. Parsons, respondent's witnesses, could unequivocally state that the respondent did not receive such enclosure. The regulation states without qualification that proceeds due from owners must be deposited by the close of the next business day. By taking seven days, respondent succeeded in extending credit to itself.

Even under respondent's own view of the regulation, that it had seven days to reimburse the custodial account for uncollected funds, it was in violation. The evidence produced at the oral hearing established that respondent on two occasions took at least nine days to reimburse the custodial account. (Cx 3 p.2 and Cx 6 p.2). The teller's stamps show that the deposit to reimburse the custodial account for the April 29, 1983, sale was not delivered to the bank until May 9, 1983, and the deposit to reimburse the account for the March 25, 1983, sale was not made until April 4, 1983.

Complainant's exhibits numbered 1, 2, 4 and 5 reveal the reasons for the shortages in respondent's custodial account.

In the first instance, respondent consistently failed to deposit to its custodial account, in accordance with the regulations, amounts equal to the proceeds receivable due from Harold Sargent, its president and owner.

Under section 201.42(c) of the regulations, the respondent is required to reimburse the custodial account for its purchases or for the purchases of its owners or officers by the close of the next business banking day following the sale. Complainant's exhibits 1 (pages 1 and 7) and 4 (pages 1 and 8) show that contrary to the regulatory mandate, respondent failed to reimburse the custodial account for Mr. Sargent's purchases on the Mondays following the Friday sales. Thus, proceeds due from Harold Sargent for the sale date of April 29, 1983 were uncollected as of May 3, 1983 and proceeds due from him for purchases on March 25, 1983, remained uncollected on March 29, 1983.

The second reason for the shortages in respondent's custodial account was respondent's deposits to its general account of proceeds received from the sale of consigned livestock.

The Secretary has consistently held that the failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 is a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), as well as a violation of section 201.42 of the regulations (9 CFR § 201.42). *In re Arab Stock Yard*, 37 A.D. 293, 301-02, 310-02, 310-11 (1978); *aff'd* 582 F.2d 39(CA 5 1978); *In re Sechrist Sales Co.*, 36 A.D. 665, 666, 671-75 (1977); *In re Hardy*, 33 A.D. 1383, 1398-1406 (1974).

Further, the Secretary has determined time and again that a market agency's failure to make deposits to its custodial account in the manner and within the times prescribed in section 201.42 is an unfair and deceptive practice. "It is deceptive because shippers do not know that their money is being used to extend credit to buyers. It is unfair because it is using trust money for their own purposes (to extend credit to themselves and others). It creates a risk that the consignors will not be paid." *In re Hardy, supra*, 33 A.D. at 1400.

Respondent suggests that the concept of willfulness found in the case of *Leon Farrow and Knoke Livestock Buyers* v. *U.S.D.A.*, 760 F.2d 211 (8th Cir. 1985) be applied in this case. This argument is not persuasive.

Leon Farrow and Knoke Livestock Buyers, Inc., were registered dealers under the Act authorized to buy and sell livestock in commerce. The dispute centered around the sale of "pound cows" at the Algona Livestock Auction and Exchange in Algona, Iowa. Knoke and Farrow were regular buyers at the exchange. Complainant had alleged that the two entered and carried out an agreement not to compete against each other in the purchase of pound cows. 760 F.2d at 212.

The Court of Appeals set aside the Judicial Officer's suspension order stating:

> "We cannot sustain the JO's view that petitioners must have known their agreement was unlawful" 760 F.2d at 216.

The Court noted further at page 216:

> "We are mindful that nothing in 7 U.S.C. § 204, authorizing suspensions, "confines its application to cases of 'intentional and flagrant conduct' or denies its application in cases of negligent or careless violations." *Butz* v. *Clover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973). *Butz* was a case where the suspension order was based on violations committed in disregard of previous warnings, not present here. The Supreme Court also expressed doubt as to this court's premise that the Secretary's practice was to impose suspensions only in cases on international and flagrant conduct.
>
> Here, however, the JO's decision indicates that under Department policy the admittedly severe order is predicated on the violation being flagrant and serious.
>
> Although we think it the sounder view that the agreement between the two principal buyers at a small sale can be deemed an unfair practice, we have found no case on all fours."

The facts here and in *Farrow* are distinguishable. The latter case involved an agreement for the purchase of "pound cows" at a Livestock Auction. The present case involves the maintenance and proper use of the custodial account, a long standing regulatory requirement designed to protect the consignors of livestock. This requirement was not unknown to respondent.

A consent decision was issued against the respondent in 1969 for custodial account violations. Under the terms of the decision, respondent was ordered, *inter alia,* to cease and desist from failing to properly maintain its custodial account proceeds for its own purposes. (CX 46) It should also be noted that in September, 1982, respondent was notified by the Packers and Stockyards Administration of the August 30, 1982, changes in the custodial account regulations. (Finding 7) Despite its obvious awareness of the requirements of the regulations, however, respondent continued to deposit funds into the general account and to reimburse the custodial ac-

count for those deposits and its president's own purchases after the time set by regulations.

It must be concluded, therefore, that respondent's course of conduct with respect to the maintenance and use of its custodial account, as determined herein, constitutes a willful violation of the Act (7 U.S.C. §§ 208, 213(a)), and of the regulations (9 CFR § 201.42).

The definition of willfulness is well settled. A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *Butz* v. *Glover Livestock Commission Co.,* 411 U.S. 182 (1973). The Supreme Court's position in *Glover* has been adopted by the Judicial Officer and is controlling in cases brought under the Packers and Stockyards Act. *In re Shatkin,* 34 Agric. Dec. 296 (1975). Thus, it is the standard to be employed in this case notwithstanding respondent's reliance upon cases decided under other statutory programs, or the holding in *Farrow.*

Respondent asserts that there was no likelihood of injury to consignors and, therefore, the shortages were merely technical. This contention must fail, however, as proof of likelihood of injury is not required in a custodial account case.

With respect to respondent's bank credit arrangements, decisions under the Act and regulations have held that a line of credit or over-draft protection extended by a bank is no defense to a charge that a custodial account for shippers' proceeds is not being maintained properly. *In re Sechrist Sales Co., supra,* 36 A.D. at 668, 670–75. A line of credit does not provide the consignors of livestock and respondent's creditors the protection required by the Act and regulations. The relationship between Mr. Sargent and the First National Bank of Springdale may be cordial and longstanding, but as Mr. Parsons, the bank president, testified, the line of credit was subject to unilateral termination by the bank at his discretion.

Nor is respondent's assertion that no consignor was harmed by the shortages a meritorious defense. A consistent line of precedent has held that it is the duty of the Packers and Stockyards Administration to prevent potential injury by stopping unlawful practices in their incipiency. *Farrow and Knoke* v. *U.S.D.A., supra,* 760 F.2d at 215; *In re Miller,* 33 A.D. 53, 62, *aff'd sub. nom.* 498 F.2d 1088 (CA 5, 1974). As Harold Davis of the Packers & Stockyards Administration testified, the danger is ever present that a consignor will not get paid. (Tr. 10–12).

Guaranteed Prices to Certain Consignors, and Reduced Transportation Costs to Certain Consignors

Respondent guaranteed to certain consignors of livestock the minimum price they would receive from the sale of their livestock and in connection with such guarantees made payments to some consignors in addition to the net proceeds due from the sale of their livestock. Documentation of the transactions is found in complainant's exhibit numbers 8 through 19 representing the period of February 11, 1983, through May 13, 1983. Those exhibits show that of the individuals who received price guarantees, some received no money in excess of the proceeds due from the sale because the livestock was sold for an amount equal to or greater than the guarantee (CX 8, 9, 10, 12, 14, 16), while other consignors received additional compensation ranging from a low of $5.66 (CX 18) to a high of $143.48 (CX 13).

The Packers and Stockyards Administration has for many years considered this practice to be violative of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and has issued a regulation specifically prohibiting the practice. That regulation provides that:

> No market agency engaged in the business of selling livestock on a commission basis shall guarantee the price at which consigned livestock will be sold.

9 CFR § 201.64.

Harold Davis, Director of the Livestock Marketing Division of the Packers and Stockyards Administration, testified (Tr. 13–14) concerning why his agency considers price guaranteeing to be an unfair trade practice.

> The Packers and Stockyards Administration feels that there are certain basic problems with price guaranteeing. The first being that this is a competitive practice which is, in our view, unfair competition for other markets, in that small markets may not be able to afford to make these guarantees and then be able to stand behind them if the market drops.
>
> The Packers and Stockyards Administration also considers price guaranteeing to be a discriminatory practice, in that it's offers to certain consignors and not to all consignors and in that guarantee is not something that's offered to all consignors on an equal basis but rather something that's negotiated and offered on whatever it takes to get the livestock shipped to their market and not on the basis of offering the service to all consignors on an equal basis. Price

> guarantees, in effect, are rebates on the commission or part of the commission that a consignor pays. This is an expense that the market incurs in doing business which is ultimately born by all the consignors and not just the consignors that receive a price guarantee.

As complainant contends, price guarantees are unjustly discriminatory regardless of whether or not they are offered to every consignor. There is no way to insure uniformity in the guarantees. For similar livestock, different consignors are likely to receive different guarantees, depending on what they negotiate. Further, when livestock fails to bring the guaranteed price, payments in the form of rebates are made to the consignor in the amount of the difference between the realized price and the guaranteed price. This payment will vary greatly between consignors, and as shown in CX 7, bears no relationship between the number of livestock consigned or the value of the livestock. The result of price guaranteeing is a chaotic situation in which some consignors receive no rebate while others receive rebates which vary greatly and at random. This is graphically illustrated in CX 20, an analysis of the price guarantee payments received by various consignors, which shows the variability of prices received for livestock and rebates received as a result of the guarantees.

Accordingly, respondent's practice of guaranteeing prices is an unfair and unjustly discriminatory practice in violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)).

Analogous to the question of guaranteed prices is the practice of offering free or reduced transportation costs to certain consignors. In connection with some consignments of livestock to the stockyard, respondent paid all or half of the transportation charges. This was done as an inducement to obtain consignments of livestock to respondent's stockyard. Documentation of the transactions is found in complainant's exhibit numbers 21 through 44. Those transactions are summarized in CX 21, which shows that in fourteen instances consignors were reimbursed for one half of their transportation expenses and in nine transactions other consignors were reimbursed for all of their transportation expenses.

Harold Davis explained that his agency considers providing free trucking to consignors to be unlawful for the same reasons that apply to price guaranteeing:

> Free trucking or reduced cost trucking is the same as price guaranteeing in that it is discriminatory between consignors. It's offered to certain consignors and not to others or its offered on an uneven basis to consignors. It's not of-

> fered on an equal basis to all consignors. So that it is unjustly discriminatory to the consignors. It is also considered to be unfair competition to competing markets and competing markets methods, in that the markets are competing on the basis of what gratuity they can offer to the consignor, rather than on the basis for the selling services and selling the livestock at the highest available bid in open competition.

TR. 15.

As the complainant correctly urges, the Packers and Stockyards Administration, considers free trucking unlawful for two reasons. The first reason is that it is an unfair method of competition which forces markets to compete on the basis of inducements rather than selling service, and places smaller markets at a competitive disadvantage. The second reason is that the provision of free trucking entails an unjust discrimination. In the present case, the discrimination occurs on one level because different consignors receive different "deals." Some have all of the trucking expenses paid, some have one half of their expenses paid, and others presumably receive no free trucking at all. On another level, the value of the free trucking varies among consignors, depending upon the distance of the haul. The net result is that, like in price guaranteeing, consignors receive rebates from the market in different amounts which vary in a random manner unrelated to the value of the livestock involved or the number of head consigned.

The Judicial Officer, adopting the conclusion of the administrative law judge in *In re Hardy*, 33 A.D. 1383, 1397 (1974), held:

> We conclude that providing free trucking to consignors as an inducement to consign livestock to a particular market is an unfair practice and willful violation of section 307 and 312(a) of the Act and discriminates against those consignors not given such free trucking as well as being an unfair and unjust practice against competing markets forcing them to give free trucking in order for them to "stay in the game".

Respondent cites several federal court cases in support of its contention that paying for trucking and guaranteeing prices do not violate the Act and regulations. However, these cases are not helpful to respondent, nor relevant to the issue here. Here, we are dealing with a seller of livestock, and auction markets are fiduciaries. They must treat all consignors fairly and equally. Some consignors got full trucking rebates and others only got half. Some consignors

received money as a result of respondent's guaranteed prices and others did not.

SANCTION

Complainant requests that the respondent be ordered to cease and desist from the practices discussed above, and that it be suspended for a period of twenty-eight days (4 sale days) and thereafter until the deficits in its custodial account are corrected. The proposed suspension is proper in the circumstances of this proceeding.

The seriousness of the violations committed, especially the improper handling of the custodial account, go to the very essence of a market agency's responsibilities and, because of the firm's prior cease and desist order, the custodial account violations alone would warrant the proposed term of suspension.[1]

Using custodial account funds for purposes of its own, guaranteeing prices to consignors and providing free trucking, demonstrate clearly that the respondent deliberately and willfully placed its interests ahead of its consignors and others in the livestock industry. Accordingly, respondent has willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and sections 201.42 and 201.64 of the regulations (9 CFR §§ 201.42, 201.64), as alleged in the complaint.

ORDER

Respondent Farmers Livestock Auction, Inc., its officers, directors, agents and employees, in connection with its operations subject to the Act, shall cease and desist from:

1. Failing to deposit in its Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of its own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondent as compensation for services rendered or for other lawful marketing charges;

3. Making such use or disposition of funds in its possession or control as will endanger or impair the faithful and prompt account-

[1] With respect to respondent's alleged shut-down in December 1984, the parties never reached an effective settlement agreement and, any purported shut-down on respondent's part was unilateral.

ing therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;

4. Failing to otherwise maintain its Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

5. Guaranteeing to the owner or consignor of livestock the minimum price which the consignor will receive for such livestock if consigned to respondent for sale on a commission basis; and

6. Providing free transportation, or transportation at less than its actual cost or value, of livestock consigned to respondent's stockyard.

Respondent is suspended as a registrant under the Act for 28 days and thereafter until it demonstrates that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated. When respondent demonstrates that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the 28 day period.

The provisions of this order shall become final and effective 35 days after service of this order on respondent, unless appealed within 30 days after service. (9 CFR §§ 1.145(a) and 1.142(c)).

Copies of this decision and order shall be served upon the parties.

In re: JIM ZEILER. P&S Docket No. 6645. Decided April 18, 1986.

Edward H. McGrail, Administrative Law Judge.
Edward Silverstein, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jim Zeiler, hereinafter referred to as the respondent, is an individual whose business mailing address is 735 Dry Gulch Road, Stevensville, Montana 59870.

2. The respondent is, and all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Jim Zeiler, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Hundred Fifty Dollars ($350.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: CARROLL LIVESTOCK MARKET, INC. P&S Docket No. 6598. Decided April 21, 1986.

Victor W. Palmer, Administrative Law Judge.
Ben Bruner, for complainant.
William Polking, Carroll IA, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Carroll Livestock Market, Inc., hereinafter referred to as the respondent, is a corporation whose mailing address is Highway 30 West, Carroll, Iowa 51401.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Carroll Livestock Market, Inc., stockyard, a posted stockyard subject to the Act.

(b) Engaged in the business of selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis and as a dealer, buying and selling livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, its agents and employees, directly or indirectly through any corporate or other device, in connection with its activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Weighing livestock at other than their true and correct weights;

2. Paying the sellers or consignors of livestock on the basis of false or incorrect weights;

3. Issuing scale tickets, purchase invoices, or other accounts of sale on the basis of false or incorrect weights; and

4. Failing to maintain and operate livestock scales owned or controlled by respondent in such a manner as to insure accurate weights and otherwise in strict conformity with the requirements of section 201.73–1 of the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty of Ten Thousand Dollars ($10,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: VIRGIL COTTRELL. P&S Docket No. 6679. Decided April 21, 1986.

Victor W. Palmer, Administrative Law Judge.
John J. Casey, for complainant.
For respondent, *pro se.*

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Virgil Cottrell, hereinafter referred to as the respondent, is an individual whose business mailing address is 4209 Isleta, S.W., Albuquerque, New Mexico 87105.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account.

CONCLUSIONS

The respondent having admitted the jurisdicional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Virgil Cottrell, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the accounts upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay for livestock.

The respondent is suspended as a registrant under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration a supplemental order may be issued terminating this suspension at any time after the expiration of 90 days upon demonstration by respondent that all livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the 90 day period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: STOCKYARDS DAIRY SALE, INC., STOCKYARDS BEEF SALE, INC., STOCKYARDS, INC., SAMUEL E. HUBBERT, CURTIS HENRY HUBBERT, and TOMMY SMITH d/b/a MAGNOLIA CATTLE CO. P&S Docket No. 6682. Decided April 24, 1986.

Victor W. Palmer, Administrative Law Judge.
Ben Bruner, for complainant.
For respondent, *pro se*.

CONSENT DECISION WITH RESPECT TO TOMMY SMITH d/b/a MAGNOLIA CATTLE CO.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Tommy Smith admits the jurisdictional allegations in paragraph I of the complaint as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Tommy Smith, hereinafter referred to as respondent Smith, is an individual doing business as Magnolia Cattle Company. His mailing address is Route 1, Box 326, Tupelo, Mississippi 38801.

2. Respondent Smith, at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account;

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account; and

(c) Employed as auctioneer for respondent Stockyards Beef, in which capacity he conducted auctions at the facilities of Tupelo Stockyard, Inc.

CONCLUSIONS

Respondent Smith having admitted the jurisdictional facts as they pertain to him, and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Smith, his agents and employees, directly or indirectly or through any corporate or other device, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

Respondent Smith shall keep and maintain accounts, records and memoranda which fully and accurately disclose the true nature of all transactions involved in his business subject to the Packers and Stockyards Act, including:

1. A general ledger of accounts showing assets, liabilities, income, expenses and net worth;

2. Copies of all accounts of sale, purchase and sale invoices, and scale tickets;

3. Copies of all checks, bank statements and deposit tickets;

4. Journals of cash receipts and disbursements, and purchases and sales; and

5. Monthly reconciliations of all bank accounts.

Respondent Smith is suspended as a registrant under the Act for a period of 60 days.

The provisions of this order shall become effective on the sixth day after service of this decision on respondent Smith.

Copies of this decision shall be served on the parties.

In re: THURMAN GUILOTT and JOE MACK SMITH. P&S Docket No. 6634. Decided April 25, 1986.

John A. Campbell, Administrative Law Judge.
Ben Bruner, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and con-

sent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Thurman Guilott and Joe Mack Smith, hereinafter referred to as the respondents, are partners doing business as Monk Cattle Company whose mailing address is P. O. Box 306, Poplarville, Mississippi 39470.

2. Respondents are, and at all times material herein were:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for their own account, and the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Guilott and Smith, their agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents are suspended as a registrant under the Act until such time as they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Three Hundred Fifty Dollars ($350.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: TOM DEMRY and CHARLES DEMRY d/b/a CENTERVILLE SALE Co. P&S Docket No. 6685. Decided April 25, 1986.

Dorothea A. Baker, Administrative Law Judge.
Ben Bruner, for complainant.
Sidney Drake, Centerville, Iowa, for respondent.

CONSENT DECISION AS TO TOM DEMRY

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the Respondents does not meet the requirements of the Act and that the Respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered as to Respondent Tom Demry only pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The Respondent Tom Demry admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Tom Demry hereinafter referred to as the Respondent, is an individual formerly doing business as Centerville Sale Co. The business address was Box 71, Centerville, Iowa 52544.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of conducting and operating the Centerville Sale Co. stockyard, a posted stockyard under the Act;

(b) Engaged in the business of buying and selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The Respondent having admitted the jurisdictional facts and having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Tom Demry, his agents and employees, directly or through any corporate or other device, in connection with his oper-

ations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations;

3. Issuing checks to any person in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented;

4. Failing to remit, when due, the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors; and

5. Failing to remit the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including (a) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (b) a current check register of all checks issued to consignors in remittance of the net proceeds from the sale of consigned livestock; (c) monthly reconciliations of all bank accounts; and (d) all invoices of sales.

Respondent Tom Demry is suspended as registrant under the Act for a period of 120 days and thereafter until such time as he demonstrates that he is solvent and that the deficiency in his Custodial Account for Shippers' Proceeds has been eliminated. When the Respondent demonstrates that he is solvent and that the deficiency in his Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 120 day period.

The provisions of this order shall become effective on the sixth day after service of this order on the Respondent.

Copies of this decision shall be served upon the parties.

In re: BUSHELLE CATTLE COMPANY, INC. P&S Docket No. 6639. Decided March 19, 1986.

Victor W. Palmer, Administrative Law Judge.
Roberta Swartzendruber, for complainant.
Joseph P. Smith, Dessert, Smith & Hunter, Park Rapids, Minnesota, for respondent.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United Stats Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Bushelle Cattle Company, Inc., hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Minnesota. Respondent's business mailing address is Route 2, Box 336, Gonvick, Minnesota 56644.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for its own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail on September 24, 1985, that the $10,000.00 surety bond it maintained to secure the performance of its livestock obligations under the Act was being terminated on October 22, 1985. Respondent was further notified

that if it continued its livestock operations under the Act without providing a $20,000.00 bond or its equivalent, it would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for its own account without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Bushelle Cattle Company, Inc., its officers, directors, agents and employees, directly or through any corporate or other device, in connection with its business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until it complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that it is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on April 26, 1986.—Ed.]

In re: ROBERT WAGNER, P&S Docket No. 6563. Decided April 30, 1986.

John A. Campbell, Administrative Law Judge.
Roberta Swartzendruber, for complainant.
Pierce & Pierce, Bushnell, Illinois, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Robert Wagner, hereinafter referred to as the respondent, is an individual whose business mailing address is 1601 East Jackson, Lotterman Trailer Park, Macomb, Illinois 61455.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Robert Wagner, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer while insolvent, *i.e.*, while his current liabilities exceed his current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account(s) upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions subject to the Act, including but not limited to: (a) a record of all cash receipts and disbursements; (b) copies of all accounts of sale and purchase invoices; and (c) a monthly reconciliation of his bank account including a list of all outstanding checks.

Respondent is suspended as a registrant under the Act for a period of 120 days and thereafter until he demonstrates that he is no longer insolvent. When respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 120 day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: GREENVILLE LIVESTOCK, INC., and W. BRYAN HARGETT. P&S Docket No. 6556. Decided March 17, 1986.

John A. Campbell, Administrative Law Judge.
Ben Bruner, for complainant.
Louis F. Foy, Jr., Brack & Foy, Trenton, North Carolina, for respondent.

SUPPLEMENTAL ORDER

On March 3, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondents as a registrant under the Act for seven (7) days and thereafter until respondents demonstrated that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated.

Respondents have now demonstrated that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 3, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: ROBERT E. STAFFORD and CHARLES R. STAFFORD. P&S Docket No. 6381. Decided March 27, 1986.

Peter Train, for complainant.
O. J. Taylor, for respondents.

Decision by Donald A. Campbell, Judicial Officer.

ORDER VACATING STAY AND SETTING EFFECTIVE DATE OF SUSPENSION

Judicial review of the order dated December 3, 1984, issued in the above-captioned case has been completed. Therefore the stay order of January 3, 1985 and the amended stay order of January 14, 1985, are hereby vacated. The suspension provision of the order dated December 3, 1984, shall become effective on the 15th Day after service of this order on respondents.

In re: BLACKFOOT LIVESTOCK COMMISSION CO. P&S Docket No. 6107. Decided April 4, 1986.

Donald Campbell, Judicial Officer.
Peter Train, for complainant.
Robert M. Cook, for respondent.

STAY ORDER

The suspension provisions of the order previously issued in this proceeding are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist provisions shall remain in effect.

In re: KENNETH DEE SORRELS. P&S Docket No. 6590. Decided April 15, 1986.

Dorothea A. Baker, Administrative Law Judge.
Kenneth Vail, for complainant.
For respondent, *pro se.*

SUPPLEMENTAL ORDER

On February 24, 1986, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act until such time as he fully complies with the bonding requirements of the Act and the regulations. This order was served upon respondent on March 6, 1986, and became effective on April 10, 1986. Respondent is now in compliance with the bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued February 24, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: SCHEPMANN CATTLE CO. P&S Docket No. 6580. Decided April 17, 1986.

John A. Campbell, Administrative Law Judge.
Roberta Swartzendruber, for complainant.
For respondent, *pro se.*

SUPPLEMENTAL ORDER

On February 24, 1986, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act until such time as it complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued February 24, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: RICHARD D. BAUMERT. P&S Docket No. 6586. Decided April 17, 1986.

Dorothea A. Baker, Administrative Law Judge.
Andrew Stanton, for complainant.
Isaac J. Tressler, for respondent.

SUPPLEMENTAL ORDER

On December 19, 1985, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations.

Respondent is now in compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued December 19, 1985, is terminated. The order shall remain in full force and effect in all other respects.

In re: TOM DEMRY and CHARLES DEMRY d/b/a CENTERVILLE SALE Co. P&S Docket No. 6685. Decided April 25, 1986.

Dorothea A. Baker, Administrative Law Judge.
Ben Bruner, for complainant.
Richard Schlegel II, Ottumwa, Iowa, for respondent.

ORDER OF DISMISSAL AS TO RESPONDENT CHARLES DEMRY

By reason of Complainant's Motion therefor, filed April 23, 1986, and for good cause shown, Respondent Charles Demry is dismissed as a party from this action.

Copies hereof shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: GEORGE HOWARD d/b/a/ THE PRODUCE Co. PACA Docket No. 2-7060. Decided March 4, 1986.

John A. Campbell, Administrative Law Judge.
Andrew Stanton, for complainant.
For respondent, *pro se.*

DECISION AND ORDER (CONSENT)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a Complaint filed on January 17, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period January 1985 through June 1985, Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices, or balances thereof, in the total amount of $206,562.07 for 63 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. George Howard, d/b/a The Produce Co., (hereinafter "Respondent"), is an individual whose mailing address is 11th State Farmers Market, Chattanooga, Tennessee 37402.

2. Pursuant to the licensing provisions of the Act, license number 850544 was issued to Respondent on January 24, 1985. This license is next subject to renewal on or before January 24, 1986.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period January 1985 through June 1985, Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices, or balances thereof, in the total amount of $206,562.07 for 63 lots of perishable agricultural commodities purchased, received and accepted in interstate commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order below is issued.

ORDER

Respondent's license is revoked.
This order shall become effective March 17, 1986.
Copies hereof shall be served upon the parties.

In re: H. B. PRODUCE, INC. PACA Docket No. 2-7084. Decided March 14, 1986.

Dorothea A. Baker, Administrative Law Judge.
Edward Silverstein, for complainant.
For respondent, *pro se*.

DECISION AND ORDER (CONSENT)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a Complaint filed on February 6, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period December 1984 through March 1985, Respondent failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $120,060.60 for 363 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. H. B. Produce, Inc., (hereinafter "Respondent") is a Massachusetts corporation whose mailing address is 17 Norrback Avenue, Worcester, Massachusetts 01606.

2. Respondent is not and has never been licensed under the PACA. Respondent, however, carried on the business of a commission merchant, dealer or broker as defined in Section 1 of the PACA (7 U.S.C. 499a), and was, therefore, subject to the licensing provisions of the PACA.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period December 1984 through March 1985, Respondent failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $120,060.60 for 363 lots of perishable agricultural commodities purchased, received and accepted in interstate and foreign commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order is issued.

ORDER

A finding is made that Respondent has committed wilful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall become effective March 24, 1986.

Copies hereof shall be served upon the parties.

In re: J.P. DANIEL PRODUCE, INC. PACA Docket No. 2-6963. Decided February 3, 1986.

Dorothea A. Baker, Administrative Law Judge.
Edward Silverstein, for complainant.
For respondent, *pro se*.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 23, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1984 through March 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 21 sellers, 32 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $203,514.55.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, J. P. Daniel Produce, Inc., is a corporation, whose address is 356-357 Hunts Point Terminal Market, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the Act, license number 821824 was issued to respondent on September 7, 1982, was renewed annually, presently is in effect, and was next subject to renewal on or before September 7, 1985.

3. As more fully set forth in paragraph 5 of the complaint, during the period November 1984 through March 1985 respondent purchased, received and accepted in interstate and foreign commerce, from 21 sellers, 32 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $203,514.55.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 32 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 400b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on March 26, 1986.—Ed.]

In re: WALTER GAILEY & SONS, INC. PACA Docket No. 2-6876. Decided April 8, 1986.

Failure to pay promptly for multiple produce transactions—License revoked

The Judicial Officer affirmed Judge Palmer's order revoking respondent's license for failure to pay promptly for about $1½ million of produce. The Bankruptcy Code does not bar the bringing of an administrative disciplinary action. There is no applicable statute of limitations. The argument that creditors will suffer if respondent's license is revoked is routinely rejected in PACA cases.

Edward Silverstein, for complainant.
Stephen A. Markus, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order on January 23, 1986, revoking respondent's license for failure to pay promptly 57 sellers and one

* *See generally* Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

consignor almost $1½ million for 320 lots of produce from October 1984 through March 1985. Much (or, more likely, most) of that amount remains unpaid to this date.

On March 3, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On March 28, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few trivial changes), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter referred to as the "Act", instituted by a complaint filed on July 8, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January through March 1985, respondent received and accepted 17 lots of vegetables, all being perishable agricultural commodities, on consignment, in interstate commerce, from one shipper, but failed to make full payment promptly of the net proceeds to that shipper in the total amount of $58,677.74. Further, it is alleged that during the period October 1984 through March 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 57 sellers, 303 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

promptly of the agreed purchase prices or balances thereof in the total amount of $1,404,570.70.

A copy of the complaint was served upon respondent, which filed an answer thereto in which it generally denied the material allegations in the complaint, admitted the allegations in the complaint regarding its bankruptcy filing, and stated several affirmative defenses. Complainant now has filed a motion for a decision generally based on respondent's admission in its bankruptcy proceedings.[1] Based upon these admissions, the precedent which this forum is bound to follow [2] requires that complainant's motion be granted.[3] Therefore, upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Walter Gailey & Sons, Inc., is a corporation, whose address is 4400 Woodland Avenue, Cleveland, Ohio 44104.

2. Pursuant to the licensing provisions of the Act, license number 206076 was issued to respondent on October 2, 1964, was renewed annually, presently is in effect, and is next subject to renewal on or before October 2, 1986.[4]

3. As more fully set forth in paragraph 5 of the complaint, during the period January through March 1985, respondent received and accepted, on consignment, in interstate commerce, 17 lots of vegetables, all being perishable agricultural commodities, but failed to make full payment promptly to one consignor of the

[1] Official notice is taken of the pleadings filed by respondent in this proceeding designated as Case No. B 85-399, U.S. Bktcy. Ct., N.D. Ohio.

[2] *See Fava & Company, Inc.*, 43 Agric. Dec. ___ (PACA Docket No. 2-6547, December 4, 1984) (Ruling on Certified Question).

[3] In affirmative defense, respondent claims that the complaint "fails to state a claim * * * upon which relief can be granted"; however such an assertion is wholly without merit. *See* 7 U.S.C. § 499h. Respondent also claims that the provisions of the Bankruptcy Code bar the bringing of this action. Such an assertion also is without merit. *In re Fresh Approach, Inc.*, 49 B.R. 494 (Bkrtcy N.C. Tex. 1985). Further, respondent's allegation that this action is barred by the "applicable statute of limitations" has no legal merit. *Melvin Beene Produce* v. *Agricultural Marketing Serv.*, 728 F.2d 347 (6th Cir. 1984). In addition, respondent claims that the shippers are barred from asserting any claim against it. Although stated as an affirmative defense, such a claim is irrelevant since the complainant is an official of the agency to which Congress has assigned the duty to administer the Act. *See* 7 U.S.C. § 499a(a). Respondent's last claim, that it should be allowed to reorganize under the Bankruptcy Code, is not a defense to an action for failure to make prompt payment under the Act. *Finer Foods Sales Co.* v. *Block*, 708 F.2d 774 (D.C. Cir. 1983).

[4] Official notice is taken of respondent's 1985 license renewal.

net proceeds received from the sale thereof in the total amount of $58,677.74.

4. As more fully set forth in paragraph 6 of the complaint, during the period October 1984 through March 1985 respondent purchased, received, and accepted in interstate and foreign commerce, from 57 sellers, 303 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,404,570.70.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 320 transactions set forth in Findings of Fact Nos. 3 and 4 above constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

This case is identical, in all material respects, to *In re B. G. Sales Co.*, 44 Agric Dec. ____ (Oct. 9, 1985), a copy of which is attached as an appendix to this decision. The contentions argued by respondent on appeal are also rejected for the reasons set forth in Complainant's Reply to Respondent's Appeal. The argument that creditors will suffer if respondent's license is revoked was rejected in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984), as follows (slip op. at 32-33):

> Respondent argues that it would be detrimental to its creditors if it were forced to discontinue business. Such arguments are frequently made and routinely rejected. Even where creditors of a respondent personally appear to urge the Department to permit the violator to continue in business, so that the violator will be able to make additional payments to the creditors, the Secretary routinely rejects such pleas for leniency made by creditors since the Secretary must consider the broader public interest involving thousands of suppliers and licensees throughout the country.[21] If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.
>
> Similarly, under all of the regulatory programs administered by the Department, any hardship to the respondent's

community, customers or employees which might result from a disciplinary order is given no weight in determining the sanction, in order to protect the broader public interest, which is best served by imposing severe sanctions for serious or repeated violations, to serve as an effective deterrent to future violations.[22]

[21] *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. [1151, 1170-72 (1983)]; *In re Bananas, Inc.*, 42 Agric. Dec. 426, 426-27 (order denying intervention), *final decision*, 42 Agric. Dec. [588, 606 (1983)]; *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), [*aff'd*, 728 F.2d 347 (6th Cir. 1984)]; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

[22] *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd mem.*, 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's license is revoked.

The facts and circumstances set forth above should be published.

This order shall become effective on the 30th day after service on respondent.

APPENDIX

In re: B. G. Sales Co., 44 Agric. Dec. ____ (Oct. 9, 1985).

REPARATION DECISIONS

P. TAVILLA CO. MIAMI INC., *v.* SANCO DISTRIBUTORS, INC., a/t/a SANDY'S MARKET BASKET. PACA Docket No. 2-6756. Decided March 7, 1986.

Unsworn answer given no consideration as evidence—Decision.

Respondent liable for the contract price alleged in the complaint, as its claims that the price was a lesser figure and that it made cash payments in its unsworn answer only, which is not given any evidentiary consideration.

Andrew Stanton, Presiding Officer.
Richard L. Katz, Coral Gables, Florida, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $5,840.00 in connection with the sale and shipment of five loads of mixed produce to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting liability for $3,721.75, but denying liability for the remainder.

Since the amount claimed as damages does not exceed $15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACTS

1. Complainant, P. Tavilla Co. Miami Inc., is a corporation whose address is 1243 N. W. 21st Street, Miami, Florida.

2. Respondent, Sanco Distributors, Inc., a/t/a Sandy's Market Basket, is a corporation whose address is 2840 North State Road 7, Hollywood, Florida. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately July 16, 19, 21, and 23, and August 11 and 17, 1984, complainant sold to respondent a total of six loads of mixed produce for a total contract price of $6,840.00, f.o.b. The produce was shipped to respondent, which received and accepted it.

4. Respondent has since paid complainant $1,000.00 for the six loads of produce, leaving $5,840.00 due and owing. A formal complaint was filed on January 29, 1985, which was within nine months from when the causes of action herein accrued.

5. Respondent filed an answer on March 5, 1985, in which it admitted liability for $3,721.75 in connection with the subject matter of the complaint. Accordingly, an Order Requiring Payment of Undisputed Amount was issued on April 29, 1985, ordering respondent to pay to complainant the admitted amount owing of $3,721.75.

PRELIMINARY STATEMENT

In respondent's unsworn answer, it claims that it originally owed complainant $5,721.75 for the six loads of produce it admittedly purchased, received, and accepted, but contends that it made $1,000 cash payments on January 19 and February 22, 1985, thereby reducing its liability to $3,721.75, which it admits owing complainant. As a result of respondent's admission of liability, an Order Requiring Payment of Undisputed Amount was issued on April 29, 1985, awarding reparation to complainant in the amount of $3,721.75

Complainant alleges in its sworn complaint that the contract prices on the six lots of produce totaled $6,840.00, and claims that respondent has only paid $1,000.00, leaving $5,840.00 still owing. Complainant has provided invoices and statements to respondent which support its claim. Respondent's contentions that it originally owed $5,721.75 but has made two recent cash payments of $1,000.00 are contained in an unsworn answer and, therefore, are not worthy of evidentiary consideration. As respondent did not make any further submissions in this proceeding, we must conclude that the sworn allegations of the complaint and the supporting documentation are sufficient to establish respondent's liability for the amount claimed. Therefore, respondent is liable for $5,840.00 less the $3,721.75 already awarded, or $2,118.25. Respondent's failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,118.25, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

S. STAMOULES, INC., a/t/a STAMOULES PRODUCE CO., *v.* SOL SALINS, INC. PACA Docket No. 2-6795. Decided March 7, 1986.

Change in contract terms—Breach of warranty—Accord and satisfaction—Decision.

Evidence in the record fails to support respondent's claims that complainant granted an allowance, the produce was in breach of warranty, and an accord and satisfaction occurred. Therefore, respondent is liable for the full contract price of the produce it admittedly accepted.

Andrew Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Robert Silberberg, McLean, Virginia, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,008.00 in connection with the sale and shipment to respondent of a trucklot of cantaloupes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, S. Stamoules, Inc., a/t/a Stamoules Produce Co., is a corporation whose address is P.O. Box 56, Mendota, California.

2. Respondent, Sol Salins, Inc., is a corporation whose address is 1325 Fifth Street, N.E., Washington, D. C. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately July 9, 1984, complainant sold and shipped in interstate commerce to respondent 1,008 cartons of S & S Brand size 18 cantaloupes at $5.00 per carton, plus $.70 per carton precooling, $.10 per carton palletization, $.15 per carton for brokerage fees and $22.50 for a temperature recorder, for a total f.o.b. contract price of $6,020.10. George DePaoli Distributing Company, Salinas, California, acted as the broker in this transaction, and both parties communicated exclusively through its president, George DePaoli.

4. After the cantaloupes arrived, respondent complained to Mr. DePaoli about the size of the melons, and requested an allowance. Mr. DePaoli contacted complainant's salesman, Rick Evans, who indicated that an allowance would be considered if respondent would provide an inspection report showing that the cantaloupes did not comply with the contract terms regarding their size. Respondent never provided the inspection report.

5. In August 1984, respondent sent complainant a check for $5,012.10 as payment for the load of cantaloupes. Nothing written on the check indicated that it was being offered as full payment. Complainant accepted and deposited the check. Respondent has not made any additional payments on this transaction.

6. A formal complaint was filed on March 1, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent does not deny purchasing, receiving and accepting the cantaloupes, but claims that after the cantaloupes arrived, complainant agreed to a $1.00 per crate allowance because the fruit was too small. Complainant denies having agreed to an allowance and has submitted the sworn statement of its salesman, Rick Evans, who states that he made clear to the broker that complainant would have to receive an inspection report showing that there was a problem with the size of the cantaloupes before any allowance could be considered. Respondent, as the party alleging that the contract terms were changed, has the burden of proving such a change by a preponderance of the evidence. *American Banana Co.*, v. *Marvin Gray*, 41 Agric. Dec. 539 (1982).

The report of investigation contains a February 19, 1985, letter to the Department from the broker's president, George DePaoli, who states that after hearing from respondent about the size problems, "I called Rick and reported this to him, I told him I would get an

inspection, my complaint was sizing never mentioning the condition. Several weeks later, Rick and I agreed on a $1.00 allowance, providing he had a federal inspection showing the sizing was small." Complainant's Mr. Evans claims an inspection report was never provided, and an allowance, therefore, was not warranted. The record in this proceeding does not contain any inspection reports. However, it is apparently respondent's position that the $1.00 per carton allowance was granted with no contingencies, and respondent has offered a sworn statement from Mr. DePaoli dated July 8, 1985, who asserts that in "late July 1984 Rick authorized this deduction." This statement does not specifically refute Mr. DePaoli's earlier statement that the allowance was contingent on respondent providing complainant with the inspection report. In addition, the February 9, 1985, statement is closer in time to the date of the alleged conversation than the statement of July 8, 1985. Further, Mr. DePaoli's February 9, 1985, statement sets forth the same facts as those expressed by complainant's Mr. Evans, the other party to the alleged conversation. Therefore, we believe the February 9, 1985, statement to be more credible, and conclude that respondent has failed to sustain its burden of proving that the allowance was granted.

Having accepted the load of cantaloupes, respondent became liable for the contract price, less damages resulting from any breach of warranty. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service Inc.* v. *Albertson's, Inc.*, 42 Agric. Dec. 429 (1983). As previously mentioned, respondent never submitted an inspection report showing that the cantaloupes were in breach of warranty. Since the record is devoid of any credible evidence of the existence of a breach of warranty by complainant, we conclude that respondent has failed to sustain its burden of proof in this regard, and is liable for the entire contract price of $6,020.10, less the $5,012.10 it has already paid.

Respondent contends that complainant's acceptance of its $5,012.10 check constituted an accord and satisfaction, thereby relieving respondent from any further liability. This contention is without merit, as an examination of the check shows that it did not contain any notation that it was offered in full settlement of the transaction for which it was given in payment. *Dennis Produce Sales, Inc.* v. *Caruso-Ciresi, Inc.*, 42 Agric. Dec. 178 (1983).

Respondent is liable for the difference between the contract price of $6,020.10 minus the $5,012.10 paid to complainant, or $1,008.00, and its failure to pay this sum to complainant is a violation of sec-

tion 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,008.00, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

DEW-GRO INC., d/b/a CENTRAL WEST PRODUCE *v.* MINGS IMPORT, INC. PACA Docket No. 2-6814. Decided March 7, 1986.

Wrongful rejection—Mitigation of Damages

Where only evidence concerning quality of sugar peas shipped was respondent's admission that U.S.D.A. inspection graded them "A", complainant has met its burden of shipping goods in suitable shipping condition. Complainant gave notice that it was moving the goods to a wholesaler after receiver refused to pay. Even though the goods were ultimately dumped, complainant is entitled to receive full contract price because respondent failed to show that the complainant acted improperly in its efforts to mitigate its damages by finding an alternative outlet.

Peter V. Train, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Daniel F. Lenzo, Boston, Massachusetts, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,737.80 in connection with the sale of sugar peas in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation was served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent failed to file a timely answer. However, prior to the issuance of a default order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer. This motion was granted on May 6, 1985, and respondent's answer was accepted. Respondent's answer denied that the goods received were

as contracted for and asserted that they were, therefore, properly rejected.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Complainant filed an opening statement in the form of an additional affidavit. Respondent did not file an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Dew-Gro, Inc., doing business as Central West Produce, hereinafter referred to as complainant, is a corporation whose post office address is 1284 West Main Street, Santa Maria, California 93454.

2. Mings Import, Inc., hereinafter referred to as respondent, is a corporation whose post office address is 85 Essex Street, Boston, Massachusetts 02111.

3. Both complainant and respondent are, and at the time of the transaction in question herein were, licensed with the Secretary of Agriculture to do business under the Act.

4. On or about May 18, 1984, complainant sold to respondent, in the course of interstate commerce, 78 cartons of sugar peas at $33.25 per carton plus $1.05 per carton for cooling and pallets, and freight of $.80 per carton. The total F.O.B. contract price was therefore $2,737.80.

5. The sugar peas were shipped by complainant from California to respondent in Boston, Massachusetts on May 18, 1984.

6. Upon their arrival in Boston, however, respondent sought to reject them claiming they were not in acceptable condition.

7. Respondent, however, in a letter to the Acting Regional Director, Northeast Region, PACA Branch dated August 27, 1984 and contained in the Report of Investigation as Exhibit No. 3, admitted that a U.S.D.A. inspector inspected the peas and found them to be "Grade A".

8. In a telegram dated May 21, 1984, complainant informed respondent that based upon respondent's rejection, complainant was moving the peas to Peter Condakes, a local wholesaler, to be sold for the account of whom concerned.

9. The peas, were, however, ultimately dumped as having no salvage value, apparently on June 26, 1984.

10. Respondent has not paid for these peas.

11. The formal complaint was filed on October 26, 1984, within nine months of the accrual of the cause of action herein.

CONCLUSIONS

There is no dispute that the peas were shipped from California and received in Boston. The parties differ as to the quality and condition of the peas on their arrival. The record is not clear at what point in time respondent notified complainant it was refusing to pay for the peas. It, therefore, can not be determined whether the respondent had first accepted the goods. In view of the ultimate disposition made herein, however, it is not necessary to reach this question. It is sufficient to say that the parties treated respondent's actions as a rejection, and that complainant promptly arranged to have the peas moved to Peter Condakes for sale on account.

Respondent's defense to this action is that the peas were not of the quality contracted for. However, the only evidence relating to the quality of peas upon arrival is respondent's admission that a U.S.D.A. inspection resulted in a finding that the peas were "grade A". To argue that the inspector was wrong, without more, falls far short of establishing that complainant failed to ship goods conforming to the contract. The date and details of the inspection as the only impartial evidence indicates that the peas received were of the quality contracted for, we find that complainant met its burden of shipping goods in suitable shipping condition. Respondent has, therefore, wrongfully failed to pay for the peas.

There is no allegation or evidence that Peter Condakes was a firm unqualified to dispose of the disputed goods, or that the firm failed to properly do so. Therefore, it is found that complainant made reasonable efforts to mitigate its damages, but to no avail. The risk of loss after a wrongful rejection falls on the purchaser under the factual circumstances existing here, absent a showing that the shipper acted improperly in its efforts to find an alternative outlet. *See, Sid Lipsig & Co.* v. *Joe Belsen*, 34 Agric. Dec. 417, 422 (1975).

Complainant is entitled to receive the value of the goods shipped which is measured by the contract price of $2,737.80. Respondent's failure to pay that amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Respondent Mings Import, Inc., is hereby ordered to pay complainant Dew-Gro, Inc. the amount of $2,737.80 plus interest at 13 percent per annum from June 1, 1984, until paid.

Copies of this Order shall be served on the parties.

SUN WORLD INTERNATIONAL, INC., a/t/a SUN WORLD, *v.* CORGAN & SON, INC. PACA Docket No. 2-6806. Decided March 10, 1986.

Complainant was the seller—Payment made to the wrong party—Breach of warranty—Respondent failed to prove—Price arrival terms in effect—Failure to deliver—Decision.

The evidence is clear that complainant was the seller of the three loads of brussels sprouts. Respondent's payment to the broker for the first load did not relieve it of liability to the complainant seller. Respondent failed to prove a breach of warranty regarding the second load and is liable for the market price at destination, in accordance with the price arrival terms in effect. The evidence shows that the third load was not delivered to respondent. Respondent liable for only the first two loads.

Andrew Stanton, Presiding Officer.
For complainant, *pro se*.
For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $17,595.25, in connection with the alleged sale and shipment to respondent of three truckloads of brussels sprouts in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Although the amount claimed as damages exceeds $15,000.00, the parties waived oral hearing. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, it not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Sun World International, Inc. a/t/a Sun World, is a corporation whose address P.O. Box 9110, Bakersfield, California.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the

times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately March 22, 1984, complainant sold and shipped to respondent 300 cartons of brussels sprouts in 25 pound cartons, at a price of $8.00 per carton, plus $.65 per carton pre-cooling, for a total of $2,595.00, f.o.b. The broker in this transaction was Go/Western Produce & Commodities Inc., Coachella, California. Complainant prepared an invoice, number 85-23880, reflecting these terms. Respondent received and accepted the sprouts.

4. On March 23, 1984, the broker prepared and sent to the parties a confirmation of sale and broker's invoice relating to complainant's invoice number 85-23880. The confirmation identified complainant as the seller and respondent as the buyer.

5. Respondent issued a check to the broker on April 26, 1984, for $4,418.60, including payment of $1,500.00 for the 300 cartons of sprouts which are the subject of complainant's invoice number 85-23880. Respondent has never made any payment to complainant on this transaction.

6. On or about April 5, 1984, complainant sold to respondent 1,930 cartons of brussels sprouts in 25 pound cartons, at a price of $6.00 per carton, plus $.65 per carton cooling, for a total of $13,128.50, f.o.b. Go/Western Produce & Commodities Inc. also acted as the broker in this transaction. Complainant prepared an invoice, number 70-24058, reflecting the contract terms. The price terms were eventually changed to price arrival.

7. On April 16, 1984, respondent received and accepted the sprouts pertaining to complainant's invoice number 70-24058. According to the April 16, 1984, listings of the Market News Service Reports for Bronx, New York, the market price for brussels sprouts in 25 pound cartons was $7.00 to $8.00 per carton.

8. On May 4, 1984, the broker prepared and sent to the parties a confirmation of sale relating to complainant's invoice number 70-24058, which indicated thereon that the price terms were "P/A".

9. On April 19, 1984, complainant loaded 295 cartons of brussels sprouts on a Pathfinder truck for shipment to respondent. The sprouts were instead shipped to Veg-A-Mix, Castroville, California.

10. On October 26, 1984, complainant's Director of Transportation, Fred Kendel, stated in a letter to the Department that with respect to the 295 cartons of brussels sprouts, "Pathfinder Trucking, Los Angeles, does not perform transport to the eastern states. I have contacted their office to ascertain the exact location of their delivery and we should have an answer from them in the very near future."

11. On November 8, 1984, Mr. Kendel wrote a letter to Veg-A-Mix concerning the 295 cartons of brussels sprouts set forth, in part, as follows:

> We are tracing the final disposition of product we shipped earlier this year. We have discovered your firm was involved in the distribution of our product and we would appreciate your assistance in helping us to identify the ultimate receiver.
>
> On April 19, 1984, we loaded 295 cartons Sun World label brussels sprouts and 785 cartons sprouts (Go/Western-packer) into a Pathfinder truck. We understood the product was destined to Corgan and Son in New York City as arranged by Diamond Trading, Palm Desert, California, but this information was erroneous. Instead, Pathfinder Trucking delivered the product to your facility on April 20, 1984. Distribution from that point in time is the unknown factor and we would ask for your assistance.

12. Respondent has not paid anything to complainant for the 295 cartons of sprouts referred to above.

13. An informal complaint was filed on July 5, 1984, which was within nine months from when the alleged causes of action herein accrued. A formal complaint was filed on February 19, 1985.

CONCLUSIONS

Respondent denies liability for the three loads of brussels sprouts at issue. Respondent claims it never made any purchases from complainant, although it admits having purchased from Go/Western 300 cartons of sprouts shipped on March 20, 1984, and 1,930 cartons of sprouts which it received on April 16, 1984. Respondent claims that it paid Go/Western for the 300 cartons of sprouts, and that it lost money on its resales of the 1,930 carton load.

The evidence is clear that respondent purchased the 300 cartons of sprouts from complainant, not from Go/Western. Complainant has submitted a confirmation of sale and brokers invoice from Go/Western dated March 23, 1984, which shows clearly that complainant was the seller, respondent the buyer, and Go/Western the broker (Finding of Fact 4). Therefore, respondent's admitted acceptance of the 300 cartons of sprouts renders it liable to complainant, the seller, for the entire contract price. Respondent alleges that it has paid for the sprouts, and the report of investigation indicates that respondent did pay $1,500.00 to Go/Western for 300 cartons of sprouts on August 17, 1984. However, since such payment was made after the March 23, 1984, confirmation was issued, respond-

ent, at the time of the payment, knew or should have known that complainant was the seller. Thus, respondent's payment to the broker had no effect on its liability to complainant for the entire $2,595.00 contract price for the 300 cartons of sprouts.

Regarding the 1,930 cartons of sprouts, respondent's insistence that it purchased them from Go/Western is contradicted by its own submission of Go/Western's May 4, 1984, confirmation of sale, showing complainant as the seller and respondent as the buyer, with Go/Western acting as the broker (Finding of Fact 8). As respondent does not deny accepting these sprouts when they arrived at its place of business on April 16, 1984, respondent became liable for the f.o.b. contract price therefor, less damages resulting from any breach of warranty, which respondent bears the burden of proving by a preponderance of the evidence. *Farm Market Service Inc.* v. *Albertson's, Inc.*, 42 Agric. Dec. 429 (1983). Respondent has presented no evidence of any breach of warranty and is thus liable for the contract price for the 1,930 cartons of sprouts.

However, we cannot agree with complainant's assertion that the contract price for the 1,930 cartons was $13,128.50, as the May 4, 1984, confirmation of sale indicates that the applicable terms were P/A, or price arrival. In a price arrival sale, the price is subject to an agreement between the buyer and seller upon the arrival of the produce at the buyer's destination. 7 CFR 46.43(cc). As no price was apparently agreed to here, we accept the market price for 25 pound cartons of brussels sprouts in New York on the date of arrival, April 16, 1984, as representing the price to which the parties would have agreed. *John Livacich Produce, Inc.* v. *Ben Gatz Co.*, 33 Agric. Dec. 1155 (1974). The applicable Market News Service Reports show a price of $7.00 to $8.00. Using the lower figure, we arrive at a market price of $13,510.00, for which respondent is liable.

Although complainant claims that it sold and shipped 295 cartons of brussels sprouts to respondent on April 19, 1984, there is evidence that the load was never delivered to respondent. Complainant's invoice and manifest show that on approximately April 19, 1984, the 295 cartons of sprouts were loaded on a Pathfinder truck for delivery to respondent. The report of investigation contains a November 8, 1984, letter from a Fred Kendel, Director of Transportation for complainant, to Veg-A-Mix, Castroville, California, in which Mr. Kendel admits that the 295 cartons were delivered to Veg-A-Mix, instead of respondent (Finding of Fact 11). The report of investigation also contains an October 26, 1984, letter to the Department, in which Mr. Kendel admits that the Pathfinder trucking company does not deliver to the eastern United States (Finding of Fact 10). Complainant contends that on June 5, 1984,

Mr. Kendel discussed this lot with respondent, and respondent did not mention having failed to receive it. However, the record does not contain any statement by Mr. Kendel that this alleged discussion ever occurred. Further, Mr. Kendel's phone records state that the respondent said with respect to the 295 carton lot only that it would "research [its] records." It is the seller's burden to prove that the produce was received and accepted by the buyer, and it is our view that complainant has failed to sustain this burden with respect to the 295 carton load.

We have determined that respondent is liable to complainant for $2,595.00 for the 300 carton load, and $13,510.00 for the 1,960 carton load, for a total of $15,105.00 Respondent's failure to pay this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $15,105.00, with interest thereon at the rate of 13 percent per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

VAL-MEX FRUIT CO. INC., *v.* KALECK DISTRIBUTING CO. PACA Docket No. 2-6811. Decided March 10, 1986.

Accepted—Noted of Breach—Not timely—Accounting—Inadequate to show damages—Settlement—Failure to prove—Decision and Order.

Respondent's acceptance of a mixed load of cantaloupes and pineapples made it liable to complainant for the purchase price less any damages resulting from any breach by complainant. Although the amount of decay shown by inspection indicated a breach by complainant respondent was found to have failed to give timely notice of the breach. In addition respondent's accounting of the resale of the goods was inadequate to show respondent's damages. Respondent also failed to establish that a settlement agreement was entered into by the parties.

George S. Whitten, Presiding Officer.
For complainant, *pro se*.
E.G. Hall, McAllen, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of

reparation against respondent in the amount of $3,454.02 in connection with the shipment in interstate commerce of one truckload of mixed produce.

A copy of the Report of Investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Val-Mex Fruit Company, Inc., is a corporation whose address is P.O. Box 1178, Hidalgo, Texas.

2. Respondent, Louis Kaleck, is an individual doing business as Kaleck Distributing Company, whose address is P.O. Box 1432, MacAllen, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about February 13, 1984, complainant sold to respondent one truckload containing 816 crates of various sizes of cantaloupes and 100 cartons of pineapples for a total invoice price of $13,165.50, f.o.b. Hidalgo, Texas. The invoice price included $22.50 for a Ryan temperature recorder.

4. Complainant shipped the mixed load of cantaloupes and pineapples to respondent's customer, Gullo Produce Company, Inc., in Pittsburgh, Pennsylvania, on February 13, 1984. Respondent's customer accepted the load after arrival, and on February 16, 1984, at 7:05 a.m., the 816 crates of cantaloupes were federally inspected in the warehouse of respondent's customer. The inspection showed temperatures in various containers to range from 36 to 40 degrees Fahrenheit, and condition to be as follows:

> Mostly firm, some ripe and firm. From 1 to 4 melons, (3 to 27%) in most crates many none, average 6% decay, Cladosporium Rot, early stages.

5. On March 15, 1984, respondent paid complainant $9,139.80 for the mixed load of produce, and on March 17, 1984, respondent paid complainant an additional $571.68 for the produce. There remains due to complainant a balance of $3,454.02.

6. An informal complaint was filed on May 1, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks to recover the balance of the purchase price of a mixed load of cantaloupes and pineapples sold to respondent and shipped to respondent's customer in Pittsburgh, Pennsylvania from Hidalgo, Texas. Respondent accepted the load of produce by unloading the truck on arrival, and is, therefore, liable to complainant for the full purchase price thereof less any damages shown by any breach of contract proven by respondent.

The federal inspection of the cantaloupes taken on February 16, 1984, in Pittsburgh shows an average of 6% decay which is in excess of what we allow for good delivery. See *G. & S. Produce Co. Inc.*, v. *Schnunk Distributing Co., Inc.*, 34 Agric. Dec. 1604 (1975). In addition, respondent alleges that complainant breached the contract of sale by not shipping fresh cantaloupes and by failing to ship U.S. No. 1 cantaloupes. However, it is not necessary for us to discuss these issues in view of the fact that complainant has alleged that respondent failed to give timely notice of any breach of contract, and respondent has not replied to this allegation. Apparently the first notice given by respondent to complainant that there was any problem with the load was when payment was made to complainant on March 15, 1984, in the reduced amount of $9,139.80. The Uniform Commercial Code Section 2-607(3) provides in relevant part that:

> Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; . . .

We find that respondent is barred from any remedy for any breach by complainant by reason of respondent's failure to give timely notice. See *Produce Specialists* v. *Gulfport Tomatoes*, 42 Agric. Dec. 1194 (1938); and *Rio-Ray Citrus Corp.* v. *Joy Citrus*, 31 Agric. Dec. 794 (1972).

In addition we note that even had respondent established that it had given timely notice to complainant of a breach of contract the accounting submitted by respondent from its customer, Gullo Produce Company, Inc., in Pittsburgh, Pennsylvania, is inadequate as a basis for proving damages in that it is not dated and does not give a breakdown of the prices received for individual sales of the produce. The accounting merely gives an average price for each

size of the cantaloupes and for the pineapples. See *Sunkist Growers v. Fishman Produce*, 41 Agric. Dec. 137 (1982).

Respondent also contends that it entered into a final settlement with complainant for an additional payment of $571.68 which it paid to complainant on March 17, 1984. Complainant denies this allegation, and we deem it highly significant, and determinative of the issue, that the check stub which accompanied the $571.68 payment from respondent merely stated "ADDITIONAL PAYMENT ON YOUR INV. # $50543 OUR INV. # 1971" If the payment was rendered in full settlement there should have been a statement to that effect accompanying respondent's check.

On the basis of all the evidence herein we conclude that there remains due and owing from respondent to complainant the sum of $3,454.02. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $3,454.02 with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

Copies of this order will be served upon the parties.

RICHARD S. BROWN, INC., *v.* SLOAN'S SUPERMARKETS, INC. PACA Docket No. 2-6822. Decided March 10, 1986.

Acceptance by partial unloading—Burden of proof upon respondent—Breach of warranty—Respondent failed to prove—Decision.

Respondent accepted the lettuce by partially unloading it, but failed to sustain its burden of proving a breach of warranty by complainant. Therefore, respondent is liable for the unpaid contract price and its counterclaim, based on the alleged breach, is without merit.

Andrew Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
For respondent,*pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a repara-

tion award against respondent in the amount of $3,198.00 in connection with the sale and shipment to respondent of a truckload of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability, and also asserted a counterclaim in connection with the subject matter of the complaint. Complainant filed a reply to the counterclaim, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Richard S. Brown, Inc., is a corporation whose address is P.O. Box 4729, 635 South Sanborn Road, Suite 13, Salinas, California. At the time of the transaction alleged in the counterclaim, complainant was licensed under the Act.

2. Respondent, Sloan's Supermarkets, Inc., is a corporation whose address is 2 Bennett Avenue, New York, New York. At the time of the transaction alleged in the complaint, respondent was licensed under the Act.

3. On approximately May 8, 1984, complainant sold to respondent, through a broker, Panorama Produce Sales, Inc., Fort Lee, New Jersey, 870 cartons of lettuce, at $3.00 per carton, plus $.65 per carton cooling and $22.50 for a temperature recorder, for a total f.o.b. contract price of $3,198.00.

4. Complainant shipped the lettuce, in interstate commerce, to respondent. A bill of lading was prepared which indicated that the pulp temperature of the lettuce, when loaded, was 36°F, and a temperature range of 34°F to 36°F was to be maintained in transit. The lettuce arrived at respondent's place of business on approximately May 14, 1984. Upon arrival, respondent unloaded and disposed of approximately 100 cartons. Respondent then requested a federal inspection, which took place on May 15, 1984, at 8:15 a.m. The inspection found as follows, in relevant part:

VARIOUS CONTAINERS Range 44 To 50°*F*

* * * * * * *

Applicant States: 775 cartons

Quality: Grade defects average 2% mechanical damage.

Condition: Wrapper leaves: Average 3% decay. Head leaves: Average 2% damage by Tipburn. Average 2% damage by Rib Discoloration. Average 2% damage by bruising. 2 to 3 decayed heads in ½ of cartons, none in remainder, average 6% decay. Decay is Bacterial Soft Rot in various stages.

REMARKS Inspection restricted to 30 cartons being unloaded and 4 stacks nearest rear doors.

5. After receiving the inspection results, respondent notified Jeff Nagelberg, an employee of the broker, who contacted complainant and informed complainant. Complainant did not grant protection or authorize an allowance, but indicated that it would honor any damages respondent sustained due to any breach of contract by complainant. Thereafter, on May 15, 1984, complainant sent the following telegram to respondent: "WILL CONFIRM CONVERSATION WITH MR NAGELBERG 8 AM 5/15/84 AS DISCUSSED YOUR FIRM HAS BEEN GRANTED NO PROTECTION OR AUTHORIZATION FOR ANY ALLOWANCE. HOWEVER RICHARD S BROWN INC WILL HONOR ANY DAMAGES YOU SUSTAIN DUE TO BREACH OF CONTRACT."

6. On May 16, 1984, respondent resold 772 cartons of the lettuce that it purchased from complainant to Square Produce Co., Inc., Bronx, New York, for $2,430.00.

7. Sometime in July 1984, complainant received a copy of the inspection taken on May 15, 1984. Complainant then sent the following telegram to the broker:

> UPON RECEIPT OF COPY OF INSPECTION SHOWING INSPECTION RESTRICTED TO 30 CARTONS AND 4 STACKS NEAREST REAR DOOR AND RANGE OF TEMPERATURES 44 to 50 DEGREES, RICHARD S BROWN INCORPORATED TAKES THE POSITION THAT SUITABLE SHIPPING CONDITION WAS BREACHED IN TRANSIT. RICHARD S BROWN REQUIRES PAYMENT OF SAID INVOICE IN FULL.

8. Respondent has failed to pay any part of the contract price to complainant, and complainant has failed to make any payment to respondent for the load of lettuce.

9. A formal complaint was filed on November 23, 1984, which was within nine months from when the cause of action herein accrued. Respondent filed a timely counterclaim on March 6, 1985, in connection with the subject matter of the complaint.

CONCLUSIONS

Respondent denies accepting the load of lettuce. However, respondent admits unloading and selling approximately 100 cartons when the load arrived at its place of business. Respondent's partial unloading of the lettuce constituted acceptance of the entire load. *Mario Saikhon* v. *Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975).

Respondent contends that complainant agreed to honor any damages it sustained as a result of a breach of contract by complainant. Respondent asserts that the May 15, 1984, inspection demonstrated that complainant breached its warranty of suitable shipping condition (7 CFR 46.43(j)) and respondent is thus not liable to complainant. We cannot agree. Having accepted the lettuce, respondent became liable for the agreed upon contract price, less any damages resulting from a breach of warranty by complainant, and it is respondent's burden to prove the breach and resulting damages by a preponderance of the evidence. *Stonoca Farms Corporation* v. *S & S Produce Inc.*, 42 Agric. Dec. 937 (1983). The May 15, 1984, federal inspection shows that the lettuce exhibited a total of 15% condition defects, including 6% decay. This is 1% in excess of the maximum decay allowed for lettuce of this type to meet the good delivery standards set forth in the Department's regulations. (7 CFR 46.44a(2)). The inspection also revealed that the pulp temperatures were quite high, from 44 to 50°F. Further, the inspection was restricted to 30 cartons being unloaded and four stacks near the doors. These high pulp temperatures and the small number of cartons inspected cause us to question the accuracy of the inspection results as representative of the actual condition of the lettuce when it arrived at respondent's place of business. Respondent argues that the high pulp temperatures resulted from local custom and practice, which dictates that vans be left open while awaiting federal inspection because of the shortage of inspectors. Respondent also asserts that the limited number of cartons inspected should not be a factor, as the inspector was not instructed to so limit his inspection. However, these arguments are immaterial, as the only question with which we are concerned is the accuracy of the inspection

results, and not the circumstances that caused the allegedly inaccurate results to occur. Therefore, it is our conclusion that respondent has failed to sustain its burden of proving any breach of warranty by complainant.

Having failed to prove a breach of warranty by complainant, respondent is liable for the entire contract price of $3,198.00, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded with interest. Further, as respondent has failed to prove any breach by complainant, its counterclaim is without merit and must be dismissed.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,198.00, with interest thereon at the rate of 13% per annum from June 1, 1984, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

INTERNATIONAL A.G. INC., *v.* MACK C. DEMPSEY d/b/a MACK DEMPSEY CO. PACA Docket No. 2-7073. Decided March 12, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on November 7, 1985. Complainant seeks to recover $6,234.64, which amount is alleged to be the total purchase price for melons sold to and accepted by respondent on or about January 17, 1986. Respondent filed an answer to the formal complaint on December 24, 1985, admitting that $3,340.50 of the amount claimed by complainant was due and owing to complainant on account of the transaction involved herein.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $3,340.50. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if an order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

TOP QUALITY FRUIT & PRODUCE DISTRIBUTORS, INC., *v.* VOLLMER PRODUCE, INC. PACA Docket No. 2-7077. Decided March 12, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on September 12, 1985. Complainant seeks to recover $4,793.95, which amount is alleged to be the total purchase price for mixed produce sold to and accepted by respondent between August 8 and September 29, 1984. Respondent filed an answer to the formal complaint on December 26, 1985, admitting that $2,630.60 of the amount claimed by complainant was due and owing to complainant on account of the transaction involved herein.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $2,630.60. Payment of this amount shall be made within 30 days

from the date of this order with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if an order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

H. HALL & CO. INC., *v.* ACTION PRODUCE. PACA Docket No. 2-6546. Decided March 14, 1986.

Failure to deliver produce on schedule—Reparation.

Respondent failed to deliver two loads of lettuce on schedule and complainant was consequently unable to meet his commitments for an advertised sale. From calculations made, it was judged that complainant's total damages amounted to $6460 for respondent's failure to deliver. However, complainant sought only the $5620 of its customers alleged cover purchases. Thus, respondent's liability to complainant restricted to that amount, i.e. $5620, plus 13% interest.

George S. Whitten, Presiding Officer.
For complainant, *pro se.*
For respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $5,620.00 against respondent in connection with a contract for the sale of two truckloads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

Since the amount of damages claimed in the complaint did not exceed $15,000, the shortened method of procedure provided in the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered as part of the evidence, as is the Department's report of investigation. In ad-

dition the parties were given the opportunity to submit further evidence in the form of verified statements. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant H. Hall and Co., Inc., is a corporation whose address is P.O. Box 5125, Salinas, California.

2. Respondent, Action Produce, is a partnership composed of Davis Packing Co., Pat H. Hodges, John Kai, and Rala Singh, whose address is P.O. Box 1712, Glendale, Arizona. At the time of the transactions involved herein this respondent was licensed under the Act.

3. On or about August 4, 1983, respondent contracted to sell to complainant one truckload of lettuce for shipment on August 6, 1983, from Center, Colorado, to complainant's customer at Jamaica, Long Island, New York. The agreed f.o.b. price of the lettuce was $4.00 per carton, plus 70¢ per carton vacuum cooling, and $3.00 per carton for freight. On the same day, respondent agreed to sell to complainant an additional truckload of lettuce for shipment on August 8, to the same destination, for an f.o.b. price of $5.00 per carton, plus 70¢ per carton for vacuum cooling, and $3.00 per carton for freight.

4. Respondent did not harvest or ship lettuce on August 6, because of rain and so notified complainant at 8:00 a.m. on the morning of August 6, 1983. The lettuce which was scheduled to be shipped on August 8, was also not shipped due to mechanical difficulty with the truck on which it was to be shipped. Complainant was not notified until the morning of August 9, 1983, that the shipment scheduled for August 8, had not been made, and at that time complainant informed respondent that it was too late for any lettuce to be shipped since arrival would not be in time for the previously advertised sale scheduled by complainant's customer for Thursday, August 11, 1983.

5. The formal complaint was filed on February 14, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

The parties agree that the lettuce which was scheduled for shipment on August 6, 1983, was not shipped by respondent due to weather conditions. However, complainant claims that this did not excuse respondent from its failure to ship the lettuce.

The parties are in disagreement over whether respondent stood ready to make the shipment scheduled for August 8, 1983, in a timely fashion. Respondent claims that it was ready to make shipment on August 8, but states that complainant gave notice on the morning of August 8, that shipment should not be made. Complainant disputes this contention, and instead maintains that respondent failed to ship on August 8, because of mechanical difficulty with the truck on which shipment was scheduled to be made. Complainant asserts that when complainant called respondent on the morning of August 9, 1983, complainant found out for the first time that a shipment had not been made on August 8. Complainant states that it was on the morning on August 9, 1983, that respondent gave the excuse that there had been mechanical difficulty with the truck. Complainant maintains that at this time it informed respondent that it was too late for any shipment of lettuce to be made. We have found that complainant's version of the events relative to the second load of lettuce is supported by a preponderance of the evidence.

We have long held that, in the absence of express conditions which are made a part of the contract, weather and transportation difficulties do not furnish an excuse for failure to ship, unless it is known and agreed ahead of time that the produce which is the subject of the contract is to come from a specific acreage. See *Christensen Bros.* v. *Hecht Produce Company,* 17 Agric. Dec. 473 (1958). It is clear that Section 2–615 of the Uniform Commercial Code, which relates to excuse by failure of presupposed conditions, was intended to embody the existing law in this regard. Official comment 9 to section 2–615 states in relevant part that:

> The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods in this section, and he may be excused, when there is a failure of the specific crop. . . .

In the absence of a specific understanding between the parties that the produce is to come from a specified tract of land, a shipper can protect himself by simply specifying as a condition of the contract that shipment will be made "weather permitting" or some similar language. The shipper could also have made availability of transportation a condition as to time of shipment. As we stated in *Christensen Bros.* v. *Hecht Produce Company, supra,*:

> Under the contract, it was respondent's duty to go into the open market if necessary and obtain the cabbage to enable him to fulfill his part of the contract. Respondent

says there was no Arizona cabbage available and he was therefore prevented from obtaining cabbage to fulfill the contract. This contention is without merit. The contract did not specify Arizona cabbage. If complainant could obtain a replacement load of cabbage, obviously respondent could have obtained cabbage with which to fill the contract.

In this case complainant states that its customer purchased lettuce to cover the contract. This was certainly permissible under the circumstances of this case. However, the only documentation which complainant furnished of the cover purchase was an invoice to complainant from its customer for the difference in price between its customer's purchase cost and contract cost for the lettuce. This is not sufficient documentation for the cover purchase. In addition there was no explanation as to why the cover purchase was effectuated in Philadelphia rather than on the New York market.

The Uniform Commercial Code § 2-711 provides in relevant part that where the seller fails to make delivery or repudiates the buyer may either cover "or . . . recover damages for non-delivery" as provided in section 2-713. Accordingly, we will attempt to assess damages for non-delivery. Section 2-713 of the U.C.C. states that "the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach." This is not an anticipatory repudiation case (see *V. V. Vogel & Sons Farms, Inc.* v. *Continental Farms, Inc.*, (PACA Docket 2-6191, decided March 21, 1985), 44 Agric. Dec. (1985)), and the "time when the buyer learned of the breach" must be interpreted as the time when complainant learned that shipment had not been made as scheduled, or the mornings of Aug. 6 and 9, 1983. See White & Summers, Uniform Commercial Code, § 6-4, and § 6-7 at p. 199 (1972). Section 2-713 of the U.C.C. further provides that in cases of non-delivery or repudiation by the seller "[m]arket price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival." The place for tender in a f.o.b. shipping point contract is at shipping point. See *White and Summers, Uniform Commercial Code*, § 6-4, p. 184-188 (1972). See also *Globe Products Co.* v. *Laurence Frozen Foods* 19 Agric. Dec. 125 (1960); *Pearce-Young-Angel Co.* v. *Turlock*, 18 Agric. Dec. 43 (1959); and *Western Fruit Dist'rs* v. *Turlock Frozen Foods*, 17 Agric. Dec. 780 (1958). However, comment No. 1 to U.C.C. section 2-713 states that the prices to be

used in calculating damages should come from "the market in which the buyer would have obtained cover had he sought that relief." On this basis, where cover was unobtainable the shipping point market, we have used destination market prices as the basis for computing damages. *Bliss Produce Co.* v. *A.E. Albert & Sons*, 35 Agric. Dec. 742 (1976).

As to the first load complainant had time to obtain cover in the shipping area and still meet its customer's requirements in a timely manner. However, complainant stated that it immediately attempted to book another load in the shipping area and was unable to do so at any price. This was not rebutted by respondent. Under the circumstances it is appropriate that we look to the destination market for the computation of damages for this load. As to the second load, when complainant learned of the breach on August 9, 1983, there was not sufficient time left to seek cover on the shipping point market and still meet the scheduled delivery time. Consequently we will also look to the destination market in order to compute damages for the second load.

There were no quotations for Colorado lettuce for New York City during the applicable period. The closest market for which quotations are available is Philadelphia, and the first date during the applicable period with Colorado lettuce quotations on the Philadelphia market is August 10, 1983. See U.C.C. section 2-723(a). The Market News Service report for Philadelphia on that date shows Colorado lettuce quoted at $12 to $13. Respondent's shipping schedule for the period in question showed shipments containing from 748 to 908 cartons with an average of 850 cartons. Using this latter figure for the two loads, and subtracting the respective contract price plus freight of $7.70 for the first load, and $8.70 for the second load, from the lower Market News Service reported price of $12.00, gives us $6,460.00 as complainant's total damages for respondent's failure to deliver. Since complainant requested only the $5,620 cost of its customer's alleged cover purchases, complainant's recovery should be restricted to such amount. Respondent's failure to pay complainant the sum of $5,620 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation, $5,620, with interest thereon at the rate of 13 percent per annum from September 1, 1983, until paid.

Copies of this order shall be served upon the parties.

THE KATZ COMPANY, INC. *v.* THE KUNKEL CO. INC. PACA Docket No. 2-6647. Decided March 14, 1986.

Acceptance of potato load with rot—not occurable over shipment period—Respondent meets burden of proof—Finding for respondent.

Respondent's customer accepted a shipment of potatoes bought from complainant. Respondent subsequently, on advice from customer, informed complainant that there was substantial mahogany rot in consignment, as verified by federal inspection. It was held that this was a condition that could not have occurred during the shipment period. Respondent tendered a check for $1600 for the damaged consignment, having subtracted a $2721 loss from the invoice price. Complainant refused that payment, demanding the entire invoice amount. Our analysis held complainant must bear the loss resulting from the poor condition of the potatoes. Thus, respondent was directed to pay complainant the $1600 originally tendered, plus 13 per cent interest per annum until paid.

Ben Bruner, Presiding Officer.
Bennett C. Katz, Plover, Wisconsin, for complainant.
Ken Komer, Hopkins, Minnesota, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This case was brought pursuant to the reparation provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award in the amount of $4,320.80, in connection with a shipment of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department of Agriculture was served upon each party. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability. As the amount claimed in the complaint does not exceed $15,000.00, the shortened method of procedure provided for in the Rules of Practice is applicable (7 CFR § 47.20). Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence, as is the Department's report of investigation. The parties were given the opportunity to file additional evidence in the form of verified statements. Neither party did so. Although given an opportunity to do so, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, the Katz Company, Inc., is a corporation whose address is P. O. Box 708, Plover, Wisconsin 54467.

2. Respondent, the Kunkel Company, Inc., is a corporation whose address is Room 105, 1301 Cambridge Street, Hopkins, Minnesota 55343.

3. On March 8, 1984, the parties entered into an oral contract whereby respondent purchased 440 sacks of U.S. No. 1A potatoes, 100 pounds per sack at a price of $9.82 per cwt. delivered to Albert Lea, Minnesota.

4. Complainant shipped 440 sacks of potatoes to Mrs. Gerry's Kitchen, Inc. on March 9, 1984, and such potatoes arrived at the delivery point on March 12, 1984. Respondent's customer accepted the shipment on March 12, 1984.

5. Respondent notified complainant on March 14, 1984, that an internal defect identified as "mahogany rot" had been discovered in the shipment of potatoes. Respondent also requested a federal inspection of the potatoes on that date.

6. On March 15, 1984, at 1:40 p.m., a federal inspection was made of the potatoes which showed, in relevant part, as follows:

> CONDITION OF LOAD: Stacked on pallets in warehouse.
>
> CONDITION OF PACK: XXX
>
> TEMPERATURE OF PRODUCT: In various sacks 37° *to 52°F.*
>
> SIZE: Generally 1⅞ to 3½ inches, mostly 2 to 3 inches in diameter. Average 3% under 1⅞ inches.
>
> QUALITY: Fairly clean to clean; mature; generally fairly well to well formed. External grade defects from 2 to 8%, average 4%, mostly old bruises and misshapen.
>
> CONDITION: Firm. From 2 to 10% per sample, average 7% damage by sunken discolored areas with underlying flesh gray to black. From 2 to 16% per sample, average 11% serious damage by Internal Mahogany Browning. No soft rot.
>
> GRADE: Fails to grade U.S. No. 1 account toal [sic] grade defects including 11% Internal Mahogany Browning.

7. Mrs. Gerry's Kitchen, Inc., had to dispose of many of the potatoes because they were unusable. That business also expended extra labor resulting in more costs in processing the shipment. As a result, respondent suffered losses totalling $2,720.80.

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8. Respondent tendered a check in the amount of $1,600.00 in payment for the load of potatoes. This amount was arrived at by subtracting the loss suffered by respondent ($2,720.80) from the invoice price ($4,320.80). Such payment was refused by complainant, which demanded the entire invoice amount.

9. The informal complaint was filed on May 4, 1984. The formal complaint was filed on July 23, 1984. These filings were within nine months after the cause of action alleged herein occurred.

CONCLUSIONS

There are two issues in this case. The first issued is whether there was an inordinate delay between acceptance of the potatoes by the purchaser and notification of breach to the seller. A second issue is whether the mahogany rot occurred prior to acceptance, in which case complainant must bear responsibility, or after acceptance, in which case respondent is responsible. Based upon our analysis of the facts and the law, we find the complainant must bear the loss resulting from the poor condition of the potatoes.

There are two circumstances in which the delay in notification could cause respondent to bear the loss resulting from the poor condition of the potatoes. First, the amount of time passing between acceptance of the shipment and notification of breach to the seller could be so unfair to complainant that it would be inequitable to grant respondent a remedy for breach. The rule of law regarding notification time limits provides that "[w]here a tender has been accepted, (a) the buyer must within a reasonable time after he discovered or should have discovered any breach notify the seller of breach or be barred from any remedy. . . ." U.C.C. § 2-607, See also *Smith* v. *Fischer*, 16 Agric. Dec. 1008, 1011 (1957); *Quality Potatoe Co.* v. *Cooney & Korschack*, 13 Agric. Dec. 1104 (1954). Applying this authority to the facts of this case, the issue may be stated as whether respondent discovered the breach and reported it to complainant within a reasonable time after acceptance.

Complainant maintains that respondent should have immediately inspected the potatoes at the time of delivery, and therefore, discovered the breach before or immediately following acceptance. Respondent argues that the defect was internal, and therefore, not discoverable unless the potatoes were cut open. Since mahogany rot is an internal defect, in order to detect it, potato purchasers would have to slice the potatoes open for a proper inspection. If the potatoes are to be processed within a relatively short time, as in the instant case, it is reasonable to wait until processing before cutting the potatoes, unless the buyer has notice of a potential internal defect. There is no evidence presented that would indicate the re-

spondent should have been alerted to the possibility of mahogany rot occurring in the load of potatoes it received prior to receipt.

The second issue is whether the potatoes conformed to the specifications agreed to by the parties at the time of acceptance. We do not believe that they did. Nowhere does complainant offer any evidence that the potatoes did not have mahogany rot at the time of processing—two days after acceptance. The only question is whether the rot could have occurred during the two-day period.

Having accepted the potatoes, respondent bears the burden of proof on this issue. *See*, U.C.C. § 2-607(4); *Roy Rucker Produce* v. *J. P. Miller Wholesale Produce*, 33 Agric. Dec. 871, 873 (1974). Respondent argues that mahogany rot is a condition that occurs in potatoes over a period of time longer than two days. In support of its position, respondent cites USDA Market Bulletin # 479 which provides that mahogany browning is a defect "caused by lengthy storage at too cold a temperature, generally three months or more." While the language cited by respondent is not specific, we conclude that it would be an extraordinary and unlikely occurrence for mahogany rot to occur over a two-day period in potatoes.

Since complainant does not dispute either the condition of the potatoes at the time respondent had them inspected or the results of that inspection, and since mahogany rot is not produced in normal circumstances over a two-day period, we hold that respondent has met its burden of proof. We, therefore, find for the respondent.

As set forth in Finding of Fact No. 8 *supra*, respondent tendered, and complainant refused to accept, a check in the amount of $1,600.00 in payment for the potatoes. Complainant does not dispute the amount of loss suffered by respondent ($2,720.80), therefore; it is held that respondent owes complainant $1,600.00, for which reparation shall be awarded. A valid tender was made thereby precluding an award of interest to complainant from the date of the transaction. *Salinas Marketing Cooperative* v. *Leonard O'Day Company*, 16 Agric. Dec. 719, 725 (1957). Respondent shall remit $1,600.00 to complainant. Its failure to pay this amount as ordered herein will constitute a violation of section 2 of the Act.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation, $1,600.00, with interest at the rate of 13 percent per annum from the first day of the month beginning after the date of this order.

Copies of this order shall be served upon the parties.

YATES BROS. PRODUCE *v.* NORMAN M. COFFIN, INC. PACA Docket No. 2-6786. Decided March 14, 1986.

Evidence—invoices—damages.

Complainant showed through invoices that respondent had not paid for beans it had purchased, but rather had paid for other transactions. Complainant was entitled to receive full sales price.

Peter V. Train, Presiding Officer.
For complainant, *pro se*.
Michael Styles, Fort Lauderdale, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,894.00 in connection with the sale of mixed vegetables in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer in which it denied liability asserting that it had been billed twice for the same produce.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Complainant declined to file an opening statement. Respondent's proposed Answering Statement was not timely filed and was therefore not accepted. Both parties declined an opportunity to file briefs.

References to Exhibits refer to the exhibits made a part of the report of investigation compiled by Department officials.

FINDINGS OF FACT

1. Complainant Yates Bros. Produce, hereinafter referred to as the complainant, is a trade name of Yates Bros. Farm, Inc. Complainant's mailing address is P.O. Box 249, Morven, Georgia 31638.

2. Respondent Norman M. Coffin, Inc., hereinafter referred to as respondent, is a corporation whose mailing address is State Farmers Market, Administration Building, Office No. 26, Pompano Beach, Florida 33060.

3. Both parties are, and at all times material herein were, licensed with the Secretary of Agriculture to do business under the Act.

4. Between November 5, 1983, and November 9, 1983, complainant sold to respondent eight truckloads of mixed vegetables. The invoice numbers were 5421, 5432, 5442, 5452, 5467, 5438, 5462, 5469 and totalled $8,284.00.

5. Respondent paid $4,390 on September 11, 1984, in full payment of invoices 5421, 5469, 5438 and 5442.

6. Respondent has not paid for invoices 5432, 5452, 5462, and 5467 totalling $3,894.00.

7. The formal complaint was filed on December 11, 1984. An informal complaint was filed on June 18, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over whether respondent ever received the goods complainant purportedly shipped. Respondent claims that it was double billed twice for the same shipment of goods. An examination of the trucking records and invoices in question, however, shows that there were eight different, albeit in some cases similar, shipments.

Exhibit 1a of the report of investigation is invoice 5438 and the delivery ticket showing that on November 5, 1983, complainant shipped to respondent 250 hampers of snap beans, 60 hampers of wax beans and 50 hampers of pole beans. The trucker was Steve Herr. Respondent claims that this transaction was the same shipment as was billed on November 8, 1983, as invoice number 5467. An examination of that invoice and delivery ticket which appear as exhibit 1g of the report of investigation shows that the delivery ticket was signed by a Joe Matosis not Steve Herr. Additionally, there is no mention on #5467 of the shipment of any wax beans and there were only 240 hampers of green beans shipped not 250 as in invoice 5438. It is clear, therefore, that these are two separate transactions.

Comparing invoices 5421 and 5432 which are very close in price, $600 and $612, respectively, show that they, too, relate to separate shipments. Invoice 5421 (Exhibit 1f) shows that 100 hampers of snap beans and 25 hampers of was beans were shipped to an A. Vissalo and that the trucker was named Demby. Invoice 5432 (Ex-

hibit 1c) makes no mention of wax beans, is for 102 hampers of snap beans and indicates that the produce was shipped to Patterson, N.J. by a Joey Tucker. These invoices refer to different loads, different destinations and different truckers. They are, therefore, clearly separate transactions.

Invoices 5462 and 5452 are for similar amounts but are once again shipped by different truckers and are for different loads. Invoice 5462 (Exhibit 1e) shows that Monroe Gibbs was the trucker who delivered 100 cartons of fancy green squash or zucchini, 100 cartons of medium green squash or zucchini and 22 hampers of snap beans and that the total invoice price was $732.00. Invoice 5452 (Exhibit 1d) shows an entirely different load consisting of 60 hampers of snap beans, 10 hampers of wax, 20 hampers of pole beans and 40 hampers of fancy green squash for a total invoice price of $760.00. The trucker was designated as Paul T. These are clearly different transactions.

The last disputed set of shipments refer to invoices 5469 and 5442. These are clearly different transactions. Invoice 5469 (Exhibit 1h) was for only $500.00 and covered the shipment of 50 hampers of pole beans and 50 cartons of fresh green squash via Associated Trucking. Invoice 5442, (Exhibit 1b) on the other hand, was for $1440.00 covering the shipment of 200 hampers of snap beans, 20 hampers of pole beans and 10 hampers of wax beans via Eagle Trucking. These two transactions involve different loads shipped via different truckers.

Respondent's defense that it had already paid for the transactions because it had, in essence, been double-billed is without merit. We find that complainant did ship the produce indicated by the eight invoices, and that respondent has only paid for four the transactions and still owes $3,894.00.

Complainant is entitled to receive the value of the goods shipped which is measured by the contract price of $8,284.00 less $4,390.00 already paid, or $3,894.00. Respondent's failure to pay that amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation, $3,894.00, with interest thereon at the rate of 13 percent per annum from December 1, 1983, until paid.

Copies of this Order shall be served upon the parties.

ADAMS BROTHERS PRODUCE COMPANY, INC., *v.* MEAT DISTRIBUTORS, INC. PACA Docket No. 2-7089. Decided March 14, 1986.

Dennis Becker, Presiding Officer.
Pro se, for complainant.
Irving Silver, Alabama, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $30,604.00 in connection with shipments of mixed produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Adams Brothers Produce Co., Inc., is a corporation whose address is P. O. Box 2682, Birmingham, Alabama 35202. Respondent, Meat Distributors, Inc., is a corporation whose address is P. O. Box 9608, Mobile, Alabama 36691. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $30,604.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $30,604.00, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SUN VALLEY PACKING COMPANY *v.* PETE GUINTA d/b/a TOP OF THE HILL PRODUCE and/or LLOYD MYERS CO. INC. PACA Docket No. 2-6378. Decided March 18, 1986.

Complainant a proper party—change of contract terms to consignment—complainant liable for loss incurred in handling consigned lot—apparent authority of broker—buyer stopped from denying—breach of broker's duties—award of fees and expenses to complainant.

Complainant found to be the proper party to file the complainant. Respondent buyer sustained his burden of proving that the contract terms were changed to a consignment on one of the three lots of produce involved. Complainant liable for buyer's loss incurred in handling consigned lot. Where buyer had given the respondent broker authority to order produce in his name and terminated the grant of authority without notifying the produce industry, buyer is estopped from denying the apparent authority of the broker to purchase the other two lots from complainant. Buyer liable for the purchase price of the two lots. Broker breached its brokers duties with respect to the two lots, but incurred no liability because of the wording of the complainant. Fees and expenses awarded to complainant.

Andrew Stanton, Presiding Officer
Thomas R. Olivert, Newport Beach, California, for complainant.
Robert Lawler, DeWitt, New York, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent Pete Guinta, d/b/a Top of The Hill Produce or, if such respondent is not found to be liable, respondent Lloyd Myers Co., Inc., in the amount of $23,936.80 in connection with three loads of lettuce allegedly sold and shipped to respondent Pete Guinta, d/b/a Top of The Hill Produce, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon each respondent. Respondent Lloyd Myers Co., Inc. filed an answer, denying liability. Respondent Pete Guinta, d/b/a Top of The Hill Produce, initially failed to file an answer and was held in default but, after its motion to reopen the hearing was granted, it filed an answer denying liability and asserting a counterclaim for $727.82.

The amount claimed as damages exceeds $15,000 and an oral hearing was requested. Therefore, an oral hearing took place on May 7, 1985, at Syracuse, New York. At the hearing, one witness

testified for complainant, one witness testified for respondent Pete Guinta, d/b/a Top of The Hill Produce, and one witness testified for respondent Lloyd Myers Co., Inc. Evidence was introduced by the Presiding Officer as well as by all three parties. Pursuant to section 47.7 of the Rules of Practice (7 CFR § 47.7) the report of investigation prepared by the Department is also considered part of the evidence. The parties were given an opportunity to file briefs and claims for fees and expenses. Complainant and respondent Pete Guinta, d/b/a Top of the Hill Produce filed briefs. Complainant also filed a claim for fees and expenses.

FINDINGS OF FACT

1. Complainant, Sun Valley Packing Company, is a partnership whose address is P.O. Box 869, Blythe, California. At the time of the transaction involved in the counterclaim, complainant was licensed under the Act.

2. Respondent, Pete Guinta, d/b/a Top of The Hill Produce (hereinafter, "Guinta") is an individual whose address is 2100 Park Street, Syracuse, New York. At the times of the transactions involved herein in the complaint, Guinta was licensed under the Act.

3. Respondent, Lloyd Myers Co., Inc. (hereinafter, "Myers"), is a corporation whose address is 23742 Rotunda Road, P.O. Box 55818, Valencia, California. At the times of the transactions involved herein in the complaint, Myers was licensed under the Act.

4. In early March 1982, Guinta and Myers entered into an agreement providing that Guinta would accept billing on certain invoices for produce purchased on his behalf by Myers but shipped to another buyer. When Myers received payment from the buyer, it would issue a check payable to Guinta, at which time Guinta would pay the original invoice. The agreement did not provide that Myers would purchase the produce from Guinta, or that Myers was not obligated to pay Guinta until Myers received payment from the third party buyer. Guinta set forth the provisions of this arrangement in an August 9, 1983, letter to the Department, which was placed into evidence by the Presiding Officer at the oral hearing. Complainant was never notified of the existence of this arrangement. Several loads of produce were purchased by Myers and billed to Guinta pursuant to this arrangement. Towards the end of March 1982, Guinta may have informed Myers that it was terminating the agreement, but complainant was never notified of this.

5. On approximately March 29, 1982 and April 1, 1982, complainant's agent, Dave Garcia, sold to Guinta, through Myers acting as the broker, two truckloads of lettuce. The March 29, 1982 load consisted of 794 cartons of 2½ dozen Nunn Brand lettuce at $12.00 per

carton plus $.65 per carton cooling and $22.50 for a Ryan recorder, for a total contract price of $10,066.60, f.o.b. The April 1, 1982, load consisted of 825 cartons of 2½ dozen Sir Jason Brand lettuce at $12.00 per carton plus $.65 per carton cooling and $22.50 for a Ryan recorder, for a total contract price of $10,458.75, f.o.b. Complainant loaded the lettuce onto trucks, and prepared a bill of lading showing the destination as Guinta at Syracuse, New York. However, both loads of lettuce were diverted by Myers to a receiver in Kansas City, Missouri. Neither Guinta nor complainant were notified of the diversion. Guinta did not learn of the purchases by Myers on his behalf until shortly after they were made, when it received complainant's invoices.

6. Soon after arranging the March 29, 1982, transaction, Myers issued and sent to complainant and Guinta a confirmation of sale noting that the seller was High & Mighty Farms, Blythe, California, and the price terms were $7.00 per carton plus $.65 per carton cooling. The confirmation did not mention that the lettuce was to be diverted to Kansas City, Missouri.

7. Complainant was never paid for the March 29 and April 1, 1982, loads.

8. On approximately April 6, 1982, complainant sold to Guinta, through Myers acting as the broker, 513 cartons of Sir Jason Brand lettuce at $6.00 per carton, plus $.65 per carton cooling, for a total contract price of $3,411.45, f.o.b.

9. The April 6, 1982, load of lettuce was shipped to Guinta, along with produce from another shipper, and arrived on approximately April 12, 1982. Upon receipt of the load, Pete Guinta wrote on the bill of lading that only 507 cartons were present. The load was then federally inspected, which resulted as follows, in relevant part:

Products Inspected:	Iceberg Type LETTUCE in cartons branded: . . . "SIR JASON, LETTUCE 2½ DOZ. HEADS, SUNVALLEY PACKING CO., BLYTHE, CA.".
	Applicant states: 513 cartons Sir Jason Brand . . . .
Condition of Pack:	*EACH LOT*: Stacked at above location on pallets, in cooler. *EACH LOT*: Some cartons are crushed in at various locations, from 1 to 2 inches.
Condition of Pack:	*EACH LOT*: Mostly fairly tight, some slack 1 to 2 inches. . . .

Sir Jason Lot: Range 29.50 pounds to 43.00 pounds, average 37.07 pounds net weight per carton.

TEMPERATURE OF PRODUCT: Range 37 to 39°F.

Quality: *EACH LOT:* Heads or portions of heads not affected by condition defects are fresh and crisp.

Condition *J.H.K. LOT: WRAPPER LEAVES:* Range 5 to 18 heads per carton, average 36% damage by yellow leaves. Range 1 to 4 heads per carton, average 10% Bacterial Soft Rot, in various stages, affecting wrapper leaves only. *HEAD LEAVES:* Range 2 to 6 heads per carton, average 12% damage by yellow leaves. Range 1 to 3 heads per carton, average 7% Bacterial Soft Rot, in various stages, affecting 1 to 4 outer leaves.

10. After the inspection, Guinta notified Myers of the condition problems, and Myers contacted complainant, which agreed to allow Guinta to handle the April 6 load on consignment. Myers then issued a confirmation of sale on April 14, 1982, reflecting this change in the contract terms.

11. Guinta resold the lettuce of the April 6 load and prepared an account of sales, which he sent to complainant. The account of sales reads as follows:

Sun Valley Packing Company
Post Office Box 869
Blythe, California 92226

Account of sales: Received only 507

7 at $7.00-	49.00
15 at 5.00-	75.00
71 at 4.00-	284.00
10 at 3.00-	30.00
250 at 2.00-	500.00
22 at 2.00 cash	44.00
132 dumped	.....
	$982.00

507 boxes times $3.14 per box freight, handling and comm.

$1,591.98	freight
117.84	handling and commission
1,709.82	
982.00	gross return
727.82	owed to us

12. Complainant was never paid for the April 6, 1982, shipment.

13. Complainant has never paid Guinta the $727.82 which Guinta claims to be due and owing for the April 6, 1982, shipment.

14. An informal complaint was filed by complainant on December 30, 1982, which was within nine months from when the alleged causes of action herein accrued. A formal complaint was filed on June 17, 1983.

15. Guinta originally failed to file an answer and was held in default. However, Guinta's motion to reopen was granted and Guinta filed an answer on February 24, 1984, in which he asserted a counterclaim in connection with the subject matter of the complaint.

CONCLUSIONS

The first issue which must be resolved is whether the complainant is the proper party to bring the complaint filed herein. Both respondents deny that the three loads of lettuce at issue were purchased from complainant. Myers claims that the purchases were made from Dave Garcia, selling for High & Mighty Farms, Blythe, California. The record contains confirmations of sale issued by Myers for the March 29, 1982, and April 6, 1982, loads which indicate that High & Mighty Farms, not complainant, was the seller. However, Dave Garcia testified (Tr. at 11, 12, 16, 17) that the three loads of lettuce sold to Guinta through Myers were from a small lot owned by complainant. Guinta admits receiving complainant's invoices for the loads. In addition, an April 12, 1982, inspection taken on the April 6 load when it arrived at Guinta's place of business shows that the lettuce originated from complainant (Finding of Fact 9). Further, Guinta sent his account of sales to complainant (Finding of Fact 11). Therefore, while Myers may not have been aware of complainant's involvement, it is apparent that Guinta was well aware that complainant was the seller of the three loads of lettuce.

We will next discuss the April 6, 1982, shipment, which was admittedly received by Guinta. Guinta claims that when the truck ar-

rived, it contained only 507 cartons, not the 513 cartons it had ordered. The record contains a bill of lading on which Pete Guinta wrote that only 507 cartons were received (Finding of Fact 10). Although the April 12, 1982, federal inspection says that the applicant, Guinta, asserted that 513 cartons were present at that time, we believe the writing on the bill of lading is more convincing evidence of the number of cartons actually received by Guinta.

Guinta also claims that the 507 cartons were severely deteriorated upon arrival, and this is borne out by an April 12, 1982, inspection report (Finding of Fact 9). Guinta contends that the contract terms were changed to a consignment. Complainant denies this, but the record contains a confirmation of sale issued by the broker reflecting this change (Finding of Fact 10). The burden is on the party asserting a change in the contract terms to prove such a change by a preponderance of the evidence *(American Banana Co. Inc.* v. *Marvin Gray,* 41 Agric. Dec. 539 (1982)), and it is our view that Guinta has sustained his burden of proof in this regard. Guinta has submitted an account of sales, which shows that only $982.00 was received on resale. This is a reasonable figure considering the severe deterioration shown by the lettuce upon its arrival. In his account of sales, Guinta claims that after deducting freight and handling, complainant owes him $727.82. We conclude that Guinta's claim is valid, and find that complainant is liable for $727.82 in connection with the April 6, 1982, shipment. The complainant alleges that if Guinta is not found to be liable, Myers should be liable for failing to properly perform its broker's duties. However, we do not perceive any breach of duty by Myers with respect to this transaction.

Guinta claims it never ordered or received the March 29, 1982, and April 1, 1982, loads of lettuce. Myers contends that it had an arrangement with Guinta whereby Myers would order the produce on behalf of Guinta and then purchase it from him. Myers would then send the produce to a third party. Myers claims that it was only obligated to pay Guinta if it received payment for the loads from the third party to whom the loads eventually were shipped, and since it did not receive such payment, it had no obligation to pay Guinta. Guinta agrees to having arranged with Myers for Myers to order produce in Guinta's name, with the understanding that the produce would be shipped elsewhere. However, Guinta does not agree that Myers bought such produce from him for shipment to a third party, or that Myers had no obligation to pay him until Myers received payment by the third party. In addition, Guinta claims that it ended this arrangement towards the end of March 1982, shortly before the two transactions at issue occurred.

Guinta's version of this arrangement with Myers is set forth in his August 9, 1983, letter to the Department (Finding of Fact 4), and we believe it accurately describes the arrangement.

Respondents do not allege that complainant was ever notified of the arrangement between them, and admit having failed to pay complainant for the two loads of lettuce. The question to be resolved is which respondent is liable for the lettuce. A similar situation was presented in *George Arakelian Farms, Inc.* v. *Leonard O'Day Co. and/or O–K Distributors*, 31 Agric. Dec. 1395 (1972). In that case, the respondents claimed that they had agreed to a business arrangement allegedly prompted by O–K's recordkeeping problems. For a limited period of time, O–K would order produce on behalf of O'Day. O–K would sell the produce to third parties, collect the purchase price, and remit it to O'Day. O'Day would then use these funds to pay the produce sellers. According to the respondents, the purchases at issue in that case were made by O–K after its arrangement with O'Day had terminated. Therefore, the respondents contended that O–K rather than O'Day was liable. The Judicial Officer found O'Day to be solely liable, stating (at 1401) as follows:

> By placing Kirchberg [O–K] in a position of having apparent authority to act for him, O'Day thus became liable to complainant not withstanding his alleged lack of actual authority. In situations such as this where a principal by any act or conduct knowingly causes or permits another to appear as his agent, either generally or for a particular purpose, he will be estopped to deny such agency.

The Judicial Officer went on to note (at 1404) that no notice was ever given to the perishable agricultural commodities industry that this arrangement had ever been terminated and O–K no longer had authority to make purchases for O'Day. Similarly, in this case, by permitting Myers to order produce in Guinta's name, for which Guinta was to be billed, and failing to notify the perishable agricultural commodities industry that this arrangement was no longer in effect, Guinta is now estopped from denying that Myers was no longer acting as his agent at the time it made the two purchases at issue. Therefore, Guinta must be held liable for the full purchase price of the two loads in the amounts of $10,066.60 and $10,478.75, totalling $20,525.35.

Myers' conduct as a broker was certainly in breach of its broker's duties set forth in section 46.28 of the regulations (7 CFR § 46.28), as it did not fully inform complainant that Guinta was not going to be receiving the March 30 and April 1, 1982, loads, and did

not prepare memoranda of sale stating truthfully who was going to be receiving them. As reprehensible as Myers' conduct was, it cannot be held liable, as complainant has alleged that Myers is liable only if Guinta is found not to be.

We have determined that Guinta is liable to complainant for the contract prices of the two loads it purchased, through Myers, in the amount of $20,525.35, less the $727.82 lost by Guinta as a result of the consigned load, or $19,797.53. Guinta's failure to pay complainant this amount is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Complainant, as the prevailing party, is entitled to reasonable fees and expenses in connection with the oral hearing. Complainant has submitted a claim for such fees and expenses in the amount of $4,367.17. Complainant's claim is reasonable, and will be awarded in full.

ORDER

Within 30 days from the date of this order, respondent Pete Guinta, d/b/a Top of The Hill Produce, shall pay to complainant $19,797.53, with interest thereon at the rate of 13% per annum from May 1, 1982, until paid.

Within 30 days from the date of this order, respondent Pete Guinta, d/b/a Top of The Hill Produce, shall pay to complainant, as reparation for fees and expenses, $4,367.17, with interest thereon at the rate of 13% per annum from the date of this order, until paid.

The complaint against respondent Lloyd Myers Co., Inc. is dismissed.

Copies of this order shall be served upon the parties.

TRI PRODUCE, INC., v. GIANT FOOD, INC. PACA Docket No. 2-6812. Decided March 18, 1986.

Rejection without reasonable cause—transportation conditions abnormal—resale would have been futile—after buyer rejects, seller may retain possession.

Respondent rejected the cantaloupes without reasonable cause and held liable for the contract price, as the warranty of suitable shipping condition was voided by the existence of abnormal transportation conditions, evidenced by the freezing damage affecting the melons upon arrival at respondent's place of business. Complainant was not required to resell the melons because such an effort would have been futile. Complainant was not obligated to turn the melons over to respondent for resale after respondent's rejection.

Andrew Stanton, Presiding Officer.
T1For complainant, pro se.
Arthur D. Koch, Washington, D.C. for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $5,062.50 in connection with the sale and shipment of a truckload of cantaloupes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00 the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation prepared by the Department is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answering statement and complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Tri Produce Co., is a corporation whose address is 1795 North Fine Avenue, Fresno, California.

2. Respondent, Giant Food, Inc., is a corporation whose address is P.O. Box 1441, Washington, D. C. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately August 31, 1984, complainant sold to respondent a truckload of size 15 cantaloupes consisting of 1,050 cartons at a price of $4.00 per carton, plus $.55 per carton precooling, $.25 per carton palletizing, and $22.50 for a temperature recorder, for a total contract price of $5,062.50, f.o.b. The contract did not specify that the cantaloupes were to be U.S. number one.

4. On August 31, 1984, complainant shipped the truckload of cantaloupes in interstate commerce to respondent, where it arrived on September 7, 1984, and was federally inspected. The inspection revealed as follows, in pertinent part:

VARIOUS CONTAINERS Range 35 To 38°*F.*

CANTALOUPES IN CARTONS: "Tri Brand 15, Ca."

Many top layer cartons and some 6th layer cartons show from one to two melons adjacent to sides or top of cartons being glassy and translucent following freezing injury up to ¼ inch in depth.

Remainder of Stock: Quality: Grade defects average 2% scars and misshapen.

Condition: Mostly ripe and firm, many firm. Mostly turning yellow, some green. 1 to 3 melons in most cartons, none in some, average 9% damage by bruising, generally affecting ripe and firm melons and located at bottoms or sides of cartons. Average 2% damage by sunken areas, affecting ripe and firm melons. Less than 1% decay.

GRADE: Meets quality requirement but fails to grade U.S. No. 1 only account of condition.

REMARKS Restricted 10 pallets being unloaded and 4 pallets nearest rear doors.

5. After the inspection, respondent refused to unload the melons, and indicated to the truck driver that it was rejecting the load. Complainant was notified and instructed the truck broker to dispose of the cantaloupes. The truck broker, on September 7, 1984, sent the following telegram to respondent:

> MAX SHAPIRO [respondent] IS REJECTING CANTALOUPES THAT MADE GOOD DELIVERY PER BOB STOCKTON OF TRI PRODUCE THE TEMPERATURES ON ARRIVAL WERE 35 TO 38 DEGREES USDA INSPECTION SHOWS 14 PERCENT CONDITION DEFECT ALAMO TRUCK BROKERS IS SELLING MELONS FOR SHAPIRO ACCOUNT WILL DEDUCT FREIGHT OF $2,800 PLUS $250 TO HAUL LOAD TO RICHMOND VIRGINIA AND WILL REMIT REMAINDER TO TRI PRODUCE.

Complainant subsequently called the truck broker and told him that if it should receive any net proceeds from its resale of the cantaloupes, those proceeds should be turned over to respondent, not complainant.

6. The truck broker disposed of the cantaloupes and remitted no proceeds to respondent.

7. A formal complaint was filed on March 6, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Complainant contends that respondent rejected the cantaloupes without reasonable cause and is thus liable for the $5,062.50 contract price. Respondent argues that the condition of the cantaloupes upon arrival at its place of business was poor and justified their rejection. Respondent also claims that complainant deprived respondent of the ability to resell the cantaloupes after rejection by instructing the truck broker to take possession of the load and resell it in Richmond, Virginia.

Complainant, as the party alleging that respondent rejected the cantaloupes without reasonable cause, has the burden of proving its own compliance with the terms of its contract with respondent. *Tom Bengard Ranch, Inc. a/t/a Keen Harvest* v. *Prevor-Mayrsohn International, Inc.*, 40 Agric. Dec. 1781 (1981). As this was an f.o.b. contract, complainant gave an implied warranty of suitable shipping condition, "that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." 7 CFR 46.43(j). Accordingly, in the absence of normal transportation conditions, the suitable shipping condition warranty is inapplicable.

The September 7, 1984, federal inspection indicates that many cartons of the load suffered severe freezing damage. This damage obviously occurred during transit. Therefore, it is apparent that transportation conditions in this case were abnormal, which voids the suitable shipping condition warranty. We conclude, therefore, that complainant has met its burden of proving its compliance with the terms of its contract, and respondent had no reasonable cause to reject the melons.

Having rejected the cantaloupes without reasonable cause, respondent became liable for the difference between the contract price and the amount realized from complainant's resale, provided the resale was made in good faith and in a commercially reasonable manner. *Byrd Produce Company* v. *Albany Public Markets, Inc.*, 31 Agric. Dec. 136 (1972); U.C.C. 2-706. The record does not reflect the actual disposition of the melons, but complainant contends in its sworn statement in reply that the trucking company sold them to recover the cost of freight. In order for complainant to be able to recover the contract price under the circumstances present in this case, it must show that it was unable to resell the cantaloupes at a

reasonable price after having made a reasonable effort to do so, or show that such an effort would have been futile. *R.V. Saur & Sons Orchards, Inc.* v. *Affy Tapple, Inc.*, 42 Agric. Dec. 458 (1983); U.C.C. § 2-709. We can assume from the deterioration and severe freezing damage shown by the September 7, 1984, inspection report that the melons were sufficiently deteriorated that their resale price could not have been in excess of the transportation costs. Therefore, any effort by complainant to resell the melons for a price greater than that obtained by the trucking company would have been futile.

Respondent claims that it was wrongly deprived of possession of the melons and the opportunity to resell them on its own. However, the Uniform Commercial Code, at section 2-703, provides in relevant part that "where the buyer wrongfully rejects . . . the aggrieved seller may . . . (d) resell and recover damages as hereafter provided (section 2-706. . . ." See also *Gwin White & Prince, Inc.* v. *National Food Corporation*, 42 Agric. Dec. 445 (1983). Therefore, complainant was legally entitled to turn over the melons to the trucking company, and under no obligation to provide them to respondent for resale.

Complainant is entitled to the contract price of $5,062.50. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,062.50, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

ROBERT L. MEYER d/b/a MEYER TOMATOES, *v.* OTAY PACKING CO.
PACA Docket No. 2-6833. Decided March 18, 1986.

Undisputed amount—Order issued—Payment in full of disputed amount.

Respondent admitted liability for 9 of the 10 loads of tomatoes alleged in the complaint, in the amount of $89,079.50, and an Order Requiring Payment of Undisputed Amount was issued requiring payment of that sum. Respondent's claim that the remaining $10,868.00 was paid to complainant, supported by evidence that complainant deposited the check, was not disputed by complainant. The complaint for $10,868.00 was thus dismissed.

Andrew Stanton, Presiding Officer.
For complainant, *pro se*.
For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $99,947.50 in connection with the sale and shipment of 10 truckloads of tomatoes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability for $89,079.50, but denying liability for $10,868.00.

Although the amount claimed as damages is greater than $15,000.00, the parties waived oral hearing. The shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is, therefore, applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but chose not to do so.

FINDINGS OF FACT

1. Complainant, Robert L. Meyer d/b/a Meyer Tomatoes, is an individual whose address is P.O. Box 606, King City, California.

2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately August 28 and 30, September 1, 8, 11, 15, 20, 21, 26, and 28, 1984, complainant sold to respondent 10 truckloads of tomatoes. The contract price for the August 28, 1984, truckload was $10,868.00, f.o.b. The contract prices for the remaining nine truckloads totaled $89,079.50, f.o.b. The tomatoes were sold in contemplation of eventual movement in interstate commerce.

4. Respondent received and accepted the tomatoes, but has paid complainant only for the August 28, 1984, load in the amount $10,868.00, by means of a check which complainant accepted and deposited into his account. Respondent has failed to pay complain-

ant the contract prices for the remaining nine loads of tomatoes in the amount of $89,079.50.

5. A formal complaint was filed on March 1, 1985, which was within nine months from when the causes of action herein accrued.

6. On May 8, 1985, respondent filed its answer, in which it admitted liability for all but one of the truckloads of tomatoes alleged in the complaint, in the amount of $89,079.50. Therefore, on June 25, 1985, an Order Requiring Payment of Undisputed Amount was issued against respondent, ordering it to pay to complainant the undisputed amount of $89,079.50.

CONCLUSIONS

Respondent admits liability for all the transactions alleged in the complaint except for the shipment of tomatoes of August 28, 1984, with a contract price of $10,868.00, which respondent claims it paid to complainant in a check dated September 28, 1984. Respondent has submitted with its verified answer a copy of the check which shows that it was accepted and deposited by complainant. Complainant has not responded to respondent's allegations of payment. Therefore, we conclude that respondent has fully paid the $10,868.00 contract price for the August 28, 1984, shipment. As we have already issued an Order Requiring Payment of Undisputed Amount for the remaining $89,079.50, we conclude that respondent is without any further liability, and the complaint against it must, therefore, be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

UNIVERSAL FRUIT CO. INC. *v.* JERRY'S FRUIT & GARDEN CENTER, INC.
PACA Docket No. 2-6692. Decided March 24, 1986.

Produce delivered must be same as that inspected for a "Purchase After Inspection". Parties must specify or clearly act in accordance with a "Purchase After Inspection." A "Purchase After Inspection" makes inapplicable all implied warranties.

Complainant sold 1,056 boxes of strawberries to respondent after respondent made two detailed inspections. Respondent claimed complainant warranted that the uninspected boxes were same quality and condition as those inspected. Complainant denied this. Since respondent accepted the goods after inspection and there was no showing goods were not same as those inspected, reparation was awarded to complainant.

Jory M. Hochberg, Presiding Officer.
LeRoy W. Gudgeon, Northfield, Illinois, for complainant.
David J. Weiss, Chicago, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter "PACA." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $3,696.00, in connection with the sale to respondent of 1,056 cases of strawberries in interstate commerce.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon the respondent. Respondent filed an answer denying any liability to complainant. The amount claimed as damages in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed opening statements and respondent filed answering statements. Complainant then filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Universal Fruit Company, Inc., is a corporation whose address is 35 South Water Market, Chicago, Illinois.

2. Respondent, Jerry's Fruit & Garden Center, Inc., is a corporation whose address is 7901 N. Milwaukee Avenue, Niles, Illinois. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about May 16, 1984, complainant sold to respondent 1,056 boxes of strawberries, which were all that remained from a load of 2,496 cases of strawberries which had been purchased by complainant, and which had arrived at complainant's place of business from California on May 11, 1984. Respondent had agreed to purchase the 1,056 cases of strawberries at a price of $3.50 per case following two separate inspections made by respondent's agents on the day of purchase. The strawberries were picked up and delivered by a cartage truck to respondent's store on May 16, 1984.

4. On the morning of May 17, 1984, respondent's buyer phoned complainant's salesman to propose the return of the strawberries on the ground that the quality and condition was unsuitable. Complainant refused to accept the return of the strawberries.

5. The formal complaint was filed on August 13, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant seeks to recover the full amount of the purchase price of 1,056 cases of strawberries, alleging that the respondent made a "purchase after inspection" as that term is defined in section 46.43(ff) of the regulations promulgated under the PACA (7 CFR § 46.43(ff)). If a "purchase after inspection" took place, respondent waived all implied warranties of qualitiy or condition. Respondent contends, however, that despite having inspected the strawberries, complainant's agent expressly represented that the uninspected boxes were of the same quality as those inspected. Respondent further contends that upon the arrival of the strawberries it discovered that they were not as represented, and that 65% were offered for sale as canning fruit at $1.00/case and 35% were unsaleable and, therefore, thrown out.

There were two basic areas of factual dispute. The first concerns whether any express warranties were made at the time of sale. Complainant claims none were made while respondent claims complainant's employee expressly represented that the uninspected boxes were of the same quality as the inspected boxes. The second factual dispute concerns the actions and statements of the parties after the strawberries arrived at respondent's store. Complainant contends that when respondent complained about the quality the following day, complainant agreed to reduce the purchase price $1.50 per case as a "courtesy." Respondent contends that complainant's salesman acknowledged the unmerchantable condition, and told respondent to sell the strawberries for whatever it could get, and that the parties would later make a settlement. Respondent further states that it informed complainant that it planned to sell the strawberries for $1.00 per case before actually doing so.

It is complainant's burden to prove by a preponderance of the evidence that the transaction in question was a "purchase after inspection." *Crouse Farms* v. *Dublin Produce Co.,* 29 Agric. Dec. 1439 (1970). To carry this burden, complainant must show that the goods shipped were the same as the goods inspected, *Kirby & Little* v. *United Fruit,* 16 Agric. Dec. 1066 (1957), and that the parties used the term "purchase after inspection" or acted in accordance with a

belief that the contract was governed by it, *Ritepak Produce* v. *Green Grove Markets,* 29 Agric. Dec. 165 (1970). First, there is little or no dispute concerning the identity of the goods. The sworn statement of complainant's salesman states that the strawberries were first offered to respondent's buyer at $4.00 per case, but were reduced to $3.50 per case if respondent desired to take all the remaining cases. Neither respondent's buyer, who inspected the strawberries at complainant's facility on two occasions on the day of shipment, nor respondent's owner, who was present during the second inspection, question whether the strawberries delivered were the same as those available for inspection.

The record also supports complainant's contention that the contract was for "purchase after inspection" as that term is defined by section 46.43(ff) of the regulations. Complainant's salesman states in his affidavit that first the respondent's buyer and then the buyer and the owner made two separate inspections on the day in question, and describes in detail the extensive and unrestricted inspections which took place in complainant's cooler. The accomplishment or details of these inspections are not denied by respondent's buyer and owner. Respondent claims, instead, that complainant's salesman expressly represented that the uninspected cases were of like quality and condition. However, this claim is not in conformity with respondent's previous statement that it purchased the produce "under the assumption that it was saleable merchandise." Moreover, respondent does not explain how the circumstances of the alleged representation by complainant's salesman came about, particularly when the two full and complete inspections would tend to make it unnecessary. Finally, respondent offers absolutely no documentary evidence to substantiate its claims that 35% of the strawberries had to be thrown out and 65% had to be sold for canning. Even if this was not a purchase after inspection, the lack of such documentary evidence would tend to undermine respondent's claim of damages as a result of breach of contract.

It has been held that full and complete inspection makes inapplicable all implied warranties. *Max Feldman & Sons* v. *Alderiso Bros., Inc.,* 27 Agric. Dec. 763 (1968); *Roll Packing* v. *Bracker,* 18 Agric. Dec. 975 (1959). At times, even "doorway inspections" have been found to form the basis for a purchase after inspection. *Leo & Sons* v. *Wesco Foods Co.,* 12 Agric. Dec. 188 (1953). The two inspections conducted by respondent herein provide ample support to find a "purchase after inspection," making all implied warranties inapplicable. The evidence further supports a finding that no express warranties were made. Since respondent rejected complainant's offer to settle the dispute by reducing the purchase price $1.50 per

case, complainant is entitled to the full purchase price of $3,696.00 as originally agreed to by the parties. Respondent's failure to pay this amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $3,696.00, with interest thereon at the rate of 13% per annum, from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

DENICE AND FILICE PACKING CO., *v.* CORGAN & SON, INC. PACA Docket No. 2-6743. Decided March 24, 1986.

Burden of proving breach and damages upon respondent—Damages resulting from breach—Respondent failed to prove—Resale of consigned peppers not prompt and proper—Purchase price—Reasonable value of peppers on quantum merit basis.

As respondent made no attempt to justify its failure to pay for three of the five loads of peppers it admittedly received and accepted, it is liable for their contract prices. Regarding one of the remaining loads, while respondent may have proved a breach of warranty by complainant, respodent has failed to sustain its burden of proving damages as it did not provide any evidence of resales. With respect to the other remaining load, although there is evidence to support respondent's allegation that the peppers were consigned, respondent failed to make prompt and proper resales and is liable for the reasonable value on a *quantum meruit* basis. Complainant's damages are limited to the amount sought.

Andrew Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, Calif., for complainant.
For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $12,586.20 in connection with the sale and shipment of five lots of peppers in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability with respect to three of the lots.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verfied complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, but respondent elected not to submit any additional evidence. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Denice and Filice Packing Co., is a corporation whose address is 10001 Fairview Road, Hollister, California.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions alleged herein, respondent was licensed under the Act.

3. On approximately July 27, 1984, complainant sold and shipped 80 cartons of large red bell peppers in interstate commerce to Shopwell Stores, Inc., Bronx, New York. Colvin Distributing Company, Millbrae, California, acted as the broker. Upon arrival at the receiver's place of business on August 1, 1984, the receiver reported to the broker that the peppers had been inspected and found to have condition defects averaging 25 percent damage by slightly sunken discolored areas affecting over ⅛ to ½ of the surface of the peppers, five to 12 percent, average nine percent damage by shriveling, and two to seven percent, average four percent damage by decay. The broker reported this to complainant, which authorized respondent to handle the peppers for complainant's account. The parties then agreed that respondent would pay complainant $7.00 per carton for the peppers, totaling $560.00, f.o.b. Respondent has not made any payment to complainant for the 80 cartons of peppers.

4. On approximately July 24 and August 2, 7, and 15, 1984, complainant sold and shipped to respondent, in interstate commerce, four lots of peppers for f.o.b. prices of, respectively, $400.00, $4,539.30, $4,343.40, and $2,743.50. All four loads were accepted by respondent. The price terms for the July 24, 1984, shipment were eventually changed to a consignment, but respondent did not remit an account of sales, or any payment. Respondent has not made any payment for the other three lots of peppers as well.

5. On August 21, 1984, respondent secured a federal inspection of the August 15, 1984, shipment. That inspection stated as follows, in relevant part:

Temperature of Product:	Ranges 48 to 50F.
Condition:	Mostly fresh, firm and crisp. Red color 5 to 34%, average 20% damage by shriveling. 13 to 26%, average 18% damage by numerous slightly sunken discolored areas. Decay ranges 2 to 9%, average 6% Gray Mold Rot and/or Bacterial Soft Rot in various stages affecting walls and calyxes.

6. Respondent did not resell any peppers from the August 15, 1984, shipment.

7. A formal complaint was filed on December 24, 1984, which was within nine months from when the causes of action herein accrued.

CONCLUSIONS

Respondent does not deny receiving and accepting the five loads of peppers at issue, but claims in its unverified answer that three of the loads were abnormally deteriorated upon arrival at its place of business. Having accepted the five loads, respondent became liable for the agreed upon contract prices, less any damages resulting from any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Magic Valley Produce, Inc.* v. *Art Kramer's Produce Buying Service, Inc.,* 39 Agric. Dec. 464 (1980)

Complainant admits that the August 15, 1984, load of peppers was deteriorated upon arrival at respondent's place of business, and a federal inspection report contained in the report of investigation confirms this (Finding of Fact 5). However, complainant claims that respondent refused to negotiate any settlement and has not provided an accounting on the shipment. The record does not contain any evidence of resales by respondent on the August 15, 1984, shipment. Therefore, we conclude that while there might have been a breach of warranty by complainant on this load, respondent has failed to sustain its burden of proving any damages resulting from such breach. Therefore, respondent is liable for the full contract price of $2,743.50.

Although respondent does not allege in its unsworn answer that there was any problem with the July 27, 1984, load, the report of

investigation contains a letter from the broker, who states that it received notice from respondent on August 1, 1984, that the July 27, 1984, load had condition problems when it arrived at the place of business of the original receiver, Shopwell Stores Inc., Bronx, New York. The broker claims that the peppers were sent to respondent to handle for complainant's account. In its opening statement, complainant does not agree that the peppers were consigned, but claims that respondent agreed to accept them at a fixed price of $7.00 per carton, or $560.00 for the load. Even if the peppers were consigned to respondent, respondent had the duty to promptly and properly resell them, render an accounting to complainant, and pay over to complainant the net proceeds after deducting its necessary expenses incurred in the resale. *Stoops & Wilson, Inc.* v. *Wholesale Produce Exchange*, 41 Agric. Dec. 290 (1982). Respondent has not provided any evidence of resales, and has made no payment at all to complainant for this load. Therefore, we conclude that even if respondent accepted the peppers on consignment, it breached its duty to complainant and is liable for the reasonable value of the peppers on a *quantum meruit* basis. *Grady Pruette* v. *E. Vega & Sons Produce*, 41 Agric. Dec. 1196 (1982). In the absence of any other evidence as to the reasonable value of the peppers, we take judicial notice of the Bronx, New York, Market News Service Reports for August 1, 1984, which shows a price of $25.00 per carton for the type of peppers involved herein, or $2,000.00 for all 80 cartons. However, this exceeds the $560.00 requested by complainant, and we conclude that respondent is liable for this lesser sum only.

With respect to the three remaining loads of peppers at issue, those sold on July 24, August 2, and August 7, 1984, respondent has not presented any evidence whatsoever to justify its failure to pay complainant the agreed upon contract prices. Therefore, we find respondent to be liable for the full amount claimed in the complaint for all five shipments, totaling $12,586.20. Respondent's failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $12,586.20, with interest thereon at the rate of 13 percent per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BLESSINGS IN ACRES *v.* ROBERT W. THURSTON d/b/a THURSTON MARKETING CO. PACA Docket No. 2-6843. Decided March 24, 1986.

Contract terms—Specific F.O.B. price agreed to—Contract terms not changed—Burden of proof as to breach and damages upon respondent—Breach of suitable shipping condition warranty—Damages incurred by respondent exceed contract price.

It was determined that the parties agreed to a specific F.O.B. contract price, and the price terms were not changed after the truckload of strawberries arrived at respondent's place of business. Respondent sustained his burden of proving a breach of complainant's suitable shipping condition warranty. The damages incurred by respondent exceeded the contract price. Therefore, the complaint was dismissed.

Andrew Stanton, Presiding Officer.
For complainant, *pro se*.
For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,154.80 in connection with the sale of a truckload of strawberries shipped in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Blessings In Acres, is a partnership whose address is P.O. Box 355, Soledad, California.

2. Respondent, Robert W. Thurston d/b/a Thurston Marketing Co., is an individual whose address is P.O. Box 1903, Bakersfield,

California. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately June 16, 1984, complainant sold to respondent a truckload of strawberries consisting of 1,128 flats, U.S. number one, at the price of $6.00 per flat, plus $.60 per flat for cooling and $222.00 for tectrol, for a total of $7,666.80, f.o.b.

4. The truckload of strawberries was shipped, in interstate commerce, to respondent's customer, Kleiman & Hochberg, Inc., Bronx, New York, where it arrived at approximately 8:00 a.m. on June 21, 1984. The temperature recorder shows that a temperature of approximately 35° was maintained throughout transit.

5. The truckload of strawberries was federally inspected at 4:45 a.m. on June 22, 1984, and revealed as follows, in relevant part:

VARIOUS CONTAINERS	Range 42° To 45°F.
STRAWBERRIES:	California Strawberries "Blessings In Acres Co."
Applicant States:	1,000 flats.
Quality:	Grade defects average 3% misshapen.
Condition:	Mostly ripe and firm, mostly fairly bright, some dull. [Unintelligible] fresh and green 15 to 35% average 22% ripe and soft, many which are leaking. Decay ranges 12 to 28% average 20% Gray Mold Rot in various stages, some of which in [unintelligible].

6. Respondent received $2,820.00 from its resale of the strawberries to Kleiman & Hochberg, Inc., which sum it remitted to complainant as the undisputed amount owing. Respondent has not made any additional payment to complainant for the strawberries at issue.

7. In a letter to the Department dated October 8, 1984, respondent's owner, Robert W. Thurston, Jr., states as follows, in pertinent part, concerning the load of strawberries at issue:

> We purchased these berries, if you can call it a purchase, based on an FOB price of $6.00, but the terms of the purchase were FOB as to price, delivered as to terms, U.S. 1 grade and excellent quality on arrival.

8. A formal complaint was filed on February 25, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

The first issue which must be resolved is the parties' dispute over the agreed upon contract price. Complainant asserts that respondent agreed to an f.o.b. price of $6.00 per flat, plus cooling and tectrol. Respondent maintains that the price was to be determined after arrival because respondent's Mr. Thurston had no prior knowledge of the shipper or label. The report of investigation contains a letter dated October 8, 1984, from Mr. Thurston to the Department in which he admits that he purchased the strawberries based on an f.o.b. price of $6.00 (Finding of Fact 7). Therefore, we conclude that a specific contract price was agreed to by the parties, in the amount claimed by complainant.

Respondent admits receiving and accepting the strawberries, but claims they were extremely deteriorated and, when complainant was advised of this, complainant agreed that respondent should handle the strawberries for complainant's account. Complainant denies that any authorization was given respondent to handle the strawberries for its account. The burden is upon respondent, the party alleging a change in the contract terms from f.o.b. to a consignment, to prove such a change by a preponderance of the evidence. *American Banana Co., Inc.* v. *Marvin Gray,* 41 Agric. Dec. 539 (1982). Respondent has not presented any evidence, other than its own assertions, of the alleged change in contract terms. Therefore, we conclude that respondent has failed to sustain its burden of proof in this regard.

Having accepted the strawberries, respondent became liable for the agreed upon contract price less damages resulting from any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc.* v. *Albertson's Inc.,* 42 Agric. Dec. 429 (1983). As this was an f.o.b. sale, complainant gave the implied warranty of suitable shipping condition, which is defined in the regulations (7 CFR 46.43(j)) as meaning that "the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The record contains a federal inspection dated June 22, 1984 (Finding of Fact 5), which shows that the strawberries at issue were extremely deteriorated, containing an average of 22% soft and 20% decay. The inspection also reveals

that the temperature of the product ranged from 42° to 45°F. Complainant argues that this high temperature caused the deterioration found by the inspection. However, transportation conditions were normal, as the temperature recording tape shows that a temperature of approximately 35° was maintained throughout transit (Finding of Fact 4). Even if the strawberries were mishandled from the time they arrived at respondent's place of business on June 21, 1984, at 8:00 a.m. to the time of the inspection on June 22, 1984, at 4:45 a.m. such as to cause the pulp temperature to rise to 42 to 45°F., such a rise in pulp temperature would not cause strawberries in suitable shipping condition to experience a total of 44% deterioration after only 21 hours. It is quite clear that the strawberries were excessively deteriorated when they arrived at respondent's place of business and, therefore, were in breach of warranty.

Respondent's damages resulting from complainant's breach of warranty are the difference at the time and place of acceptance between the value of the strawberries if they had been as warranted and their actual value. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest* v. *Garden State Farms, Inc.*, 42 Agric. Dec. 922 (1983). The Market News Service Reports for Bronx, New York shows that on June 21, 1984, the value of the strawberries involved herein if they had been as warranted was from $.75 to $1.00 per pint, mostly $.90 to $1.00 per pint. Using the $.90 per pint figure results in a price of $10.80 per flat, or $12,182.40 for the entire 1,128 flat load. For the actual value of the strawberries, we look to the proceeds of a prompt and proper resale. Respondent claims that $2,820.00 was received from its buyer, Kleiman & Hochberg, Inc. While the documentation in the record as to this resale is not as complete as we would like, it is apparent from the condition problems of the strawberries that respondent was extremely fortunate to recover even $2,820.00. Therefore, we find respondent's resale to have been prompt and proper.

Respondent's damages were thus $12,182.40 less $2,820.00, or $9,362.40. This exceeds the contract price of $7,666.80 and, therefore, respondent had no obligation to remit anything to complainant. Respondent has paid $2,820.00 to complainant and is not liable for any additional sum. Accordingly, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING, *v.* CARNIVAL FRUIT CO. INC. PACA Docket No. 2-6671. Decided March 27, 1986.

Commercial unit is entire load—Unloading truck as act of acceptance—Acceptance of wrongful rejection.

Respondent held to have accepted a truckload of tomatoes when it accepted a part of them for its own use. However, since complainant agreed to its wrongful rejection of the remainder of the load, respondent is not liable for damages.

Dennis Becker, Presiding Officer.
Pro se, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks $3,884.50 in connection with a transaction in interstate commerce involving the shipment of cherry tomatoes, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice was followed. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statement. Complainant filed an opening statement, and respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Kent W. Northcross is an individual doing business as Northcross Distributing, with an address at Rio Rico Industrial Park, Nogales, Arizona 85621.

2. Respondent, Carnival Fruit Co., Inc., is a corporation with an address at 475 N.E. 185th Street, North Miami Beach, Florida 33179. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On May 28, 1984, complainant sold to respondent 1,080 trays of cherry tomatoes at $6.30 per tray plus $.40 per tray for palletizing, and $22.50 for a temperature recording device, for a total contract price of $7,258.50, f.o.b. The cherry tomatoes were shipped from Arizona to Florida on that date, and arrived in Florida on May 31, 1984, where they were received and accepted by respondent.

4. The transaction was brokered jointly by Joe Yrigoyen Brokerage of Nogales, Arizona, and by The Tobi Company, located in Miami, Florida. Joe Yrigoyen Brokerage issued a Broker's Memorandum of Sale which reflected the terms of the contract, as set forth in paragraph 3, above.

5. Upon arrival of the tomatoes in North Miami Beach, Florida, respondent unloaded the truck, thereby accepting the tomatoes. Its visual inspection revealed that a number of the trays of the tomatoes were already ripe. Therefore, it called for a federal inspection, which was held on May 31, 1984. That inspection showed in pertinent part that the range of temperature for the containers of cherry tomatoes was 58° to 60°F, far in excess of the 45° to 48° temperatures requested by complainant upon the loading of the truck. It also showed as regards condition as follows:

630 Lot:	Average approximately 90% red. Ranges 2 to 28%, average 11% Soft Average 1% decay.
450 Flat Lot:	Average approximately 20% turning and pink, 80% Light red & red. No decay.

Under the remarks section of the inspection certificate the inspector wrote "Applicant states above lot unloaded and reloaded onto trailer. Above lots separated for inspection by applicant."

6. Although divided into two lots, the cherry tomatoes inspected by the inspection reflected in paragraph 5, above, were the 1,080 trays delivered to respondent by complainant.

7. As a result of the federal inspection the respondent notified complainant through the brokers that it was rejecting the 630 trays of cherry tomatoes which were red because they were overripe. However, it stated that it was accepting the 450 trays of cherry tomatoes which were turning and pink. Complainant initially notified respondent that it accepted respondent's actions in rejecting a part of the load of the cherry tomatoes. It placed the 630 trays of cherry tomatoes with another company in Miami, Florida known as Caribe Produce at $1.00 per tray plus $.40 per tray for palletizing and handling for a total contract price of $882.00. Com-

plainant issued an invoice to Caribe Produce for that amount which it dated May 28, 1984, although such invoice was issued later, and which invoice contained the same invoice number as did the original invoice to Carnival Fruit Company. Caribe Produce paid Northcross Distributing $882.00 with respect to its purchase of the 630 trays of tomatoes.

8. Respondent paid complainant $3,002.50 for the remaining 450 trays of cherry tomatoes which it kept. That left $3,374.00 unpaid out of the total contract price of $7,258.50.

9. A formal complaint was filed in this proceeding on September 13, 1984, which was within nine months of the time the cause of action herein arose.

DISCUSSIONS

This proceeding involves a situation in which respondent wrongfully rejected a portion of a truckload of cherry tomatoes because of their ripe condition upon arrival. However, it also involves a circumstance in which we find that complainant accepted respondent's wrongful rejection, as a result of which respondent must prevail.

Upon arrival of the cherry tomatoes in Miami, Florida respondent determined after visual and federal inspection that 630 of the 1,080 trays were riper than it wished. However, the other 450 trays met its requirements for ripeness. As a result of the federal inspection respondent notified complainant through two brokers, The Tobi Company of Miami, Florida and Joe Yrigoyen Brokerage of Nogales, Arizona that it was rejecting the 630 trays which were overly ripe. It has long been held that a receiver cannot accept a portion of a truckload of a commodity while rejecting the rest. *Salinas Lettuce Farmers Corporative* v. *Larry Ober Company,* 39 Agric. Dec. 65 (1980). The evidence also reflects that the respondent unloaded and reloaded the tomatoes. This is also an act of acceptance. *Theron Hooker Company* v. *Ben Gatz Co.,* 30 Agric. Dec. 1109, 1112 (1971). Therefore, respondent's rejection of the 630 trays of cherry tomatoes was a wrongful rejection. However, complainant accepted respondent's rejection of the 630 trays of cherry tomatoes. Because complainant agreed to the action of respondent, respondent is absolved from any liability which might arise from its wrongful rejection. See *Walters Produce, Inc.* v. *Francis Produce, Inc.* 44 Agric. Dec. ____ (1985); *Admiral Packing Co.* v. *Prevor-Mayrsohn International, Inc.,* 41 Agric. Dec. 99 (1982).

Subsequent to accepting the rejection complainant advised respondent that it was not accepting respondent's rejection of the 630 trays of cherry tomatoes. It told respondent that it considered the

problem to be a transportation problem, as a result of which respondent should look to the trucking company for reimbursement for any damages it might have suffered, and that complainant was seeking to recover the full contract price. However, complainant's actions were inconsistent with such action. Complainant issued an invoice to the secondary receiver of the 630 trays, Caribe Produce of Miami, Florida. Caribe Produce paid the full invoice amount of $882.00 directly to complainant, thereby showing that, indeed, complainant had assented to the rejection by respondent. Furthermore, Bobby Wagner, the employee of Northcross Distributing who negotiated the contract with respondent, and who discussed the matter with Joe Yrigoyen Brokerage, signed a letter along with Joe Yrigoyen concerning the transaction involved. Those individuals stated that there had been a delay in receipt of a sufficient quantity of cherry tomatoes to fill respondent's order, from May 25, to May 28, 1984. Both Mr. Wagner and Mr. Yrigoyen stated that:

> After several phone conversations between Joe Yrigoyen and Bobby Wagner it was agreed that Carnival Fruit Co., would unload the 450 Flats of Pink to Light Red Cherry Tomatoes at the invoice price, and pay the trucker for that portion of the Freight, and that Northcross Distributing would find another receiver in the Miami area to handle the balance of 630 Flats of Cherry Tomatoes.

The information quoted above was conveyed to The Tobi Company, and apparently it was not until sometime later that other issues with respect to the payment of freight arose. The statement by complainant's broker and employee is very damaging to complainant's case, and must be given great weight.

In review of the above we find that respondent did not violate the Act.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

TYRE FARM, INC., *v.* DANDREA PRODUCE, INC. PACA Docket No. 2-6709. Decided March 27, 1986.

Acceptance occurs upon unloading—Broker's statements—Private inspections discounted.

When respondent unloaded a truckload of pickles it accepted them, as a result of which it had the burden to show they did not meet contract specifications. Its provi-

sion of affidavits from private parties are not acceptable as to condition. The statement of the broker as to the transaction is given great weight, as a result of which it was determined that the contract was not modified.

Dennis Becker, Presiding Officer.
For complainant, *pro se*.
For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $11,668.00 in connection with the sale of a truckload of pickles in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement consisting of two sworn affidavits. Respondent filed an answering statement consisting of an affidavit. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Tyre Inc., is a corporation with an address at 1304 Forest Drive, Sanford, Florida 32771.

2. Respondent, Dandrea Produce, Inc., is a corporation with an address at P.O. Box 184, Harding Highway, Landisville, New Jersey 08326. At the time of the transaction involved in this proceeding. Respondent was subject to license under the Act.

3. On May 26, 1984, complainant sold to respondent a truckload of pickles consisting of 250 bushels of 3/400 green pickles at $14.00 per bushel for a total price of $3,500.00, 412 bushels of dill pickles at $14.00 per bushel for a total price of $5,768.00, and 200 bushels of choice pickles at $12.00 per bushel for a total price of $2,400.00, and a total contract price of $11,668.00, f.o.b. The pickles were shipped in interstate commerce on May 26, 1984, and were received

and accepted by respondent on or about May 27, 1984. Spike Miller of Parkland, Florida acted as the broker in this proceeding. Respondent has not paid any part of the purchase price for the pickles.

4. A formal complaint was filed in this proceeding on October 31, 1984, which was within nine months of the time of the cause of action herein arose.

DISCUSSION

This proceeding involves a controversy in which complainant claims that it sent a truckload of three different types of pickles to respondent, which truckload was received and accepted by respondent, as a result of which respondent is obligated to pay $11,668.00, the full contract price. Respondent, on the other hand, claims that the pickles arrived in such deteriorated condition that they were not merchantable, as a result of which because of certain actions on the part of the broker and complainant, it owes complainant nothing for the load. In support of their respective claims the complainant submitted affidavits of itself and the broker, and respondent submitted affidavits of itself and several individuals. The affidavits reflect total disagreement as to the essential facts in this proceeding.

The evidence shows clearly that the load of pickles left Florida on May 26, 1984, and arrived by truck in Landisville, New Jersey on or about May 27, 1984. The evidence further shows that the contract was free on board, as a result of which respondent is responsible for any problems during transport. Furthermore, because the truckload of pickles was unloaded at respondent's place of business before there was an attempted rejection, the pickles were received and accepted by respondent. *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Sunfresh Distributing Company* v. *Frank Donia Company*, 43 Agric. Dec. ____ (1984). Therefore, respondent's claim that the goods were rejected on arrival cannot be given recognition.

Respondent claims that after unloading the goods it called the broker, Spike Miller of Parkland, Florida, and talked with him and Tyre Farm on the telephone. Respondent claims that while both parties were on the phone Mr. Miller said that a federal inspection was not needed, but rather that respondent should regrade the pickles, which respondent said it did twice, and that they were rejected twice for resale. Complainant's story in this regard is different. Complainant claims that the respondent said there was no need for an inspection, but rather that he would work out the pickles and cause the trucker to stand the loss. Complainant proved his

point through the affidavit of Spike Miller, the broker, whereas the respondent utilized its own affidavit. As an ostensibly neutral third party the testimony of the broker must be given great weight. See *Homestead Tomato Packing Co.* v. *Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers* v. *T.J. Power & Co.*, 40 Agric. Dec. 425 (1981). Therefore, insofar as the vying claims as to whether complainant said not to inspect the pickles or respondent said it would take responsibility for the pickles by working them out is concerned we must find in favor of complainant.

Respondent also provided affidavits from three individuals who were not associated with it directly, and who were not federal inspectors, which affidavits were signed much later than at the time of the transaction. These individuals stated that they had looked at the pickles at the time they arrived, and that they were not suitable for human consumption. Spike Miller, in his affidavit, stated that he had talked to one of the individuals and the wife of another of the individuals who signed the affidavits on behalf of respondent, and that there was strong evidence that either the affidavits were not looked at before they were signed or that they were signed merely as a favor to respondent. Respondent sought to rebut the statements of Mr. Miller with his own affidavit rather than replying with affidavits by the same individuals in which they would controvert the claims of the broker. Respondent's efforts in this regard must fail. In view of the strong statements by Mr. Miller that the affidavits of respondent were concoctions of respondent rather than truly reflective of the facts, the proper rebuttal, and that which could be recognized in this proceeding, would have been from the same individuals. Therefore, we must discount the evidentiary value which might have been attached to the affidavits of the individuals. We should, however, caution in this regard that even those affidavits would not have been sufficient to overcome the requirement that damages after acceptance of goods be shown by a cognizable federal inspection. It has long been held that inspections by individuals who are not neutral should be discounted. See *Mutual Vegetable Sales* v. *Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979).

Finally, respondent claimed that there were also pickles from Turner Farm on the truck, and that those pickles were equally unmarketable, but that no complaint was made about its failure to pay for them. This matter was not pleaded in the answer. It was raised for the first time in respondent's answering statement. The claim was vague and general, and cannot be given weight. In view of the above we find that respondent has failed to pay complainant $11,668.00 with respect to the transaction involved in this proceed-

ing. Its failure to pay this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days of the date of this Order respondent shall pay to complainant, as reparation, $11,668.00, with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

HUNT OIL CO., a/t/a PLANTATION PRODUCE CO., *v.* ANTON T. KASTNER d/b/a TONY KASTNER & SON WHOLESALE PRODUCE CO.
PACA Docket No. 2-6729. Decided April 10, 1986.

Delivered sale—Shipper responsible for transit conditions—Merchantable—Defined—Damages—Accepted goods—Contracts—Non-negotiated terms added to bill of lading by shipper do not contractually bind buyer.—Evidence—lack of motive to falsify records considered.

Cabbage sold on a delivered basis was found to have been sold without any grade specification. Necessity that cabbage be of merchantable quality required that it be of fair average quality—neither the best nor the poorest quality. Federal inspections made promptly after arrival and acceptance of the cabbage showed breach of warranty of merchantability. Market reports did not cover cabbage in same size containers as shipped and damages were awarded based on difference between the delivered contract price and the gross proceeds of respondents prompt and proper resale. Statement placed on bill of lading by complainant declaring that no claims would be honored unless temperature recorder was secured and noted on trucks receipts was not contractually binding on respondent buyer. Respondent lost temperature recorder and tape but read the tape on arrival and noted on the bill of lading that temperature was 36°. In view of the fact that transit temperature was responsibility of complainant in delivered sale, respondent had no motive to falsify temperature notation.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $9,397.35 in connection with the shipment in interstate commerce of a mixed truckload of cabbage and parsley.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was

served upon respondent, which filed an answer thereto denying liability to complainant, and asserting a counterclaim against complainant arising out of the same transaction in the amount of $814.50. Respondent later amended the amount of damages claimed in the counterclaim to $1,782.15. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor counterclaim exceeds $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, Hunt Oil Company, is a corporation also trading as Plantation Produce Co., whose address is P.O. Box 1043, Mission, Texas. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Anton T. Kastner, is an individual doing business as Tony Kastner & Son Wholesale Produce, whose address is 2225 North Humbolt, Milwaukee, Wisconsin. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about February 9, 1984, complainant sold to respondent 273 sacks of New Cabbage brand green cabbage at $12.00 per sack; 150 1 2/5 wirebound crates of cabbage at $12.00 per crate; 200 sacks of Valley Kist brand slaw cabbage at $15.25 per sack; 40 wirebound crates of Plantation brand curly parsley, 5 dozen size, at $12.00 per crate; and 86 cartons of Valley Kist brand green cabbage at $17.25 per carton, or a total price of $10,089.50 delivered to respondent's place of business in Milwaukee, Wisconsin.

4. The produce was shipped by complainant on February 10, 1984, at 2:00 a.m. from Mission, Texas to respondent in Milwaukee. The bill of lading stated that the expected delivery date was February 12, at midnight. The produce arrived at respondent's place of business sometime on February 14, 1984, and was accepted by respondent.

5. Complainant included a Ryan temperature recorder on the load, and the bill of lading had stamped in block print on its face "RECEIVER: *This load contains a temperature recorder. No claims honored unless recorder secured and noted on truck's receipts.*"

Upon receiving the load respondent made notations on the face of the bill of lading indicating that the 273 sacks of New Cabbage brand green cabbage and the 150 1 2/5 wirebound crates of cabbage both showed decay and slime. Respondent looked at the tape from the Ryan recorder and recorded on the bill of lading that the temperature was 36°.

6. Respondent notified complainant through the broker of the poor condition of the cabbage on arrival, and was instructed to secure a federal inspection. A federal inspection was made on February 15, 1984, at 8:30 a.m. of cabbage located in respondent's warehouse. The certificate issued as a result of such inspection showed in relevant part as follows:

Products Inspected:	Domestic type CABBAGE in crates stamped "Produce of Mexico" or in open mesh bags printed "Produce of U.S.A., 50 Lbs. Net Wt., New Cabbage." Applicant states lot consists of 373 sacks and 150 crates.
Condition of Load:	Crate lot: Stacked on pallets in applicant's cooler. Bag lot: Stacked in applicant's warehouse.
Temperature of Product:	Crate lot: At various locations 43°F. Bag lot: At various locations 54° to 55°F.
Condition:	Crate lot: Serious damage by numerous black sunken areas ranges from 60 to 80% per crate, averages 75%. Damage by yellowing in most crates 10 to 20%, some none averages 10%. Decay in most crates 10 to 30%, some none, average 15%. Bag lot: Serious damage by yellowing ranges from 50 to 90% per crate, averages 67%. Decay ranges from 10 to 50% per crate, averages 33%. Each lot: Decay is Bacterial Soft Rot generally in advanced stages.

7. Respondent communicated the results of the inspection through the broker to complainant, and informed complainant that respondent would pay for the parsley, but would only handle the cabbage for the shipper. Later on February 15, complainant com-

municated to respondent its request that another inspection be made which would cover all of the cabbage on the load. Respondent requested a second federal inspection and on February 16, 1984, at 2:05 p.m., a second inspection was made at respondent's warehouse which showed in relevant part as follows:

Products Inspected:	Domestic Type CABBAGE in crates stamped, "Produce of Mexico", or in cartons printed, "Valley Kist Brand, Produce of U.S.A., Cabbage, 1 2/5 Bushel, Plantation Produce Company, Mission, Texas" or in bags printed, "Valley Kist Cabbage, Produce of U.S.A., net wt. 50 lbs., Plantation Produce Co., Mission, Texas," or in bags printed, "New Cabbage, Produce of U.S.A., 50 lbs. net wt." Applicant states: 150 crates, 86 cartons and 573 sacks.
Condition of Load:	*Each Lot*: Stacked on pallets in applicant's cooler.
Temperature of Product:	*Each Lot*: Various locations; 41°F.
Condition:	*Each Lot*: Heads or portions of heads not affected by condition defects are fresh, crisp and green color. *Carton Lot*: Damage by numerous sunken discolored areas ranges 16 to 24% averages 20%, including 7% serious damage. No Soft Rot. *Crate Lot:* Serious damage by yellowing ranges 6 to 14%, averages 10%. Serious damage by numerous sunken discolored areas ranges 66 to 84%, averages 75%. Soft Rot ranges 10 to 20%, averages 15%. *Open Mesh Sack New Cabbage Lot:* Serious damage by yellowing ranges 50 to 70%, averages 60%. Soft Rot ranges 30 to 50%, averages 40%. *Open Mesh Sack Valley Kist Brand: Larger Cabbage Lot:* Damage by yellowing ranges 12 to 26%, averages 20%, including 5% serious damage. No soft Rot.

Open Mesh Sack Valley *Kist Smaller Cabbage Lot:T1 Serious damage by numerous sunken discolored areas ranges 20 to 30%, averages 25%. Serious Damage by yellowing ranges 30 to 46%, averages 40%. Soft Rot ranges 26 to 50%, averages 35%. Each Lot:* Soft Rot is Bacterial Soft Rot in advance Stages.

8. On Februrary 29, 1984, at 2:00 p.m. a third federal inspection was made at respondent's processing plant of 50 sacks of the New Cabbage brand cabbage and 150 crates of the wirebound crate cabbage stamped "Produce of Mexico, 50 lbs. Net Wt.". The inspection showed that the temperatures in each lot in various locations ranged from 35° to 42°F. Decay in each lot averaged 100% Bacterial Soft Rot in advanced stages. This cabbage was dumped by respondent.

9. Respondent dumped 200 containers of the cabbage and sold the remaining cabbage in a prompt and proper manner for $1.00 per container, or a total of $509.00.

Respondent has paid complainant a total of $692.14 which included $480.00 as payment in full for the 40 wirebound crates of parsley. The remaining $212.14 was the remainder of the $509.00 gross proceeds realized from the resale of the cabbage, after deduction of a commission of $50.90, inspection fees in the total amount of $195.95, and an unloading charge of $50.00.

10. The formal complaint was filed on October 1, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price of four lots of cabbage sold and shipped to respondent on a delivered basis, and accepted by respondent on arrival. Since respondent accepted the cabbage respondent became liable to complainant for the full purchase price thereof less any damages resulting from any breach of contract on the part of complainant. Although respondent maintained that the cabbage was sold as U.S. No. 1, the broker's Memorandum of Sale, as well as complainant's invoice, show otherwise. We conclude that the cabbage was sold on a no grade basis.

Under the terms of the delivered sale contract complainant was obligated to deliver cabbage at respondent's place of business in

merchantable condition. In this context, merchantable does not mean merely that the goods can be sold. We have stated that:

> The term "merchantable" has been defined as "goods which are reasonably suited for the ordinary uses and purposes of goods of the general type described by the terms of the sale and which are capable of passing in the market under the name or description by which they are sold," and though not descriptive of goods of the best quality, neither does it imply goods of the poorest quality, but covers goods of a fair, average quality. See *L. Gillarde Sons Co.* v. *Moritz,* 21 Agric. Dec. 590 (1962) and *Samuel P. Mandell Co.* v. *Sam Catanzaro,* 17 Agric. Dec. 21 (1958).

The federal inspections made of the cabbage on February 15, and 16, 1984, show that none of the lots of cabbage were in merchantable condition according to the definition quoted above. The record shows that respondent promptly secured buyers for the cabbage, and although the price secured was low, considering the extremely poor condition of most of the cabbage we find that respondent acted reasonably under the circumstances.

Complainant argues strenuously that the 150 wirebound crates of no brand cabbage which it shipped to respondent had no markings on the crates indicating that such cabbage was "Produce of Mexico." Complainant submitted several affidavits by persons who stated they had seen the crates prior to shipment and who affirmed that no such markings were on the crates. Complainant contends that the 150 wirebound crates of cabbage which were the subject of the federal inspections at destination were not the same 150 crates which complainant shipped. Complainant requested on this basis that a personal investigation be done of respondent's records by the Department to ascertain what cabbage from other sources was on hand during the time period when complainant's cabbage arrived. Such investigation was done by this Department with the following results:

> Respondent's receiving book showed the only cabbage it received from Texas was the lot involved in the complaint. The receiving book showed other cabbage received during January, February and March, 1984 was purchased from Borzynski Farms, Inc., Sturtevant, Wisconsin. There was no evidence in respondent's records to show it received any other cabbage originating from Texas or other lots of cabbage which contained the marking "Produce of Mexico."

We conclude on the basis of all of the evidence that the 150 wire-bound crates of cabbage shipped by complainant were stamped with the marking "Produce of Mexico".

As stated earlier respondent has shown by the prompt federal inspections made after arrival of the produce that complainant breached the contract of sale. UCC § 2-714 provides in relevant part that "where the buyer has accepted goods and given notification . . . He may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any amount which is reasonable." The same section of the UCC provides that the measure of damages for breach of warranty is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. . ." Respondent submitted Market News Reports for Chicago covering sales on February 14, 15, and 16, 1984, in an effort to show the value which the cabbage would have had if it had been as warranted. However, such reports give quotations only for 1 3/4 bushel cartons and crates rather than the 1 2/5 bushel cartons and crates which were sold by complainant. In addition the reports give quotations for 50 pound sacks, but such quotations are broken down in categories of large or small to medium size sacks. There is no adequate indication in this record as to what size cabbage was contained in the sacks sold by complainant. While the second federal inspection does indicate that the 200 sacks of slaw cabbage consisted of a "larger cabbage lot and a smaller cabbage lot," we do not know the number of sacks in either lot. In the absence of official market reports we will use the contract delivered price of the cabbage as the closest possible approximation of its market value. See *Corte & Sons* v. *Lerner & Son,* 14 Agric. Dec. 320 (1955). Accordingly, the value of the cabbage if it had been as warranted was $9,609.50. The actual value of the cabbage delivered is shown by the gross proceeds of a prompt and proper resale which in this case amounted to $509.00. Deducting the latter amount from the former leaves $9,100.50 as respondent's basic damages in regard to the cabbage. The UCC § 2-714 provides that in a proper case any incidental and consequential damages may also be recovered. The $50.90 commission, as well as the $195.95 inspection fees, are allowable as incidental and consequential damages. Respondent's total damages for the cabbage thus amount to $9,347.35. This amount deducted from the total delivered price for all of the produce leaves $742.15 as the correct amount owed by respondent to complainant. Of this amount respondent has already paid complainant $692.15, which leaves a balance still due and owing from respondent to complain-

ant of $50.00. This $50.00 was an unloading fee which respondent claimed as a part of its damages but which cannot be allowed since, as far as this record shows, such fee would have been incurred by respondent regardless of complainant's breach. Respondent's failure to pay complainant the amount of $50.00 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Complainant also alleged as an additional basis of recovery that respondent failed to secure the temperature recorder tape as requested pursuant to the instructions stamped on the bill of lading which stated "NO CLAIMS HONORED UNLESS RECORDER SECURED AND NOTED ON TRUCKS RECEIPTS." However, respondent did secure the recorder, read the tape, and noted on the bill of lading that the temperature was 36°. What complainant really complains of is respondent's subsequent loss of the temperature tape and its inability to supply such tape as evidence in this proceeding. Even if we were to find that this was a failure to conform with the instructions on the bill of lading, complainant has not shown any reason why we should consider respondent contractually bound by such instructions. Furthermore, since this was a delivered sale with complainant being responsible for transit conditions, respondent had no motive to note any temperature on the bill of lading other than the correct temperature which respondent read from the tape. We conclude that complainant has failed to state an adequate basis on which it can recover against respondent in this proceeding for loss of the temperature tape.

Respondent's counterclaim arose out of the same transaction as that alleged in the formal complaint and was predicated on the basis of alleged Market News Service Report values for the cabbage which were in excess of the contract price used by us to compute damages. Consequently respondent's counterclaim must be dismissed.

ORDER

Within thirty days of the date of this order, respondent shall pay to complainant, as reparation, $50.00 with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

SENEVA J. BERRY, d/b/a SUNNY FARMS, *v.* QUALITY KING PRODUCE CO. INC. PACA Docket No. 2-7070. Decided April 10, 1986.

Dennis Becker, Presiding Officer.
For complainant, *pro se.*
or respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of $38,392.50 in connection with three shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, and admitting indebtedness to the complainant in the amount of $10,392.50, claiming that it had already paid complainant $28,000.00 of the amount sought by complainant. Complainant was informed by certified mail of respondent's claim that it had paid $28,000.00 of the amount sought and was given an opportunity to dispute such payment. Complainant did not dispute such payment. We conclude, therefore, that $28,000.00 of the $38,392.50 has been paid, and that the remaining indebtedness is $10,392.50, which is the amount respondent admits it owes the complainant. Consequently, the issuance of an order in the amount of $10,392.50 without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Seneva J. Berry, doing business as Sunny Farms, is an individual whose address is P. O. Box 1, Edison, California 93220. Respondent, Quality King Produce Co., Inc., is a corporation whose address is 8-10 New England Produce Center, Chelsea, Massachusetts 02150. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint, as modified above, are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $$10,392.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $10,392.50, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

BECKMAN PRODUCE, INC., *v.* MARVIN G. HOLPERIN d/b/a UNIQUE FOODS CO. PACA Docket No. 2-7116. Decided April 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on November 12, 1985. Complainant seeks to recover $4,372.41, which amount is alleged to be the remaining balance for mixed produce sold to and accepted by respondent on April 30 and May 7, 1985. Respondent filed an answer to the complaint on February 18, 1986. In this answer, respondent admitted owing complainant $3,100.00 of the $4,372.41 claimed by complainant.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $3,100.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from May 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

SAHARA PACKING COMPANY *v.* N. P. DEOUDES, INC. PACA Docket No. 2-6755. Decided April 11, 1986.

Transit conditions—Discrepancy between ambient air temperatures and pulp temperatures.—Good Delivery Standards—Lettuce found abnormally deteriorated—Damages—accepted goods.

Complainant sold and shipped a truckload of lettuce to respondent on a F.O.B. basis. Following acceptance on arrival a prompt Federal inspection in respondent's warehouse showed pulp temperatures substantially lower than ambient air temperatures shown by tape from temperature recorder. Pulp temperatures were found to show that transit was normal and Good Delivery Standards were therefore applicable. Lettuce was found to have been abnormally deteriorated on arrival and complainant to have breached the contract of sale. Damages were allowed based on difference between delivered cost of lettuce and gross proceeds of prompt and proper resale.

George S. Whitten, Presiding Officer.
Matthew N. McTierney, Newport Beach, California, for complainant.
For respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,277.50 in connection with the shipment in interstate commerce of a truckload of lettuce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Sahara Packing Company, is a corporation whose address is P.O. Box 156, Brawley, California.

2. Respondent, N. P. Deoudes, Inc., is a corporation whose address is 270 Fifth Street, N.E., Washington, D. C. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about September 16, 1983, complainant sold to respondent, 850 cartons of Sahara brand lettuce at $8.00 per carton, plus precooling and temperature recorder, for a total invoice price of $7,375.00 f.o.b.

4. On September 16, 1983, at approximately 9:30 a.m., complainant shipped the lettuce from loading point in Brawley, California to respondent in Washington, D. C. by truck. The lettuce arrived at respondent's place of business in Washington, D. C. on September 21, at approximately 5:00 a.m., and was unloaded from the truck by respondent. Respondent requested a federal inspection at approximately 6:30 a.m., and at 7:50 a.m. on September 21, 1983, the 850 cartons of lettuce were federally inspected while stacked in respondent's warehouse. Such inspection showed the temperatures in the lettuce to range from 42 to 43°F and stated the condition to be as follows:

> Heads or portion of heads not affected by condition defects are fresh and crisp.
>
> Wrapper leaves: Decay ranges from 4 to 20 heads in most cartons, none in some, average 30%.
>
> Head leaves: 2 to 4 decayed heads in most cartons, none in some, average 10%.
>
> Decay is Bacterial Soft Rot in various stages affecting 2 leaves to ½ of head.

5. The Stires temperature tape recovered from the load shows that the tape began at 9:00 a.m on September 16, 1983, and the eight day scale is checked on the tape. The trace begins at approximately the two hour mark on the tape in the 70° range, and falls rapidly to about 47° where it continues until the twelve hour mark. From the twelfth hour to the thirtieth hour the trace reads approximately 48°, and from the thirtieth hour to the forty-fourth hour the trace reads approximately 50°. At the forty-fourth hour the tape drops to about 46°, and rises again to the 50° range at about the fifty-fourth hour from the fifty-fourth hour to the sixtieth hour the trace gradually rises to about 55°. From the sixtieth hour to the one hundred and second hour the trace remains at approximately 55°. From the one hundred and second hour until the trace ends at approximately the one hundred and fourteenth hour the trace reads approximately 57°.

7. Respondent resold the lettuce and realized gross proceeds of $5,491.50. From this amount respondent deducted freight in the amount of $2,635.00, inspection fee $35.00, brokerage $127.50, handling at $.15 per carton or $127.50, and a commission charge of 15%, or $823.73. The net proceeds computed by respondent were $1,742.77. Respondent paid complainant on the basis of $1.50 per carton, plus $.65 cooling, and $22.50 for the temperature recorder, or $1,850.00. In addition respondent paid complainant $.35 per carton, or $297.50, which it recovered from the trucker. Respondent's total payment to complainant was $2,147.50.

8. The informal complainant was filed on June 18, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

The dispute between the parties to this proceeding centers around the question as to whether transportation services and conditions were normal. In a f.o.b. sale the warranty of suitable shipping condition is applicable only if transportation is normal. See *Veg-A-Mix* v. *Wholesale Produce Supply, Inc.*, 37 Agric. Dec. 1296 (1978). In this case there is a perplexing discrepancy between the ambient air temperatures shown by the Stires temperature recorder during transit and the pulp temperature shown by the federal inspection shortly after arrival. The bill of lading shows that the lettuce had a pulp temperature of 36° when it was placed on the truck. The pulp temperatures disclosed by the federal inspection on arrival show a rise during the 4 and ¾ day transit period of 6 to 7° in temperature. However, the Stires temperature recorder tape basically shows a gradual rise in temperature from about 46° to 57° over the same period. The temperature recorder was returned to the Stires Recording Thermometer Company on October 7, 1983, and on July 23, 1984, such company issued a "Calibration Request Response" stating that they had reviewed a copy of the chart and that it was correct within 2°.

There was not sufficient time between the arrival of the truckload of lettuce and the federal inspection for such lettuce to have been cooled down by the temperatures in respondent's cooler. Accordingly, we must accept the pulp temperatures shown by the federal inspection as an accurate reflection of the temperature of the lettuce itself when it came off the truck. Apparently either the ambient air temperatures in the trailer were actually lower than shown by the tape or such air temperature was simply insufficiently high to raise the pulp temperatures of the lettuce more than the

6 or 7° reflected by the federal inspection. We conclude that transportation services and conditions were normal.

The condition of the lettuce as shown by the federal inspection at destination clearly shows that such lettuce was abnormally deteriorated. See Good Delivery Standards for lettuce, 7 CFR § 46.44. We conclude that complainant breached the contract of sale. Respondent accepted the lettuce and is liable to complainant for the full purchase price thereof less damages resulting from complainant's breach.

Sections 2-714 of the Uniform Commercial Code provides in relevant part that the measure of damage for seller's breach in regard to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. In the absence of other evidence the delivered costs of the lettuce, or $10,010.00, is accepted as the value such lettuce would have had if it had been as warranted. This figure consists of the f.o.b. price of $7,375.00 plus the freight cost of $2,635.00. Respondent appears to have promptly and properly disposed of the lettuce for gross proceeds of $5,491.50. This sum is accepted as the best evidence of the value of the lettuce received by respondent. The difference between these two values, or $4,518.50, represents respondent's damages. In addition, respondent incurred a $35.00 inspection fee, brokerage in the amount of $127.50, a handling fee in the amount $127.50, and also should be allowed the claimed 15% commission, or $823.73. Consequently, respondent's total damages are $5,632.23. However, inspection fees may not be included in damages. Thus, the total compensable damages are $5,597.23. This amount deducted from the total purchase price of $7,375.00 leaves $1,777.77 as the amount which respondent should have paid complainant. Respondent has actually paid complainant in excess of this figure, and consequently the complaint should be dismissed.

This complaint is dismissed.

Copies of this order shall be served upon the parties.

PRODUCE DISTRIBUTORS INC., *v.* MICHAEL BROS. INC. PACA Docket No. 2-6775. Decided April 11, 1986.

Jurisdiction—no timely complaint as to transactions alleged as set-off against complaint—Payment—Allocation by respondent ineffective—Actual payment substantially less than stated allocation—Payment—Allocation by complainant to earliest transactions upheld.

Complainant sought to recover the balance of the purchase price due on two shipments of produce. Respondent raised defenses to complainant's action based on three earlier transactions and it was found that respondent had not filed a timely complaint relative to such transactions. A payment allocation attempted by respondent was found ineffective because the statement accompanying the payment showed an allocation of funds substantially in excess of the amount of the payment. Complainant's allocation of the payment to earlier transactions was therefore justified.

George Whitten, Presiding Officer.
Pro se, complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of $12,779.44 in connection with the shipment in interstate commerce of several lots of perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which defaulted in the filing of an answer. Subsequently the proceeding was reopened after default, and respondent filed an answer within the time allowed denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complianant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Produce Distributors, Inc., is a corporation whose address is 111 Northfield Avenue, West Orange, New Jersey.

2. Respondent, Michael Bros., Inc., is a corporation whose address is 38 Providence Fruit & Produce Building, Harris Avenue, Providence, Rhode Island. At the time of the transactions involved herein respondent was licensed under the Act. I113. On or about August 26, 1983, complainant sold to respondent, and caused to be shipped from the State of California to respondent in West Orange, New Jersey, 1560 containers of grapes for a f.o.b. price of $5,955.44. Complainant invoiced respondent for these grapes on September 1, 1983, by its invoice number 7054.

4. On or about October 19, 1983, complainant sold to respondent, and caused to be shipped from the State of California to respondent in West Orange, New Jersey, 1,008 containers of cantaloupes for a f.o.b. price of $7,028.10. Complainant invoiced respondent for these cantaloupes on October 23, 1983, by its invoice number 7516.

5. On or about October 21, 1983, complainant sold to respondent, and caused to be shipped from the State of California to respondent in West Orange, New Jersey, 1,200 containers of Valencia oranges for a f.o.b. price of $7,410.00. Complainant invoiced respondent for these oranges on October 26, 1983, by its invoice number 7577.

6. On or about November 8, 1983, complainant sold to respondent, and caused to be shipped from the State of Washington to respondent in West Orange, New Jersey, 494 containers of apples for a f.o.b. price of $6,113.50. Complainant invoiced respondent for these apples on November 21, 1983, by its invoice number 7696.

7. On January 27, 1984, respondent paid complainant in full for complainant's invoice number 6909 dated August 26, 1983, covering an August 10, 1983, shipment of melons at a total f.o.b. price of $5,513.50. On January 27, 1984, respondent paid complainant in full for complainant's invoice number 7007 dated August 28, 1983, covering an August 22, 1983, shipment of nectarines and plums at a total f.o.b. price of $16,219.50.

8. The four shipments of produce covered by Findings of Fact 3 through 6 have a total invoice value of $26,507.04. Of February 24, 1984, respondent paid complainant a total of $13,727.60. A statement accompanying the payment check indicated that by such payment invoice 7054 was being paid in the amount of $3,406.54; invoice 7516 in the amount of $7,028.10; invoice 7577 in the amount of $7,410.00; and invoice 7696 in the amount of $6,113.50. The statement also indicated that invoice 6909 had been overpaid in the amount of $360.54, and invoice 7007 had been overpaid in the amount of $9,870.00.

9. On February 27, 1984, complainant wrote to respondent stating that the payment of $13,727.60 was being applied by complainant as follows: $5,955.44 to invoice 7054; $7,028.10 to invoice 7516; and $744.06 to invoice 7577. Complainant informed respondent that there remained due to complainant from respondent the sums of $6,665.94 on invoice 7577, and $6,113.50 on invoice 7696, or a total of $12,779.44.

10. An informal complaint was filed on May 7, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price due on invoice number 7577 dated October 26, 1983, in the amount of $6,665.94, and the total due on invoice 7696 dated November 21, 1983, in the amount of $6,113.50. Respondent's defenses to complainant's action are raised only in regard to complainant's invoices 6909 dated August 26, 1983, 7007 dated August 28, 1983, and 7054 dated September 1, 1983. Respondent claims that its payment in full on January 27, 1984, of complainant's invoices number 6909 and 7007 was a mistake. Respondent states that the shipments of produce covered by these invoices were in poor condition on arrival, and that at the time the inadvertent full payments were made, a dispute was underway with complainant in regard to such invoices. Respondent also states that there was trouble with the produce covered by complainant's invoice 7054, and that the partial payment in the amount of $3,406.54 shown by respondent's statement which accompanied the $13,727.60 payment check dated February 24, 1984, represented the net returns realized from the resale of the produce covered by such invoice.

Respondent's first notice to this Department of its claims relative to these three invoices was made on June 29, 1984, in a letter which responded to Departmental inquiries which had been prompted by the informal complaint filed by complainant. This letter was filed with the Department more than nine months following the accrual of the causes of action which respondent alleged relative to these three invoices. Respondent's defense herein is, in effect, an attempt to set off, in whole or in part, these three invoices against the balance alleged to be due by complainant on invoices 7577 and 7696. Section 6(a) of the Act (7 U.S.C. 499f(a)) provides in relevant part that "[a]ny person complaining of any violation of any provision of Section 2 of this Act by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition . . ." Since the first claim filed by respondent with this De-

partment relative to the three transactions which it wishes to set off against complainant's claim herein, was clearly made more than nine months after the cause of action relative to such transactions accrued, we do not have jurisdiction to adjudicate any allegations relative to such transactions. See *North Shore Produce Co., Inc.* v. *Eastco Produce Distributors, Inc.*, 40 Agric. Dec. 621 (1981).

It should be noted that the payment in the amount of $13,727.60 made by respondent on February 24, 1984, cannot be deemed as being allocated in the manner in which respondent designated in the statement which accompanied its check, for the simple reason that such statement shows an allocation of a total amount of $23,958.14, whereas the payment amounted to only $13,727.60. In view of this fact complainant was warranted in allocating the payment to its earlier invoices. See *Mendelson-Zeller Co.* v. *Bleier*, 34 Agric. Dec. 683 (1975).

We also note that even if there had been on record a timely informal complaint relative to invoices 6909, 7007, and 7054, respondent would still have lost on the merits, due to respondent's failure to submit adequate accountings covering the resale of the produce covered by such invoices.

There remains due and owing to complainant from respondent the total amount of $12,779.44. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $12,779.44, with interest thereon at the rate of 13% per annum from December 1, 1983, until paid.

Copies of this order shall be served upon the parties.

R.F. DONOVAN FARMS, INC., v. CORGAN & SON INC. PACA Docket No. 2-6800. Decided April 11, 1986.

Market price for consigned vegetables—freight deducted from gross proceeds.

Where there is no valid account of sales present, the market price for consigned goods is determined based on the Market News Service Reports. Freight must be deducted from the total, as that is an expense borne by complainant.

Andrew Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $45,634.37 in connection with the consignment to respondent of 14 truckloads of mixed vegetables in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability for $44,726.21, but denying liability for $908.16.

Although the amount claimed as damages exceeds $15,000.00, the parties waived oral hearing. The shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is, therefore, applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but chose not to do so.

FINDINGS OF FACT

1. Complainant, R. F. Donovan Farms, Inc., is a corporation whose address is P.O. Box 1669, Santa Maria, California.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 New York City Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately June 6 and 20, July 3 and 19, August 1, 8, 15, 25, and 31, September 6, 13, 25, and 27, and October 4, 1984, complainant consigned to respondent 14 loads of mixed vegetables.

4. The 14 loads of mixed vegetables were shipped, in interstate commerce, to respondent, who accepted them for handling on consignment for the account of complainant. Respondent prepared and sent to complainant accounts of sale for each load except the one shipped on September 13, 1984. The accounts of sale showed net proceeds, after deductions of freight, commission, and various other

expenses, of $44,726.21. Respondent has failed to pay complainant any part of this sum.

5. According to the Market News Service Reports for New York, New York on September 17, 1984, the market price for artichokes, the commodity in the September 13, 1984, shipment to respondent, was $12.00 to $14.00 per flat.

6. Respondent has failed to make any payment to complainant for the September 13, 1984, shipment.

7. A formal complaint was filed on January 30, 1985, which was within nine months from when the causes of action herein accrued.

8. Respondent filed an unsworn answer on April 8, 1985, in which it admitted liability to complainant in the amount of $44,726.21 for 13 of the 14 truckloads of mixed vegetables at issue. Accordingly, an Order Requiring Payment of Undisputed Amount was issued on June 21, 1985, ordering respondent to pay to complainant the undisputed amount owing of $44,726.21.

CONCLUSIONS

In respondent's unsworn answer, it does not deny liability for 13 of the 14 truckloads which it handled on consignment for the account of complainant. Respondent claims that its liability for the September 13, 1984, shipment is less than the $908.16 alleged by complainant, and has enclosed an account of sales which shows gross proceeds of $1,111.50, with deductions of $236.50 for freight, $24.30 for cartage, $1.29 for terminal fees, $133.38 for commission, and $8.60 for handling, leaving net proceeds of $707.43. Complainant bases its claim for $908.16 on the market price for the 86 cartons of artichokes contained in the September 13, 1984, shipment, which the Market News Service Reports for New York, New York show as $12.00 each, for gross sales of $1,032.00. Complainant concedes a 12% commission of $123.84, which would leave net proceeds of $908.16.

Respondent's answer is not verified. Therefore, neither the answer nor the attached account of sales can be given any evidentiary value. We will thus determine the amount owing for the September 13, 1984, shipment by referring to the Market News Service Reports provided by complainant. However, in complainant's calculation of the net proceeds due, it has neglected to deduct freight. In the previous shipment of September 6, 1984, consisting of 278 cartons of artichokes, respondent had deducted $2.70 per carton for freight, to which complainant did not object. Therefore, we will deduct from the proceeds of the September 13, 1984, shipment $2.70 per carton for freight, totalling $232.20, leaving net proceeds of $675.96.

Respondent's liability for all but the September 13, 1984, truckload of artichokes has previously been determined in the June 21, 1985, Order Requiring Payment of Undisputed Amount. Respondent is also liable for the net proceeds of the September 13, 1984, shipment handled on consignment, in the amount of $675.96. Respondent's failure to pay this sum to complainant is in violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $695.96, with interest thereon at the rate of 13% per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

STRUBE CELERY & VEGETABLE CO., *v.* TRIPLE B PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-6804. Decided April 11, 1986.

Consignment transactions—Liability for payment of freight—Evidence—Effect of sworn affidavits.

Because complainant proved by a preponderance of the evidence that the transaction involved was one for the consignment of goods, the shipper was required to pay the cost of the freight as a necessary expense incidental to the transaction.

Dennis Becker, Presiding Officer.
Le Roy W. Gudgeon, Northfield, Illinois, for complainant.
William Rothstein, Nogales, Arizona, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $1,900.00 in connection with its allegedly erroneous payment to respondent of freight connected with the consignment by respondent to complainant of mixed vegetables in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages is less than $15,000.00 the shortened method of procedure provided in

section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and statement in reply. Respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Strube Celery & Vegetable Company, is a corporation with an address at 108 South Water Market, Chicago, Illinois 60608.

2. Respondent, Triple B Produce Distributors, Inc., is a corporation with an address at P.O. Box 2746 Nogales, Arizona 85621. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On May 14, 1984 complainant agreed to accept from respondent a truckload of mixed vegetables consisting of watermelons, peppers, and tomatos, to be handled on consignment for the account of respondent. The truckload of produce arrived at complainant's place of business on May 18, 1984. During the next several days complainant sold the goods at various prices, and on June 21, 1984, provided respondent with an account of sales showing total sales for the commodities involved of $6,455.39, and deducting therefrom charges of $1,155.28, leaving net sales of $5,300.11, which it remitted to respondent. Complainant did not deduct the freight charge of $1,900.00 from the total sales price.

4. Subsequently, the trucker, Paul Yates, demanded that complainant pay it the $1,900.00 for freight. Complainant sought to have the bill shifted to respondent, but when confronted with the threat of a law suit for failure to pay, it paid the trucker the $1,900.00.

5. To date respondent has not repaid complainant the $1,900 for the freight involved in this consignment transaction.

6. A formal complaint was filed in this proceeding on December 12, 1984, which was within nine months of the time the cause of action herein arose.

DISCUSSION

The dispute in this proceeding centers around the question as to whether the shipment of mixed vegetables involved was a sale with pricing after arrival or a consignment transaction. We find, based upon a preponderance of the evidence, that the transaction involved a consignment of goods by respondent to complainant, and

that as a result of this determination respondent was liable to pay the freight involved as a necessary expense attached to the consignment.

We are drawn to our conclusion that this was a consignment transaction for several reasons. In the first place, respondent sent complainant a shipping order dated May 14, 1984, which did not contain any prices. Thereafter, after selling the commodities involved, complainant sent respondent an account of sales which carefully set forth the several prices at which the various commodities were sold. Complainant would have no reason to maintain such careful records were this a straight sale transaction. Nor would it have reason to send such an account of sales to respondent. Furthermore, respondent eventually provided an invoice which reflected prices for the three commodities involved which seemed not to reflect any true relationship to normal pricing practices, but rather appeared to be an after the fact endeavor on the part of respondent to manufacture an invoice which would closely approximate the total amount of money transmitted by complianant, without regard to freight charges. Indeed, as suggested by complainant, respondent had to put in an adjustment factor of $21.10 to make its invoice coincide with the amount of money remitted in the account of sales. Complainant denies having received the so-called invoice from respondent in the affidavit of both its Assistant Store Sales Manager, Joe Kulinski, and its owner, Robert W. Strube. Such affidavits, having been properly sworn, must be given great weight.

We are further motivated to reach the conclusion that we have because complainant stated that it was constantly calling respondent to tell it the prices being fetched for the commodities involved. Respondent acknowledged that there were phone calls of this nature, although it characterized them otherwise. When there is a consignment involved it is common for the parties to discuss the prices that are being fetched. Therefore, complainant's version is the more consistent story.

Although there were two transactions between the two parties immediately prior in time to the one in issue here in which complainant was invoiced for the goods, complainant's explanation that while it purchased the goods involved therein it insisted on a consignment with respect to the transaction in issue here because the prior goods were of poor quality is credible under all of the circumstances. Finally, respondent did not send the invoice which closely reflected the total amount shown on the account of sales sent by complainant until after complainant provided the account of sales in early June. That respondent claims to have paid its growers based on the total price received as reflected in the account of sales

does not rise to the point under these circumstances of estopping complainant from making a full claim since respondent did not properly pursue that particular line of defense with affidavits and statements by its growers.

In view of the above we find that respondent has violated section 2 of the Act because freight is an expense properly connected to produce transactions. Therefore, it should be ordered to pay complainant $1,900.00 as reparation, with interest at the rate of 13%.

ORDER

Within 30 days from the date of this order respondent shall pay complainant $1,900.00 as reparation with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

PACIFIC FARM COMPANY *v.* CORGAN & SON INC. PACA Docket No. 2-6835. Decided April 11, 1986.

Burden of proving breach of warranty and damages—Respondent failed to sustain.

Where respondent failed to sustain its burden of proving a breach of warranty by complainant or any damages sustained as a result of my such breach, respondent is liable for the full contract prices for the eight lots of mixed fruit and vegetables it admittedly received and accepted.

Andrew Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $29,033.80 in connection with the sale and shipment of eight trucklots of mixed fruit and vegetables to respondent in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability for $11,090.60 but denying liability for the remaining $18,943.20.

Although the amount claimed as damages exceeds $15,000.00, the parties waived oral hearing. The shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is, therefore, applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, but respondent chose not to submit any additional evidence. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Pacific Farm Company, is a corporation whose address is 1047 M Street, Firebaugh, California.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately April 20, July 13, 18, and 23, August 30, and September 4, and 8, 1984, complainant sold to respondent eight trucklots of mixed fruit and vegetables for f.o.b. prices totalling $29,033.80. The individual transactions are set forth as follows:

Date of Sale	Number of Cartons	Commodity	Contract Price
April 20, 1984	832	lettuce	$3,100.90
July 13, 1984	1092	cantaloupes, Vaughn's	5,264.10
July 18, 1984	540	honeydews, Gold Piece 5's	
	900	honeydews, Gold Pieces 6's	4,725.00
July 23, 1984	1020	honeydews, Bottoms Up	2,572.50
August 30, 1984	420	cantaloupes, Bottoms Up 18's	
		cantaloupes, Bottoms Up 23's	4,026.60
September 4, 1984	1008	cantaloupes, Bottoms Up	4,530.60
September 8, 1984	96	crenshaws, Rosy 4's	
	216	crenshaws, Rosy 5's	
	54	crenshaws, Rosy 6's	
	108	persians, Rosy 5's	2,204.10
September 8, 1984	900	honeydews, PFC	2,610.00
		Total	$29,033.80

4. Complainant shipped the eight trucklots of fruits and vegetables in interstate commerce to respondent, which received and ac-

cepted them but has failed to pay any part of the agreed upon contract prices.

5. A formal complaint was filed on December 17, 1984, which was within nine months from when the causes of action herein accrued.

6. Respondent filed an answer on April 11, 1985, in which it admitted liability for $11,090.60 of the amount alleged in the complaint, but denied liability for the remaining $18,943.20. An Order Requiring Payment of Undisputed Amount was, therefore, issued ordering respondent to pay to complainant the undisputed amount of $11,090.60.

CONCLUSIONS

Respondent does not deny purchasing, receiving and accepting the eight loads of lettuce at issue. Respondent has submitted an unverified answer which it alleges that some of the loads were abnormally deteriorated upon arrival at its place of business, and has included inspection reports to support these allegations. Having admittedly accepted the eight loads, respondent became liable for the contract prices less any damages resulting from a breach of warranty by complainant. It is the respondent's burden to prove the breach and damages by a preponderance of the evidence. *Magic Valley Produce Inc.* v. *Art Kramer's Produce Buying Service Inc.*, 39 Agric. Dec. 464 (1980).

We conclude that respondent's defenses to the complaint are lacking in merit. The inspections pertaining all transactions except the September 8, 1984, shipment of crenshaw and persian melons, either show insufficient evidence of deterioration to indicate a breach of warranty, are restricted to a small portion of the load, exhibit excessively high temperatures, indicate the existence of transportation problems, or are dated far too long after shipment to be worthy of significant weight. Further, even if the inspections did reveal one or more breaches of warranty, respondent has provided no evidence of resales and, therefore, has not sustained its burden of showing damages incurred as a result of any breach. *David Nava & Sons* v. *Vega & Sons Produce,* 41 Agric. Dec. 991 (1982).

We have already issued an Order Requiring Payment of Undisputed Amount for $11,090.60 of the amount alleged in the complaint. We have determined that respondent is liable for the remaining $18,943.20, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $18,943.20, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon parties.

CAL-MEX DISTRIBUTORS INC., *v.* VALLEY BROKERAGE INC. PACA Docket No. 2-6703. Decided April 14, 1986.

Failure to pay full contract price—Adjustments in price—Reparation awarded.

Complainant sold and shipped 15 truckloads of mixed vegetables to respondent which accepted and paid in accord with claimed price adjustments. Evidence was found to support some of claimed adjustments and not to support others.

George S. Whitten, Presiding Officer.
Pro se, for complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $16,363.65 in connection with the shipment of 15 trucklots of mixed vegetables which moved in foreign commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties waived oral hearing, and accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Complainant filed a letter, with attachments, which was considered as a brief. Respondent did not file a brief.

FINDINGS OF FACT

1. Complainant, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California.

2. Respondent, Valley Brokerage, Inc., is a corporation whose address is 335 South Harbor Boulevard, La Habra, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about February 13, 1984, under invoice no. 6364, complainant sold to respondent, and shipped to respondent's customer, one truckload of produce containing tomatoes and eggplants. The parties have agreed during the course of this proceeding that the sum of $50.40 is the correct amount remaining due from respondent to complainant in regard to this transaction.

4. On or about February 22, 1984, under invoice no. 6423, complainant sold to respondent 108 lugs of pink tomatoes at 6.00 per lug, plus $.35 per lug for freight. The tomatoes were shipped from Chula Vista, California to respondent in La Habra, California on or about the same date, and on arrival the load was found to contain only 107 lugs, and to be over-ripe. Complainant and respondent agreed on an adjustment based on 107 lugs at $5.50 per lug, plus $.35 per lug for freight. Respondent has paid complainant the total amount of $625.95 based on this adjustment.

5. On or about March 2, 1984, complainant sold to respondent, and shipped to respondent's customers the following produce, and invoiced respondent as follows by its invoice no. 6432: To Coast Citrus Co.: 198 flats of pink tomatoes at $10.50, or a total of $2,079.00; 54 lugs of pink tomatoes at $9.50, or a total of $513.00; and freight at $.35, or $88.20, for a total of $2,680.20; To Albertson Distribution: 75 W/B crates of eggplants at $6.50, or $487.50, plus $.35 for freight, or $26.25, for a total of $513.75; To Valley Fruit & Produce: 162 lugs of pink tomatoes at $9.50, for $1,539.00; 54 lugs of pink tomatoes at $10.50, or $567.00; 9 W/B crates of eggplants at $6.35, or $57.15; and freight in the amount of $.35, or $78.75, for a total of $2,241.90. The grand total shown by the invoice was $5,435.85. The 75 crates of eggplants were incorrectly invoiced at $6.50, and complainant agreed to change the price to $6.40 per crate making respondent's liability for the 75 crates of eggplants $506.25. At the close of the submission of evidence in this proceeding, on April 20, 1985, respondent paid complainant $2,680.20 for the tomatoes shipped to Coast Citrus Co. In addition on July 20, 1984, respondent tendered to complainant, by means of a check which also tendered payment on other invoices, payment in the correct amount of $2,748.15 for the remaining produce sold under invoice no. 6432. However, complainant did not negotiate the

check, in part because of respondent's failure to include at that time payment for the tomatoes shipped to Coast Citrus Co. Accordingly, there remains due and owing from respondent to complainant the sum of $2,748.15 on this invoice.

6. On or about March 4, 1984, under invoice no. 6456, complainant sold to respondent, and shipped to respondent's customers, a mixed load of tomatoes, eggplants, and bell peppers, and a lot of tomatoes. After arrival of the produce complainant and respondent agreed to an adjusted price for all of the produce of $4,675.80. Respondent has already paid complainant this amount.

7. On or about March 8, 1984, under invoice no. 6466, complainant sold to respondent, and shipped to respondent's customers, two lots of bell peppers and one lot of eggplants having a total invoice price of $1,726.20. After arrival of the produce complainant and respondent agreed to an adjusted price for all of the produce of $1,438.50. Respondent has already paid complainant this amount.

8. On or about March 13, 1984, under invoice no. 6488, complainant sold to respondent, and shipped to respondent's customers, two lots of tomatoes having a total invoice price of 3,108.60. Respondent received the merchandise covered by this invoice and tendered payment to complainant in the reduced amount of $1,280.40 on July 20, 1984, by check no. 13792. This check was not negotiated by complainant, and the entire amount of $3,108.60 remains due from respondent to complainant.

9. On or about March 7, 1984, under invoice no. 6493, complainant sold to respondent, and shipped to respondent's customers, 84 W/B crates of eggplants at $6.50, plus $.35 for freight, or a total of $575.40. Respondent's customer received the peppers, and respondent has not paid complainant the agreed purchase price.

10. On or about March 12, 1984, under invoice no. 6508, complainant sold to respondent, and shipped to respondent's customers, three lots of produce, one containing cucumbers, one eggplants, and the remaining lot cucumbers and green bell peppers, at a total invoice price of $1,595.40. Complainant invoiced respondent for an incorrect amount of $8.65 for 36 crates of cucumbers rather than the agreed amount of $7.65. Respondent has paid complainant the correct amount of $1,595.40.

11. On or about March 16, 1984, under invoice no. 6509, complainant sold to respondent, and shipped to respondent's customers, three lots of tomatoes, having a total invoice cost of $2,036.10. Respondent's customers received the produce covered by this invoice, and respondent has tendered payment to complainant in the reduced amount of $1,532.10 by its check no. 13792 on July 20, 1984.

This check was not negotiated by complainant, and the entire amount of $2,036.10 is due from respondent to complainant.

12. On or about March 20, 1984, under invoice no. 6536, complainant sold to respondent, and shipped to respondent's customers, three lots of tomatoes, having a total invoice cost of $1,126.80. After arrival of the tomatoes one lot was lowered in price by an agreement between the parties, which brought the total invoice price to $971.70. Respondent has already paid complainant $429.00 of this amount. The remaining amount of $542.70 was tendered to complainant by respondent as a portion of respondent's check no. 13792 issued July 20, 1984. This check was not negotiated by complainant, in part because other items paid by the check were paid in incorrect amounts. There remains due from respondent to complainant the sum of $542.70 on this invoice.

13. On or about March 28, 1984, under invoice no. 6568, complainant sold to respondent, and shipped to respondent's customers, two lots of tomatoes and one lot of tomatillos. The two lots of tomatoes were billed at $3,855.00, and respondent paid complainant that amount. As to the lot of tomatillos the price was not available at time of billing, and rather than pay the freight in the amount of $36.00, respondent secured complainant's agreement to bill the tomatillos separately. During the course of this proceeding complainant rendered the separate billing in the total amount, including freight, of $468.00. This sum is presently due from respondent to complainant.

14. On or about March 5, 1984, under invoice no. 6572, complainant sold to respondent, and shipped to respondent's customers, one lot of eggplants having a total invoice price of $756.00. Respondent has tendered the amount of $756.00 to complainant for this lot of eggplants by respondent's check no. 13792 issued July 20, 1984. This check was not cashed by complainant, in part because other items paid by the check were paid in incorrect amounts. There remains due from respondent to complainant the sum of $756.00 on this invoice.

15. On or about March 29, 1984, under invoice no. 6575, complainant sold to respondent, and shipped to respondent's customers, three lots of tomatoes for a total invoice price of $3,297.90. After arrival of the tomatoes complainant and respondent agreed to an adjusted price of $2,676.90. Respondent has already paid complainant this amount.

16. On or about April 17, 1984, under invoice no. 6664, complainant sold to respondent, and shipped to respondent's customer, one lot of tomatoes having an invoice price of $332.10. Respondent's customer received the produce covered by this invoice, and re-

spondent tendered payment to complainant in the reduced amount of $278.10 on August 8, 1984, by its check no. 13895. This check was not negotiated by complainant, and the entire amount of $332.10 is due from respondent to complainant.

17. On or about March 18, 1984, under invoice no. 6920, complainant sold to respondent, and shipped to respondent's customer, one lot of eggplants having a total invoice price of $407.40. Respondent has tendered complainant the entire amount due under this invoice, but such amount was included as a part of check no. 13895 issued on August 7, 1984, which included payment in an incorrect amount for another invoice. This check was not cashed by complainant, and consequently the entire amount of $407.40 is due from respondent to complainant.

18. All of the produce in each of the transactions involved in this proceeding originated in Mexico, and was imported into California by complainant prior to shipment to respondent or respondent's customers.

19. The formal complaint was filed on September 25, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover amounts and balances allegedly due in connection with the sale to respondent of 15 trucklots of mixed vegetables imported by complainant from Mexico. The issues in regard to each invoice must be considered separately.

As to complainant's invoice no. 6364, the total adjusted amount due was $4,306.20. Respondent paid complainant $4,255.80 by check no. 13354 dated May 21, 1984. This left the sum of $50.40 due on this invoice. Although respondent tendered this remaining amount to complainant as a part of its check no. 13895 dated August 7, 1984, such check also contained a payment on invoice no. 6920 in less than the amount claimed due by complainant, and consequently complainant refused to cash the check. There remains due from respondent to complainant as to invoice no. 6364 the sum of $50.40.

In regard to complainant's invoice no. 6423, the original amount of the invoice was $685.80 based on a price of $6.00, plus $.35 freight, for 108 lugs. The parties agree that respondent should be liable for only 107 lugs, but respondent claims that its customer rejected the tomatoes due to overripeness and that this was communicated to Bob Villalobos, president of complainant, by Larry C. McSherry, salesman for respondent. Respondent further claims that complainant's president agreed to a price adjustment of $.50 per lug, leaving a balance due of $625.95. Although complainant has denied that any such agreement was made, complainant ac-

cepted and cashed a check from respondent containing payment for the 107 lugs of tomatoes. The check had attached to it a stub showing payment for invoice no. 6423 at $625.95. At the bottom of the stub were typed the words "THE INVOICES LISTED ABOVE ARE PAID IN FULL AS PER BOB V. AND LARRY MCSHERRY." We conclude on the basis of all of the evidence that complainant agreed to the adjustment claimed by respondent and that nothing remains due to complainant on this invoice.

In relation to complainant's invoice no. 6432, by the time submission of evidence in this proceeding was completed the parties had come to an agreement on every item except the price for the 75 crates of eggplants. Respondent maintained that the invoice price of $6.50 per crate was not in accord with the agreed price, and respondent's Larry C. McSherry asserted that upon receiving the invoice he telephoned Bob Villalobos and called his attention to the billing error. Mr. McSherry stated that Mr. Villalobos agreed to change the amount from $6.50 to $6.40, and that respondent then changed the invoice and sent it back for approval. Mr. McSherry contends that the invoice was returned with a note signed by Mr. Villalobos stating that it was all right to change the invoice. A copy of the note was attached to Mr. McSherry's statement, and it simply lists a large number of invoices stating that it is okay to make changes on them. The nature of the change is not specified for any of the listed invoice numbers. Mr. Villalobos does not deny sending the note but states that the reference thereon to invoice 6432 is a typographical error and should read 6433. The lack of specificity in the note leads us to believe that it must have been sent by complainant to accompany invoices changed by respondent, and sent to complainant for approval as respondent contends. We conclude that complainant is bound by the note as it stands, and has not shown that it applies to a different invoice. Accordingly, we have found that complainant agreed to change the price on the invoice to $6.40, and respondent is liable only for this amount. As stated in finding of fact 5, respondent's remaining liability on invoice no. 6432 amounts to $2,748.15.

The parties dispute the original terms of sale, prices, and quantities in regard to various portions of the produce sold under invoice no. 6456. However, the quantity actually shipped is agreed upon by both parties. It is not necessary for us to discuss and decide these issues because we find that the record supports the conclusion that the parties, after arrival of the produce, agreed upon a total invoice cost for the produce in the amount $4,675.80. Although complainant disputes this, and claims instead that the agreed amount was $6,332.70, respondent sent complainant a check on July 6, 1984, in

the total amount of $12,303.30, which included the amount $4,675.80 for invoice no. 6456, and so stated on the check stub. The stub also included the words typed in all caps: "THE INVOICES LISTED ABOVE ARE PAID IN FULL". We consider complainant's cashing of this check to be adequate evidence of the settlement agreement claimed by respondent.

In regard to complainant's invoice no. 6466, respondent claims that 42 boxes of bell peppers arrived in bad condition and that such peppers were returned to complainant pursuant to agreement between the parties. Respondent also contends that the parties agreed to an adjusted invoice price of $1,438.50. Complainant claims that it never authorized the return of the peppers, never received such peppers, and that there is no inspection report to support the peppers arriving in bad condition. The record shows that respondent sent complainant a check on April 20, 1984, in the total amount of $8,741.30, which included the amount of $1,438.50 for invoice no. 6466, and so stated on the check stub. The stub also included the words typed in all caps: "THE INVOICES LISTED ABOVE ARE PAID IN FULL AS PER BOB V.". We consider complainant's cashing of this check to be adequate evidence of the settlement agreement claimed by respondent.

In regard to complainant's invoice no. 6488, respondent claims that complainant shipped a quantity of tomatoes in excess of what was ordered, and that a portion of the tomatoes was of a quality below that specified when ordered. Respondent states that complainant was contacted by telephone after arrival of the tomatoes and agreed to a portion of the tomatoes being handled on an open basis. Respondent also alleges that complainant agreed that no inspection need be secured. Respondent submitted in evidence a copy of the invoice, heavily marked, alleging that it was sent to complainant and returned with complainant's okay signifying acceptance of the reduced prices noted thereon. Complainant denies all of respondent's allegations. There is no way of concluding with any certainty from the face of the marked up invoice submitted by respondent that complainant approved the price changes noted thereon. Respondent had the burden of proving by a preponderance of the evidence that complainant agreed to the adjustments claimed. We conclude on the basis of all of the evidence that respondent has not met this burden. The entire invoice amount of $3,108.60 in now due from respondent to complainant.

Respondent asserts that the peppers covered by invoice no. 6493 were placed on an open basis with its customer with complainant's consent, after having arrived in poor condition. Respondent states it that agreed with complainant on June 26, to a price of $4.85.

Complainant denies that it ever agreed to the peppers being handled on an open basis or to an adjusted price. Respondent had the burden of proving the alleged change in the original contract terms and the alleged adjusted price. We find that respondent has failed to meet this burden by a preponderance of the evidence, and is liable to complainant for the total amount of $575.40 on this invoice.

In regard to invoice no. 6508, respondent contends that it was incorrectly billed for $8.65 on 36 crates of cucumbers. Complainant denies this contention, and asserts that the invoice amount is correct. However, on June 15, 1984, respondent paid complainant $1,595.45 on invoice no. 6508, which reflected the lower price alleged by respondent to be the original agreed price. The check stub contained the words typed in all caps at the bottom: "THE ABOVE INVOICES ARE PAID IN FULL." Complainant accepted and cashed the check. We conclude that respondent has shown by a preponderance of the evidence that the original price for the 36 crates of cucumbers was $7.65, and that payment in full has been made to complainant on this invoice.

In regard to complainant's invoice no. 6509, respondent claims that a portion of the tomatoes covered by the invoice arrived in poor condition. Respondent asserts that after arrival of the tomatoes it was agreed with complainant's president that these tomatoes would be handled on an open basis, and that subsequently complainant's president agreed to a reduced price for such tomatoes. Respondent states that a copy of the invoice was marked with the reduced price and returned to complainant's president, and that such invoice was subsequently sent back to respondent with the approving signature of complainant's president. The marked up copy of the invoice submitted by respondent reflects what appear to be initials near the bottom, but we are unable to say with any certainty that these are the initials of complainant's president, and Mr. Villalobos has denied the allegations of respondent in this regard. Respondent had the burden of proving by a preponderance of the evidence that complainant agreed to the adjustments claimed . We conclude on the basis of all of the evidence that respondent has not met this burden. The entire invoice price of $2,036.10 is presently due from respondent to complainant.

In regard to complainant's invoice no. 6536, complainant agreed during the course of this proceeding that respondent's contention that only $542.70 remains due is correct. Since respondent's tender of this amount was by means of a check which included other incorrect payment amounts, complainant did not negotiate the check.

The sum of $542.70 remains due and owing from respondent to complainant in regard to this invoice.

As to invoice no. 6568, the parties agreed that the tomatillos originally on such invoice, without a price other than the cost of freight, should be rebilled. Complainant rebilled the tomatillos separately at $468.00, including freight, and respondent has not objected to this amount. We conclude that such amount is now due and owing from respondent to complainant.

The parties are in agreement as to the amount due on invoice no. 6572, and respondent tendered this amount to complainant in its check no. 13792 issued July 20, 1984. However, since this check included other incorrect payment amounts, complainant did not cash the check. The sum of $756.00 remains due and owing from respondent to complainant on this invoice.

As to invoice no. 6575, respondent claims that the tomatoes arrived in poor condition, and that complainant upon being contacted by respondent agreed to an adjusted price for the load of $2,676.90. Complainant denies respondent's allegations. However, respondent sent complainant a check on July 10, 1984, in the total amount of $6,102.90, which included the amount of $2,676.90 for invoice no. 6575, and so stated on the stub. The check stub also included the words typed in all caps at the bottom: "THE INVOICES LISTED ABOVE ARE PAID IN FULL." We consider complainant's cashing of this check to be adequate evidence of the adjustment claimed by respondent.

As to invoice no. 6664, respondent claims that the price shown on the invoice was incorrect. Respondent states that the agreement of complainant was secured by telephone to the reduced price of $278.10, and that the invoice was so marked in return for complainant's approval. Respondent alleges that the invoice was approved by complainant and returned with Bob Villalobos' initials evidencing such approval. Complainant denies these contentions. Respondent has not furnished any substantive evidence showing that the initials on the invoice belong to Bob Villalobos, and we conclude that respondent has failed to prove that the reduced price is the correct amount. There remains due from respondent to complainant the sum of $332.10 on this invoice.

In regard to the last of complainant's invoices, no. 6920, the parties have agreed that the correct amount due is $407.40. Since respondent's tender of this amount was by means of a check which included another incorrect payment amount, complainant did not negotiate the check. The sum of $407.40 remains due from respondent to complainant as to this invoice.

The total amount which we have found to be still due and owing from respondent to complainant is $11,024.85. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $11,024.85, with interest thereon at the rate of 13 percent per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

CLARENCE W. ROBINSON d/b/a ROBINSON FARMS, *v.* MICHAEL BROTHERS, INC. PACA Docket No. 2-6776. Decided April 14, 1986.

Rejection—no contest

Respondent rejected a consignment of melons bought from complainant following federal inspection indicating defects. The rejection was not contested by complainant. Complaint dismissed.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $3,539.33 in connection with the sale of a truckload of honeydew melons in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages is less than $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an

opening statement, and respondent filed an answering statement. In addition, complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Clarence W. Robinson is an individual doing business as Robinson Farms, with an address at P.O. Box 1064, Blythe, California 92226.

2. Respondent, Michael Brothers, Inc., is a corporation with an address at Produce Building, 38 Harris Avenue, Providence, Rhode Island 02903. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On October 4, 1983, complainant sold to respondent 120 cartons of 5s honeydew melons at $3.25 per carton for a total price of $390.00, 120 cartons of 6s honeydew melons at $3.25 per carton for a total price of $390.00, and 1,140 cartons of 8s honeydew melons at $2.25 per carton for a total price of $2,565.00, plus palletizing at $.25 per carton for a total price of $345.00, and a thermogard thermometer for $22.50, for a total contract price of $3,712.50, f.o.b. Tom Lange Co., Inc., of Springfield, Illinois acted as the broker for the transaction. The honeydew melons were shipped on October 4, 1983, in interstate commerce, and arrived at respondent's place of business on October 11, 1983, where they were inspected by the federal inspection service.

4. The federal inspection referred to in paragraph 3, above, occurred on October 11, 1983. The melons were still on the truck when the inspection was held at 9:15 a.m. The inspection showed in pertinent part as follows:

Condition of Pack:	Tight to fairly tight.
Quality:	Mature, many clean and generally well formed. Grade defects range 2 to 7 melons (25 to 87%) per carton, average 52% caked on dirt, scars, cuts and misshapen.
Grade:	Fails to grade U.S. No. 1, account of grade defects.

5. As a result of the inspection respondent rejected the load of honeydew melons, and notified the broker that it was doing so. Tom Lange Company notified complainant at 11:00 a.m. on October 11, 1983, that respondent had rejected the load. On complainant's instructions the load was consigned to Paramount Produce, Inc., lo-

cated in Chelsea, Massachusetts, where it was sold, and an account of sales was provided with net proceeds to complainant of $173.17.

6. When the truckload of melons arrived at Paramount's place of business Paramount notified complainant that 266 cartons of melons were not on the truck. Complainant, on October 13, 1983, at 12:38 p.m., sent a telegram to respondent which stated as follows:

> We are not accepting your unjustified rejection of Mar 5422 shipped on 10/4/83 and notified by Tom Lange Company of Salinas, California 9 am 10/12/83. You had taken off 266 cartons of honeydews therefore you did accept the load. We expect full invoice less any proven damages due to breach of contract.

7. A formal complaint was filed in this proceeding on February 28, 1984, which was within nine months of the time of cause of action herein accrued.

DISCUSSION

Although the respondent contends that the contract provided for the delivery of U.S. No. 1 honeydews, and complainant is inconsistent in its statements as to whether there was a U.S. No. 1 or no grade contract, this issue is immaterial because it is superseded by the overriding question as to whether there was a proper rejection of the truckload of melons. We find upon our evaluation of all of the evidence in this proceeding that respondent properly rejected the truckload, and therefore, must prevail.

Complainant contends that respondent accepted the honeydew melons because it partially unloaded the truck by taking 266 cartons of melons off the truck after the inspection occurred and before the melons went to Paramount Produce, Inc., of Chelsea, Massachusetts, on consignment at complainant's instructions. Complainant contends that the partial unloading of the melons constitutes acceptance of the entire truckload. Unfortunately for complainant it has not proved that respondent was responsible for unloading the 266 cartons from the truck. The evidence reflects that the federal inspection occurred on October 11, 1983, at 9:00 a.m. The evidence further reflects, as shown by the broker's memorandum that complainant was notified on October 11, 1983, at 11:00 a.m. that respondent had rejected the truckload because of the grade defects found by the federal inspection. Therefore, we reject complainant's claim that it was not notified until October 12, 1983, because the statement of an ostensibly neutral third party must be given great weight. See *Homestead Tomato Packing Co.* v. *Mims*

Produce, Inc., 43 Agric. Dec. ____ (1984); *Kern Ridge Growers* v. *T. J. Power & Co.*, 48 Agric. Dec. 425 (1981).

The actions of complainant show clearly that it did not contest the rejection of the load by respondent on October 11, 1983. It was at the direction of complainant on that date that the goods were shipped to Paramount for handling on consignment. That being the case it was complainant's responsibility for any unloading which may have occurred while the goods were in transit from respondent's place of business to Paramount's place of business. There is no evidence to reflect that respondent unloaded any of the goods after it rejected the truckload. We are not much impressed by the statement of the truck driver that the goods were fully intact when he took them from respondent's place of business to that of Paramount since the statement is partially self-serving. It is complainant's burden of proof to show that respondent acted improperly after it rejected the goods, and complainant has offered no solid proof to show that it was respondent rather than the truck driver, Paramount or someone else which took off the 266 cartons involved. Neither are we impressed by complainant's telegram to respondent at 12:38 p.m. on October 13, 1983, indicating that it resinded its acceptance of respondent's rejection. It is more likely because of the short distance between Providence, Rhode Island, and Chelsea, Massachusetts that the goods arrived at Paramount's place of business on October 11, 1983, and certainly no later then the morning of October 12, 1983. It appears to us that complainant was late in complaining to respondent as to the loss of 266 cartons, in any event.

In view of the above the complaint must be dismissed.

ORDER

The complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

JOHN LIVACICH PRODUCE INC., a/t/a VISTA-WATSONVILLE SALES, *v.* CARNIVAL FRUIT CO. INC. PACA Docket No. 2-6874. Decided April 14, 1986.

Burden of proof to show breach of warranty and damages—on respondent. Breach of warranty by complainant. Damages proved by respondent. Payment to suppliers by complainant made while aware of condition problems.

Respondent sustained its burden of proving complainant's breach of warranty of suitable shipping condition on the load of strawberries respondent admittedly accepted, and respondent's damages resulting from the breach. As respondent's dam-

ages equal the contract price, respondent is without liability. Respondent is not responsible for complainant's payment to its suppliers made while complainant was aware of the condition problems of the strawberries.

Andrew Stanton, Presiding Officer.
Matthew M. McTierney, Newport Beach, California, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,901.50, in connection with the sale and shipment of a trucklot of strawberries to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement but respondent chose not to submit any additional evidence. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, John Livacich Produce, Inc. a/t/a Vista-Watsonville Sales, is a corporation whose address is P.O. Box 5519, San Bernardino, California.

2. Respondent, Carnival Fruit Co., Inc., is a corporation whose address 475 N.E. 185th St., Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately May 19, 1984, complainant sold to respondent 380 trays of strawberries at $4.00 per tray plus $.60 per tray for cooling, $74.00 for tectrol, $22.50 for a Ryan recorder, and $.18 per tray for brokerage, for a total f.o.b. contract price of $1,901.50. The broker in this proceeding, through whom both parties communicated, was The Tobi Company, Inc., Miami, Florida, represented by their employee, Gene Meyers.

4. The strawberries were shipped in interstate commerce to respondent, where they arrived on May 23, 1984, and were federally inspected. The inspection found as follows, in relevant part:

VARIOUS CONTAINERS Range 40° *To 42°*

SHIPPER: Vista Watsonville Sales
STRAWBERRIES—"Vista 112 Dry Pints"

Applicant States 380 flats.

CONDITION: Berries mostly ripe and firm. Calyxes generally fresh and green, few turning brown. Ranges 5 to 20%, average 20% damage by bruising. Decay ranges 17 to 75%, average, 34% Rhizopus Rot and Gray Mold Rot each in various stages.

5. On May 23, 1984, after receiving the results of the inspection, respondent immediately contacted Mr. Meyers, informed him of the results, and asked him to notify complainant that respondent might only be able to return freight costs. Mr. Meyers then contacted complainant and conveyed the information given to him by respondent. On that same date, Mr. Meyers issued an "Adjustment Form", on which he noted the inspection results, respondent's statement that it would try to return freight, and that he had reported respondent's statement to complainant.

6. Respondent has not paid any part of the contract price to complainant.

7. An informal complaint was filed on January 2, 1985, which was within nine months from when the alleged cause of action herein accrued. A formal complaint was filed on April 29, 1985.

CONCLUSIONS

Respondent claims that the load of strawberries it admittedly received and accepted was found by a federal inspection to be in very poor condition. It therefore told the broker to inform complainant that it might not be able to recover on resale anything in excess of its freight expense. Complainant contends that transportation conditions were abnormal. Complainant asserts further that it never received notice of the condition problems until November 1984, when it received a copy of the May 23, 1984, federal inspection. Complainant states that prior to receiving notice, it made full payment to its suppliers, and therefore demands payment of the entire contract price from respondent.

As this was an f.o.b. sale, respondent, having admittedly accepted the strawberries, became obligated to pay complainant the agreed

upon contract price, less damages resulting from any breach of warranty by complainant. Respondent has the burden of proving the breach and resulting damages by a preponderance of the evidence. *Farm Market Service Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983).

The May 23, 1984, inspection (Finding of Fact 4) clearly reveals that the strawberries were in very poor condition when they arrived at the respondent's place of business. Although pulp temperatures were slightly high, this could not have accounted for the 34% rot found by the inspection. We conclude, therefore, that there was a breach of complainant's suitable shipping condition warranty (7 CFR § 46.43(j)). Respondent was thus entitled to recover damages consisting of the difference between the actual value of the strawberries at the time and place of acceptance and the value they would have had if they had been as warranted. *Homestead Tomato Packing Co., Inc.* v. *Austin J. Merkel Co., Inc.*, 40 Agric. Dec. 1587 (1981). The actual value is usually determined by the results of a prompt and proper resale. Respondent claims that it resold the strawberries but recovered only enough to pay for its freight expense of $1.20 per tray, or $456.00. Considering the extremely high level of decay shown by the federal inspection, we believe that respondent was fortunate to have recovered even $456.00. We thus conclude that the resale was indeed prompt and proper, even in the absence of an account of sales. *Farm Market Service, Inc.* v. *Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). For the value of the strawberries if they had been as warranted, we will use the contract price plus freight, which consists of $2,357.50. Respondent's damages are the difference between $2,357.50 and $456.00, or $1,901.50, which is equivalent to the contract price. Therefore, respondent has not incurred any liability with respect to this transaction.

Complainant's claim that it did not receive notice of the condition problems until November 1984, by which time it had already paid its suppliers, does not cause us to alter our conclusion that respondent is without liability. Complainant's claim is flatly contradicted by the broker, who says complainant was informed of the problems on May 23, 1984 (Finding of Fact 5), the date the strawberries arrived and were inspected. Assuming the truth of the broker's statement, which we have no reason to doubt, complainant apparently paid its suppliers while being aware of the condition problems of the strawberries. Respondent cannot be held responsible for this decision.

Accordingly, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.
Copies of this order shall be served upon the parties.

BIANCHI & SONS PACKING CO., *v.* G & J PRODUCE INC. PACA Docket No. 2-6930. Decided April 14, 1986.

Evidence effect of unsown pleading. Good delivery standards for tomatoes. Inspection report as *prima facie* evidence.

Where respondent provided unsworn answer its claim backed evidentiary value, as a result of which the only evidence which could be considered regarding its claim the tomatoes did not make good delivery was a federal inspection certificate. However, the certificate showed the tomatoes did make good delivery—hence, complainant was entitled to the full purchase price.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $7,193.70 in connection with the sale of a truckload of tomatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an unsworn answer thereto denying liability to complainant. Because the amount claimed as damages is less then $15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant Bianchi & Sons Packing Company, is a corporation doing business at P.O. Box 190, Merced, California 95341.

2. Respondent, G. & J. Produce, Inc., is a corporation with an address at Suite 106, 2520 Airline Drive, Houston, Texas 77009. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On June 21, 1984, complainant sold to respondent 1,728 cartons of tomatoes at $4.00 per carton plus $.15 per carton for palletizing, and $22.50 for a Temperature Recorder for a total contract price of $7,193.70, f.o.b. The tomatoes were shipped on that date in interstate commerce, and were received and accepted by respondent on June 24, 1984.

4. A federal inspection was held with respect to the load of tomatoes on June 25, 1984. It showed in pertinent part with respect to condition as follows:

> Average approximately 30% turning or pink. 70% light red or red. Average 2% decay. From 2 to 22% in most samples, many none average 6% damage by bruising including 5% seirous [sic] damage and including 2% very serious damage scattered throughout pack and lot.

The percentage of condition defects was within tolerance for U.S. No. 1 tomatoes at point of destination.

5. A formal complaint was filed in this proceeding on April 22, 1985. An informal complaint was filed on January 24, 1985, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

There is no issue as to whether the truckload of tomatoes was shipped to respondent by complainant, and received and accepted by respondent upon delivery. Respondent filed a one paragraph Answer which was not sworn, and therefore, which has no evidentiary value. *Frank W. Prillwitz, Jr.* v. *Sheehan Produce*, 19 Agric. Dec. 1213 (1960); *The Garin Co.* v. *Affiliated Foods, Inc.*, 43 Agric. Dec. ___ (1984). Respondent provided no other evidence with the exception of a federal inspection certificate reflecting an inspection which occurred on June 25, 1984. That inspection showed 10% condition defects with respect to the truckload of tomatoes, which is within the tolerance for tomatoes at destination. See 7 CFR 51.1861(a)(2). Such being the case we have no alternative other then to conclude that the tomatoes made good delivery, and that complainant is entitled to recover the full purchase price of the truckload. In view of the above we find that respondent has violated section 2 of the Act, and that reparation should be awarded to complainant, with interest thereon in the total amount of $7,193.70.

ORDER

Within thirty days from the date of this order respondent shall pay to complainant $7,193.70, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

CORKY FOODS CORPORATION *v.* S & S PRODUCE CO., INC. PACA Docket No. 2-6941. Decided April 14, 1986.

Deferred billing—Market News Reports as evidence of price—Evidence—Statement of broker—Evidence—invoices showing prices of other transactions. Where parties agreed to deferred billing with actual price to be determined later based upon market price, best evidence of market price was shown by prices paid for similar transactions during the same period, plus the broker's statement, rather than conflicting prices shown in Market News Reports.

Dennis Becker, Presiding Officer.
Pro se, for complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $12,731.35, in connection with the sale of a truckload of tomatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto in which it admitted it owed an additional $9,563.35, leaving for resolution $3,168.00, respondent having paid the additional $9,563.35. Because the amount claimed as damages is less then $15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20)is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and respondent filed an answering statement. Although given an opportunity to do so neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Corky Foods Corporation, is a corporation with an address at 3452 West Boynton Beach Boulevard, Suite 4, Boynton Beach, Florida 33436.

2. Respondent, S & S Produce, Co., Inc., is a corporation with an address at Louisville Produce Terminal, Units 8 and 10, Louisville, Kentucky 40218. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On January 19, 1985, complainant sold to respondent 432 25 pound units of 5×6 tomatoes, 1,008 25 pound units of 6×6 tomatoes, and 140 25 pound units of 6×7 tomatoes, f.o.b., with the entire truckload to be billed at market price at a later time. The tomatoes were shipped on that date to respondent, and were received and accepted by respondent on or about January 22, 1985. Pat Adams, Bonita Springs, Florida, acted as the broker with respect to this transaction.

4. Because of a freeze in Florida the market for tomatoes in the middle of January 1985 was very unsettled. As a result the parties agreed through the broker that pricing would be deferred with billing at market price to occur at a later, unspecified date. The Market News for Cincinnati, Ohio for January 23, 1985, showed that the market for tomatoes was unsettled, and provided no prices. The Market News for the Southeastern United States for January 24, 1985, showed the prices that complainant sought to charge respondent, namely $19.00 for 5×6 tomatoes, $17.00 for 6×6 tomatoes, and $15.00 for 6×7 tomatoes. Complainant issued its billing based upon that Market News report. Although the prices for tomatoes were very high on Wednesday, January 23, 1985, they dropped rapidly from that date until the end of the week. During that week other companies charged less then complainant for similar tomatoes, generally charging the price that respondent seeks to pay in this proceeding, namely $16.00 for the 5×6 tomatoes, $14.00 for the 6×6 and $12.00 for the 6×7 tomatoes. There was never a meeting of the minds between the parties as to what was an appropriate price for the tomatoes.

5. Respondent provided an account of sales which show that it fetched on resale much less then the prices it offered to pay complainant for the tomatoes involved in this proceeding.

6. A formal complaint was filed on April 10, 1985, which was within nine months of the time the cause of action herein aroused.

DISCUSSION

The dispute in this proceeding arises because there was a very unsettled market for Florida tomatoes in mid January, 1985 as a

result of a freeze in that state. Complainant seeks to derive the highest price it can based upon federal Market News Reports for the Southeastern United States for the period involved. Respondent, on the other hand, seeks to pay a lesser price based upon it understanding as to what was the true market price for tomatoes during more than a one day period of time for Florida tomatoes. It offered in evidence invoices and brokers' memoranda showing prices which other sellers of tomatoes were charging their customers during the week of January 19 through 25, 1985. Respondent acknowledged that it owed complainant all but $3.00 of the price originally billed by complainant, and paid that amount, which came to $22,989.60, including palletizing at $.15 per carton. Respondent claims, and complainant does not contest, that it was granted $1.00 allowance for every carton of tomatoes sold. Therefore, there is left for resolution a differential of $2.00 per carton between the price billed by complainant and the price offered by respondent.

Because there was no meeting of the minds as to the actual price to be paid, we must look to extrinsic evidence to determine what price the tomatoes should have fetched. In this instance the best evidence is the invoices submitted by respondent showing prices charged by other sellers of tomatoes during the pertinent period of time. There being no indication that the billing at market was to be on a specific day, such as the day of arrival, which was January 22, 1985, it would be inappropriate to accept complainant's billing based upon prices quoted in the Market News on January 23, 1985, which appear to be the highest prices quoted for Florida tomatoes during that week.

We find, based upon a preponderance of the evidence, that the prices offered by respondent, and which it eventually paid, more nearly reflects the true market price for Florida tomatoes during the week of January 19 through 25, 1985. Our conclusion in this regard is bolstered by the statement of Pat Adams, of Adams Brokerage, the broker for the transaction involved herein, who said in a letter to the Department of Agriculture dated June 4, 1985:

> Concerning the load of tomatoes I purchased for S & S Produce, Co., in Louisville, Ky. on Jan 19th 1985. The tomatoes was loaded on an open market basis from Corky Foods Corp. with the understanding they would be billed at market price. The market came out on Wednesday with *5×6 $16.00 6×6 $14.00 6×7 $12.00 but this market price didn't hold and by the end of that week you can buy the same tomatoes a lot less.*

The same day Corky Foods Came out with $18.00-$16.00-$14.00 this price was way out of market range, I know of no other shipper who was getting that kind of money for tomatoes on such a market.

After (3) three weeks of trying to work out a fair price I was unable too, So S & S Prod. was forced to take other actions,

In view of the statement by the broker as reinforced by broker's memos and other invoices we cannot conclude other than that the price charged by Corky was too high, and that the price offered by respondent was appropriate.

In view of the above the complaint in this proceeding must be dismissed.

ORDER

The complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

ALTON H. ALLEN and JOHN M. COELHO d/b/a SUNSET STRAWBERRY GROWERS, *v.* V.F. LANASA, INC. PACA Docket No. 2-6686. Decided April 17, 1986.

Breach of contract. Suitable shipping condition. Modification of contract, failure to object. Dismissal.

Where respondent accepted a shipment of strawberries from the complainant, respondent had the burden of proving that the goods failed to meet contract specifications. Upon demonstration by the respondent that the goods were inferior, respondent was only liable to complainant for the value of goods received.

Stephen J. Luparello, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499 *et seq.*). A timely complaint was filed in which complainant seeks a reparation award in the amount of $2,476.70 in connection with a shipment of strawberries in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon the respondent which filed an answer thereto (also entitled "complaint") denying liability to the complainant. The amount claimed in the formal complaint being less than $15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in this case, as is the Department's report of investigation. The parties were given the opportunity to file additional evidence in the form of verified statements as well as briefs. Complainant submitted an opening statement and a brief. Respondent elected not to submit any additional evidence.

FINDINGS OF FACT

1. Complainant Sunset Strawberry Growers is a partnership composed of Alton H. Allen and John M. Coelho, whose address is 2400 West Main St., Santa Maria, California 93453. At the time of the transaction involved herein, complainant was licensed under the Act.

2. Respondent V. F. Lanasa, Inc., is a corporation whose address is 317 Hull St., Richmond, Virginia 23224. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On May 17, 1984, complainant contracted to sell respondent 1,152 trays of strawberries. The contract price was $4.50 per tray, plus .60 per tray cooling, .15 per tray brokerage fee and a $22.50 fee for a Ryan recorder, for a total invoice price of $6,070.50 f.o.b. The strawberries were shipped in interstate commerce from California to Richmond, Virginia, on May 17, 1984, and arrived at respondent's place of business on May 22, 1984.

4. Respondent inspected the strawberries upon arrival and detected heavy decay and gray mold rot. A federal inspection conducted later on May 22 revealed, in pertinent part: "From 5 to 25%, average 17% decay, mainly Gray Mold Rot and Rhizopus Rot in various stages." The inspection also determined the pulp temperature of the strawberries to be between 46° and 48°.

5. Respondent inspected the strawberries and immediately notified the complainant of their condition. The parties, through a broker, Punelli-Lazopoulos, Inc., agreed that the respondent should sell the load and an adjustment to the contract price would be made at a later date. Complainant now states that he would not have agreed to the adjustment had he known the content of the federal inspection.

6. Respondent has paid complainant $3,593.80.

7. A formal complaint was filed on this matter on September 25, 1984, within nine months of the time the cause of action herein accrued.

CONCLUSIONS

This proceeding involves a dispute in which the complainant claims that he fulfilled the terms of his contract with the respondent, and the respondent claims that the subject of the contract, a shipment of strawberries, did not meet contract specifications, and therefore that it has rightfully withheld full payment. It is the complainant's contention that any damage to the strawberries occurred after the risk of loss and responsibility had shifted to the respondent, thereby entitling the complainant to the full contract price of $6,070.50. As the proponent of a breach of contract claim, the complainant generally carries the burden of proof to a preponderance of the evidence. *See New York Trade Assoc.* v. *Sidney Sandler*, 32 Agric. Dec. 702, 705 (1973). However, since the respondent accepted the goods, the burden of proving that the complainant failed to tender the goods in suitable shipping condition falls on the respondent. *See* U.C.C. § 2-607(4); *Roy Rucker Produce* v. *J. P. Miller Wholesale Produce*, 33 Agric. Dec. 871, 873 (1974). Based upon our analysis of the evidence submitted, we conclude that the respondent should prevail.

The terms of the contract are not in dispute. The contract called for the purchase by respondent of 1,152 trays of strawberries on an f.o.b. basis, at a price of $4.50 per tray, plus .60 per tray cooling, .15 per tray brokerage and $22.50 for a Ryan recorder, for a total contract price of $6,070.50. The evidence shows that the strawberries were shipped in interstate commerce on May 17, 1984, and arrived at the respondent's place of business on May 22, 1984. The evidence further demonstrates that when the goods arrived at their destination point of Richmond, Virginia, the respondent conducted an inspection of the goods and determined that due to extensive decay and gray mold rot, the goods did not conform to contract specifications. The parties, through the brokerage firm of Punelli-Lazopoulus, Inc., agreed that the respondent should sell the strawberries and that the parties would work out a price adjustment at a later date.

The complainant bases his breach of contract claim on the findings of a federal inspection performed on May 22. The inspection read in part that the average pulp temperature of the strawberries was 46° to 48°F, considerably higher than the 34° to 36° range dictated in the bill of lading. It is the position of the complainant that the agreement to modify the contract price was based on misinfor-

mation supplied by the respondent as to the handling of the strawberries and therefore is void. The complainant contends that the pulp temperatures indicated in the federal inspection are proof that the decay and rot occurred after the strawberries were placed in the possession of the trucker, that is, after the risk of damage in transit had shifted to the respondent. The complainant, relying on this evidence, contends that he fulfilled his obligation under the contract in that he delivered the goods to the trucker in suitable shipping condition as per section 46.43(j) of the regulations (7 CFR § 46.43(j)) and the terms of the f.o.b. contract. Noting that, he demands full payment.

Evidence submitted by the respondent on the issue of breach of warranty of suitable shipping condition included the federal inspection report and the temperature reading taken by the Ryan recorder. The inspection showed that the strawberries averaged 17% decay, well in excess of the acceptable delivery standard. Further, the Ryan recorder indicated that the temperature of the truck's cooling unit was maintained at approximately 36° for the duration of the trip, with predictably warmer readings during the loading and unloading stages. The Ryan recorder evidence appears to support the contention that the strawberries were shipped in accordance with the instructions provided by the complainant in the bill of lading. It must be presumed therefore that any damage or decay to the shipment must have existed prior to the tender of the strawberries to the trucker. We are particularly drawn to this conclusion because of the temperatures shown on the Ryan. The high pulp temperatures could easily result from the percentage of decay in the load. In light of the fact that the complainant offered no evidence as to the condition of the strawberries prior to shipment, the evidence submitted by the respondent is sufficiently substantial to conclude that the complainant did not deliver the goods in suitable shipping condition.

Even if the decay occurred during transit respondent would prevail since complainant agreed to modify the contract. When discussions were held complainant was required to ask all pertinent questions regarding the load. Absent misrepresentation or fraud on the part of respondent, any misunderstanding resulting in a modification is not actionable. *Walters Produce, Inc.* v. *Francis Produce Co.*, 44 Agric. Dec. ____ (1985).

The complainant's failure to deliver the goods in suitable shipping condition constitutes a breach of the contract. *See Garin Co.* v. *Gelman Commission Co.*, 32 Agric. Dec. 223, 227 (1973). The standard formula for determining damages when the buyer has accepted the goods is the difference at the time and place of acceptance be-

tween the value of the goods accepted and the value of goods conforming to the contract. *See* U.C.C. § 2-714; *Freshpict Fruits* v. *H. R. Bushman & Son*, 29 Agric. Dec. 71, 79 (1970). The method for assessing the value of conforming goods is the f.o.b. contract price plus expenses. *See Norfolk Banana Distributors, Inc.* v. *Standard Fruit & Steamship Co.*, 34 Agri. Dec. 413, 415 (1975). The contract price was $5,184.00 ($4.50 per tray multiplied 1,152 trays), plus $691.20 for cooling costs and $172.80 for brokerage fees, giving a total of $6,048.00 as the value of conforming goods. In determining the value of the goods accepted, the only evidence available is the agreement between the parties that a fair adjustment would be worked out at a future date. From the pleadings, it appears that the complainant had no objection to the assessment of $3.00 per tray as a reasonable price for strawberries in such decayed condition. Using the $3.00 figure, the value of the goods accepted was $3,456. Subtracting the value of the accepted goods from the value of conforming goods results in a difference of $2,592.00, which represents respondent's damages.

The complainant contends and the evidence shows that the respondent remitted $3,593.80 in payment for the strawberries, $2,476.70 less than the original contract price. Due to the breach of contract by the complainant, however, the respondent is responsible only for the difference between the original contract price and the damages resulting from the breach. Since that figure is less than the amount remitted by the respondent to the complainant, the complainant has received all to which he is legally entitled.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PURE GOLD, INC., *v.* VICTOR'S PRODUCE INC. PACA Docket No. 2-6944. Decided April 24, 1986.

Acceptance manifested by act of unloading. Burden of proof as to damages. Suitable shipping condition. Tolerances at destination.

Because respondent unloaded a truckload of oranges it accepted them; therefore, it had the burden to show it suffered damages because of a breach of complainant's suitable shipping condition warranty. It could not do so because the amount of condition defects was within regulatory tolerances for oranges at destination.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) A timely complaint was filed in which complainant sought an award of reparation in the amount of $1,861.00 in connection with the sale of the truckload of naval oranges in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer in which it denied the allegations of the complaint. Because the amount claimed as damages is less than $15,000 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. However, complainant filed a brief.

FINDINS OF FACT

1. Complainant, Pure Gold, Inc., is a corporation with an address at P.O. Box 40, Redlands, California 92373.

2. Respondent, Victor's Produce Inc., is a corporation with an address at 3701 "D" East Alameda, El Paso, Texas 79905. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On December 28, 1984, complainant sold to respondent 1,100 cartons of naval oranges at $4.50 per carton for a total contract price of $4,950.00, f.o.b. The transaction was brokered by South Central Produce Brokers, San Antonio, Texas. The oranges were shipped on December 28, 1984, and were received and accepted by respondent on or about January 1, 1985.

4. On January 2, 1985, the oranges were subjected to a federal inspection at respondent's place of business. That inspection showed in pertinent part as follows insofar as condition was concerned:

> Mostly firm. In most samples from 8 to 24%, in some none, average 11% damage by skin breakdown, mostly pitted. Average 1% decay.

5. Respondent has paid complainant $3,089.00 of the $4,950.00 contract price, leaving $1,861.00 unpaid.

6. A formal complaint was filed on June 3, 1985, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

Because respondent unloaded the oranges from the truck and took them into its place of business, it accepted the oranges. *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Sunfresh Distributing Company* v. *Frank Dania Company*, 43 Agric. Dec. ____ (1984). As a result it has the burden of proof to show that it suffered damages because of a breach of contract on the part of complainant. *Rydell California Potato Co.* v. *The Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957). Respondent has failed to sustain its burden of proof in this regard.

The sole issue in this case is whether the percentage of condition defects, namely 11% damage by skin breakdown and 1% decay at destination is so great as to lead us to the conclusion that complainant's warranty of suitable shipping condition was breached. Complainant claims that the oranges were sold as U.S. No. 1. Respondent claims that they were sold as U.S. Fancy. It makes no difference which of the two grades of oranges were involved because pursuant to federal regulations (7 CFR § 51.1091) the tolerances for condition defects are the same for both grades. That provision reads as follows:

> Not more than 10 percent, by count, of the oranges in any lot may fail to meet the requirements relating to color. In addition; not more than 10 percent, by count, of the oranges in any lot may fail to meet the remaining requirements of the specified grade, but not more than one-twentieth of this amount, or one-half of 1 percent, shall be allowed for decay at shipping point: *Provided*, That an additional tolerance of 2½ percent for a total of not more than 3 percent, shall be allowed for decay en route or at destination."

The above tolerances with respect to either U.S. Fancy or U.S. No. 1 oranges are for the shipping point. With respect to decay the tolerance is specifically increased at destination. The federal inspection showed that there was only 1% decay at destination whereas the tolerance allowed as much as 3% decay. The finding of

11% damage by skin breakdown is so close to the 10% tolerance allowed that we cannot conclude that the oranges exceeded the tolerances allowed at destination. This is particularly true because there is generally some latitude given at destination with respect to the tolerances at point of origin set forth in the regulations. See *Pope Packing & Sales, Inc.* v. *Santa Fe Vegetable Growers Cooperative Association, Inc.*, 38 Agric. Dec. 101, 104-105 (1979); *Denice & Filice Packing Co.* v. *Super Food Services, Inc.*, 38 Agric. Dec. 744, 746-747 (1979).

In view of the above, we find that respondent has violated section 2 of the Act. It should be ordered to pay complainant $1,861.00, with interest at the rate of 13% per annum.

ORDER

Within thirty days from the date of this order respondent shall pay complainant $1,861.00 with interest thereon from February 1, 1985 at the rate of 13% per annum until paid.

Copies of this order shall be served upon the parties.

MOUNTAIN KRISP, INC., *v.* EMPIRE PRODUCE INC., and/or ERICH K. SCHULZ d/b/a CASCADE MARKETING CO. PACA Docket No. 2-7128. Decided April 25, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C § 499a *et seq.*). A timely complaint was filed on November 5, 1985. Complainant seeks to recover $10,776.70, which amount is alleged to be the purchase price for apples sold to and accepted by respondent Empire Produce, Inc., in five transactions brokered by respondent Erich H. Schulz d/b/a Cascade Marketing Co., between December 26, 1984, and March 19, 1985. Respondent Schulz filed an answer to the complaint on March 12, 1986, in which he denied any liability to complaint. Respondent Empire Produce, Inc., filed an answer to the complaint on March 14, 1986. In this answer, respondent Empire admitted owing complainant $6,505.20 of the $10,776.70 claimed by complainant.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admit-

> ted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent Empire Produce, Inc., shall pay to complainant, as an undisputed amount, $6,505.20. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from April 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondents' liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

JIM HRONIS d/b/a JIM HRONIS & SONS *v.* MICHIGAN RE-PACKING & PRODUCE CO. INC. PACA Docket No. 2-6839. Decided March 7, 1986.

George S. Whitten, Presiding Officer.
Ken Youmans, Los Angeles, California, for complainant.
David S. Steingold, Detroit, Michigan, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $16,494.57 in connection with a transaction involving the shipment of grapes in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of January 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO. INC., *v.* GULF LAKE PRODUCE CO.
PACA Docket No. 2-6697. Decided March 12, 1986.

Andrew Stanton, Presiding Officer.
Pro se, for complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on November 7, 1985, dismissing the complaint. On December 17, 1985, complainant filed a petition for reconsideration of the Decision and Order under 7 CFR § 499g(c)).

Section 7(c) of the Act (7 U.S.C. § 499g(c)) states that any party adversely affected by the entry of a reparation order may appeal such order to a United States District Court within 30 days from the date of such order. Complainant's petition was filed 40 days after the Decision and Order was issued. Further, the petition was not even mailed to the Department until December 11, 1985, according to the postmark on the envelope, or 34 days after issuance of the Decision and Order. The Secretary, is, therefore, without jurisdiction to consider complainant's petition as an administrative agency has no jurisdiction to reconsider a decision after the decision has, in accordance with the applicable statute, become final due to the expiration of the time allowed for filing a petition for review. *Lasky* v. *Commissioner of Internal Revenue*, 235 F.2d 97 (9th Cir. 1956) *aff'd per curiam*, 352 U.S. 1027 (1956); *Southland Produce Co., a/t/a Keystone Produce Co.* v. *Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

Complainant's petition for reconsideration is denied.

Copies of this order shall be served upon the parties.

SUNSPROUTS OF TEXAS INC., *v.* JIM SCHAEDLER d/b/a MISSION CITY PRODUCE & BROKERAGE CO. PACA Docket No. 2-6823. Decided March 19, 1986.

George S. Whitten, Presiding Officer.
Mark D. Wilson, Houston, Texas, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the parties have reached a settlement of their dispute and complainant has requested that its complaint be dismissed with prejudice. Accordingly, the complaint is hereby dismissed with prejudice. Copies of this order shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO. INC., *v.* R.C. MCENTIRE, JR., d/b/a R.C. MCENTIRE & COMPANY. PACA Docket No. 2-7034. Decided March 19, 1986.

Dennis Becker, Presiding Officer.
Pro se, for complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $2,480.00 in connection with a transaction involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated February 10, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of February 10, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

INTERNATIONAL A.G. INC., *v.* MACK C. DEMPSEY d/b/a MACK DEMPSEY CO. PACA Docket No. 2-7073. Decided March 21, 1986.

Decision by Donald A. Campbell, Judicial Officer.

CORRECTIONS TO ORDER

An order requiring payment of the undisputed amount was issued in the above-captioned matter on March 12, 1986. This order contained several errors which are set forth below and corrected as indicated.

The first paragraph is corrected to read, " . . . sold to and accepted by respondent on or about January 17, 1985."

The third paragraph is corrected to read, "Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum for February 1, 1985."

The fourth paragraph is corrected to read, "Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued."

TOP QUALITY FRUIT & PRODUCE DISTRIBUTORS, INC., *v.* VOLLMER PRODUCE, INC. PACA Docket No. 2-7077. Decided March 21, 1986.

Decision by Donald A. Campbell, Judicial Officer.

CORRECTION TO ORDER

An order requiring payment of the undisputed amount was issued in the above-captioned matter on March 12, 1986. The second to the last paragraph of the order issued March 12, 1986, contained an error and is hereby corrected to read, "Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued."

ANDRUS & ROBERTS PRODUCE CO., *v.* BERRYMAN PRODUCE, INC. PACA Docket No. 2-7058. Decided March 27, 1986.

Dennis Becker, Presiding Officer.
Pro se, for complainant and respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $26,129.96 in connection with transactions involving the shipment of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 3, 1986, complainant notified the Department that respondent submitted to complainant a payment agreement which had been accepted by complainant. Complainant, in its letter of March 3, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GOLD COAST PACKING, INC., *v.* H. SCHNELL & COMPANY, INC., and/or LLOYD MYERS CO. INC. PACA Docket No. 2-6414. Decided April 9, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER UPON REHEARING

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) an order was issued December 17, 1984, awarding reparation to complainant against H. Schnell & Company, Inc. in the amount of $3,404.00, plus interest, and against respondent Lloyd Myers Co., Inc. in the amount of $7,522.00, plus interest. The award against respondent Lloyd Myers Co., Inc. was to reimburse complainant for the amount of a check, apparently received from A & J Produce Corp. by Lloyd Myers Co. Inc., in its capacity as the broker who negotiated the conveyance of a load of broccoli from complainant to A & J Produce. Respondent Lloyd Myers Co., Inc. petitioned that this matter be reheard (see *J. A. Wood Co.* v. *Manhattan*, 25 Agric. Dec. 1493 (1966)) on the ground that the order of December 17, 1984, was in error in making any award against such respondent.

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On May 15, 1985, we granted rehearing of this matter for the limited purpose of receiving evidence on the question of whether A & J Produce Corp.'s check No. 9829 in the amount of $7,787.20, made out to Lloyd Myers Co., had ever been received and negotiated by respondent Lloyd Myers Co., Inc.

Complainant filed an opening statement with exhibits attached on August 16, 1985, and on August 21, 1985, respondent Lloyd Myers Co., Inc. was given opportunity to file evidence in the form of an answering statement. Although such respondent applied for, and was granted, two extensions of time in which to submit evidence in the form of an answering statement, it failed to submit any such evidence. Both parties filed briefs.

The record as it now stands contains a copy of an invoice issued by Lloyd Myers to A & J Produce Corp. for the rail car load of broccoli in question, requesting the payment of a total of $7,787.50, with a paid stamp over which is written the date 11/19 and the number 9829; a copy of check no. 9829 drawn by Joseph Levantino, secretary of A & J Produce Corp. on that company's account with Marine Midland Bank in Bronx, New York for the amount of $7,787.20 to the order of Lloyd Myers Co. and dated 11/19/82; a copy of an account reconciliation from Marine Midland Bank-New York showing that check no. 9829 in the amount of $7,787.20 was paid by that bank on 11/24/82; and a letter from Joseph Levantino under the letterhead of A & J Produce Corp. stating that check no. 9829 was issued by A & J Produce Corporation in the amount of $7,787.20 to Lloyd Myers on November 19, 1982, in payment for a load of broccoli, and that such check was negotiated by Lloyd Myers. On the basis of all of the evidence submitted in this proceeding it is our conclusion that Lloyd Myers Co., Inc. has been paid the amount of $7,787.20 for the load of broccoli in question which was shipped by complainant. Consequently, our order of December 17, 1984, was correct and is hereby reinstated, except that the reparation awarded therein, with interest, shall be paid within thirty days from the date of this order.

Copies of this order shall be served upon the parties.

RENE PRODUCE DISTRIBUTORS, INC., *v.* A. PELLEGRINO & SON, INC., and MELON PRODUCE, INC. PACA Docket No. 2-6971. Decided April 9, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $119,051.45 in connection with a transaction involving the shipment of mixed vegetables in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated January 22, 1986, complainant notified the Department that it wished to have the complaint dismissed. Complainant, in its letter of January 22, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

A&P BROKERS *v.* MARK WHISNANT d/b/a RAINCROW FARMS. PACA Docket No. 2-7010. Order issued April 9, 1986.

Pro se, for complainant.
Sana V. Jay, for respondent.
Dennis Becker, Presiding Officer.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $119,013.47 in connection with a transaction involving the shipment of cantaloupes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated January 29, 1986, respondent notified the Department that settlement had been reached between the parties. Complainant was notified by certified mail of respondent's letter and was given an opportunity to dispute the fact that settlement had been reached. Complainant has not disputed this settlement.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY INC., *v.* METROPLEX PRODUCE COMPANY.
PACA Docket No. 2-7015. Order issued April 9, 1986.

Dennis Becker, Presiding Officer.
Pro se, for complainant and respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $13,063.25 in connection with a transaction involving the shipment of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. In its answer to the formal complaint, respondent admitted owing $12,211.50 to complainant. An Order Requiring Payment of Undisputed Amount was issued on January 17, 1986, by the Judicial Officer, assessing against respondent $12,211.50 plus interest at the rate of 13% per annum from June 1, 1985. By letter dated March 13, 1986, complainant notified the Department that it was willing to accept payment of the undisputed amount plus interest as full settlement of complainant's claim. Complainant, in its letter of March 13, 1986, authorized dismissal of its complaint with respect to the disputed amount.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GARDEN STATE FARMS, INC., and PROCACCI BROTHERS SALES CORP., *v.* JOHN LIVACICH PRODUCE INC., and/or VALU PAK, INC. PACA Docket No. 2-6847. Order issued April 24, 1986.

Dennis Becker, Presiding Officer.
Pro se, for complainant.
Thomas R. Oliveri, Newport Beach, California, for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainants seek reparation against respondents in the amount of $1,970.90 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondents. By letter dated March 17, 1986, complainants notified the Department that respondents tendered to complainants a check in full settlement of complainants' claim. Complainants, in the letter of March 17, 1986, authorized dismissal of the complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

M. L. GALLOWAY INTERNATIONAL, INC., d/b/a GALLOWAY FARMS INTERNATIONAL *v.* MARK WHISNANT d/b/a RAINCROW FARMS. PACA Docket No. 2-7009. Order issued April 24, 1986.

Dennis Becker, Presiding Officer.
Mark S. Feuer, Porterville, California, for complainant.
Sana V. Jay, Naples, Florida, for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $175,656.00 in connection with transactions involving the shipment of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated February 20, 1986, respondent notified the Department that settlement had been reached between the parties. Complain-

ant was informed that respondent had reported the parties' settlement to the Department, and was notified that, in cases where such a settlement was reached, dismissal of the complaint was proper. It was given an opportunity to contest the fact that a settlement had been achieved, but failed to do so.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

RAINIER FRUIT SALES, INC. *v.* PANCHO'S PRODUCE CO. PACA Docket No. RD-86-164. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, $1,450.00 plus 13 percent interest per annum from September 1, 1985, until paid.

SONORA RANCHES INC. *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA. PACA Docket No. RD-86-165. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, $1,170.00 plus 13 percent interest per annum from June 1, 1985, until paid.

FRUTICO INTERNATIONAL INC. *v.* BEN VASQUEZ PRODUCE INC. PACA Docket No. RD-86-167. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, $26,953.50 plus 13 percent interest per annum from June 1, 1985, until paid.

EXETER SALES INC. *v.* GUERRA BROTHERS PRODUCE. PACA Docket No. RD-86-168. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, $14,250.00 plus 13 percent interest per annum from May 1, 1985, until paid.

H. SCHNELL & COMPANY INC. *v.* MEDINA FRUITS & VEGETABLES INC. PACA Docket No. RD-86-169. Decided March 3, 1986.

Respondent was ordered to pay complainant, as reparation, $8,640.00 plus 13 percent interest per annum from July 1, 1985, until paid.

D & D INTERNATIONAL INC. *v.* SUN FRUIT INC. PACA Docket No. RD-86-170. Decided March 5, 1986.

Respondent was ordered to pay complainant, as reparation, $4,884.00 plus 13 percent interest per annum from March 1, 1985, until paid.

ARKANSAS VALLEY PRODUCE OF TEXAS INC. *v.* V & A PRODUCE. PACA Docket No. RD-86-171. Decided March 5, 1986.

Respondent was ordered to pay complainant, as reparation, $1,395.00 plus 13 percent interest per annum from June 1, 1985, until paid.

DOVEX IMPORTS INC. a/t/a UNIFRUTTI OF AMERICA *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-172. Decided March 5, 1986.

Respondent was ordered to pay complainant, as reparation, $13,862.00 plus 13 percent interest per annum from March 1, 1985, until paid.

TAMPICO PRODUCE INC. *v.* THE PRODUCE CO. PACA Docket No. RD-86-173. Decided March 5, 1986.

Respondent was ordered to pay complainant, as reparation, $14,957.68 plus 13 percent interest per annum from June 1, 1985, until paid.

PETER SOLOMON & JOSEPH R. SOLOMON, d/b/a CATTLE VALLEY FARMS *v.* FRANCIS L. OLSON d/b/a COEXPORT WEST and/or COEXPORT INTERNATIONAL, INC. PACA Docket No. 2-6651. Decided March 14, 1986.

Respondent was ordered to pay complainant, as reparation, $152,055.33 plus 13 percent interest per annum from August 1, 1982, until paid.

SUNNYBOY PRODUCE CO. INC. *v.* PETER M. TROMBETTO d/b/a J & M PRODUCE. PACA Docket No. RD-86-62. Decided March 19, 1986.

Respondent was ordered to pay complainant, as reparation, $21,302.88 plus 13 percent interest per annum from January 1, 1985, until paid.

D. LOI & SON INC. *v.* QUALITY FRUIT CO. INC. PACA Docket No. RD-86-175. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation, $4,696.00 plus 13 percent interest per annum from February 1, 1985, until paid.

SUNSPROUTS OF TEXAS INC. *v.* CHINO'S PRODUCE INC. PACA Docket No. RD-86-176. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation, $26,229.40 plus 13 percent interest per annum from January 1, 1985, until paid.

B. R. DIVIN PRODUCE CO. *v.* FARMER'S SALES OF TEXAS INC. PACA Docket No. RD-86-177. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation, $8,283.00 plus 13 percent interest per annum from March 1, 1985, until paid.

CALIFORNIA COASTAL FARMS INC. *v.* CROWN PRODUCE CO. a/t/a CROWN PRODUCE DIST. PACA Docket No. RD-86-178. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation, $4,581.00 plus 13 percent interest per annum from June 1, 1985, until paid.

SUNKIST GROWERS INC. *v.* CROWN PRODUCE CO. a/t/a CROWN PRODUCE DIST. PACA Docket No. RD-86-179. Decided March 31, 1986.

Respondent was ordered to pay complainant, as reparation, $18,321.95 plus 13 percent interest per annum from June 1, 1985, until paid.

JACK MALL POTATO CO. INC. *v.* FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-86-180. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, $18,337.05 plus 13 percent interest per annum from September 1, 1985, until paid.

GREG ORCHARDS & PRODUCE INC. *v.* FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-86-181. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, $2,375.00 plus 13 percent interest per annum from September 1, 1985, until paid.

SARGENT PRODUCE COMPANY *v.* V & A PRODUCE. PACA Docket No. RD-86-182. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, $3,590.00 plus 13 percent interest per annum from June 1, 1985, until paid.

HOMESTEAD TOMATO PACKING CO. INC. *v.* BUSBEE TOMATO COMPANY INC. PACA Docket No. RD-86-183. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, $3,168.00 plus 13 percent interest per annum from May 1, 1985, until paid.

STRUBE CELERY & VEGETABLE CO. *v.* DAVID FREED d/b/a FREED PRODUCE CO. PACA Docket No. RD-86-184. Decided April 2, 1986.

Respondent was ordered to pay complainant, as reparation, $5,242.55 plus 13 percent interest per annum from July 1, 1985, until paid.

HOMESTEAD TOMATO PACKING CO. INC. *v.* J. V. CAMPISI INC. PACA Docket No. RD-86-185. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, $6,400.00 plus 13 percent interest per annum from February 1, 1985, until paid.

FAR SOUTH INC. a/t/a B & R FARMS *v.* GIOVINAZZI PRODUCE CO. INC. PACA Docket No. RD-86-186. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, $29,275.00 plus 13 percent interest per annum from December 1, 1985, until paid.

BLUE GOOSE GROWERS INC. a/t/a DOLE CITRUS *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-187. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, $7,750.00 plus 13 percent interest per annum from August 1, 1985, until paid.

HOLLAR & GREENE PRODUCE CO. INC. *v.* TERRY CROWDER d/b/a E. H. FOOD SERVICE. PACA Docket No. RD-86-188. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, $760.00 plus 13 percent interest per annum from August 1, 1985, until paid.

STANDARD FRUIT AND STEAMSHIP COMPANY *v.* SUN VALLEY PRODUCE INC. PACA Docket No. RD-86-189. Decided April 4, 1986.

Respondent was ordered to pay complainant, as reparation, $33,880.00 plus 13 percent interest per annum from October 1, 1985, until paid.

SARAS INC. *v.* KIS KISOLE d/b/a SAMCHULLI FOOD CO. PACA Docket No. RD-86-190. Decided April 7, 1986.

Respondent was ordered to pay complainant, as reparation, $2,756.95 plus 13 percent interest per annum from April 1, 1985, until paid.

C. H. ROBINSON COMPANY *v.* ED SCHWARTZ d/b/a ED'S FARMERS MARKET. PACA Docket No. RD-86-192. Decided April 7, 1986.

Respondent was ordered to pay complainant, as reparation, $9,351.00 plus 13 percent interest per annum from August 1, 1984, until paid.

SOURCE PRODUCE DISTRIBUTING CO. *v.* CHINO'S PRODUCE INC. PACA Docket No. RD-86-193. Decided April 7, 1986.

Respondent was ordered to pay complainant, as reparation, $1,278.00 plus 13 percent interest per annum from June 1, 1985, until paid.

BATTAGLIA PRODUCE SALES INC. *v.* JOE PINTO & SON. PACA Docket No. RD-86-194. Decided April 16, 1986.

Respondent was ordered to pay complainant, as reparation, $9,875.52 plus 13 percent interest per annum from April 1, 1985, until paid.

SANTA CLARA PRODUCE INC. *v.* GINO PINTO INC. PACA Docket No. RD-86-195. Decided April 16, 1986.

Respondent was ordered to pay complainant, as reparation, $1,547.45 plus 13 percent interest per annum from January 1, 1985, until paid.

MONTEREY BAY PACKING CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-196. Decided April 16, 1986.

Respondent was ordered to pay complainant, as reparation, $9,720.35 plus 13 percent interest per annum from September 1, 1985, until paid.

J. R. NORTON COMPANY *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-197. Decided April 16, 1986.

Respondent was ordered to pay complainant, as reparation, $6,773.25 plus 13 percent interest per annum from September 1, 1985, until paid.

J-B DISTRIBUTING CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-198. Decided April 16, 1986.

Respondent was ordered to pay complainant, as reparation, $2,686.80 plus 13 percent interest per annum from September 1, 1985, until paid.

GRANADA MARKETING INC. a/t/a RICHARD A. GLASS CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-199. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, $33,695.35 plus 13 percent interest per annum from August 1, 1985, until paid.

H & H PRODUCE SALES INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-200. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, $3,722.15 plus 13 percent interest per annum from August 1, 1985, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE *v.* WAYNE M. HATANAKA d/b/a HATANAKA PRODUCE. PACA Docket No. RD-86-203. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, $7,335.00 plus 13 percent interest per annum from July 1, 1985, until paid.

CASILLAS BROS, INC. *v.* WAYNE M. HATANAKA d/b/a HATANAKA PRODUCE. PACA Docket No. RD-86-204. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,740.60 plus 13 percent interest per annum from September 1, 1985, until paid.

PHELAN & TAYLOR PRODUCE COMPANY *v.* WAYNE M. HATANAKA d/b/a HATANAKA PRODUCE. PACA Docket No. RD-86-205. Decided April 17, 1986.

Respondent was ordered to pay complainant, as reparation, $23,371.65 plus 13 percent interest per annum from August 1, 1985, until paid.

SOUZA BROS. PACKING CO. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-206. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, $8,172.00 plus 13 percent interest per annum from October 1, 1985, until paid.

BONITA PACKING CO. a/t/a BETTERAVIA FARMS *v.* WALLA WALLA PRODUCE CO. PACA Docket No. RD-86-207. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, $2,585.00 plus 13 percent interest per annum from September 1, 1985, until paid.

TRICO TRADING CO. INC. a/t/a OLYMPIC PRODUCE CO. *v.* CROWN PRODUCE DISTRIBUTORS. PACA Docket No. RD-86-208. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, $3,696.00 plus 13 percent interest per annum from June 1, 1985, until paid.

R & J Joseph Inc. *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-209. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, $7,292.71 plus 13 percent interest per annum from June 1, 1985, until paid.

RAWLAND F. TAPLETT d/b/a R. F. TAPLETT FRUIT & COLD STORAGE CO. *v.* JORGE L. RIVAS d/b/a PANCHO'S PRODUCE CO. PACA Docket No. RD-86-210. Decided April 18, 1986.

Respondent was ordered to pay complainant, as reparation, $1,254.00 plus 13 percent interest per annum from September 1, 1985, until paid.

KINGS CANYON FRUIT SALES CORP. *v.* JORGE L. RIVAS d/b/a PANCHO'S PRODUCE CO. PACA Docket No. RD-86-211. Decided April 21, 1986.

Respondent was ordered to pay complainant, as reparation, $342.00 plus 13 percent interest per annum from September 1, 1985, until paid.

J. A. WOOD CO.-VISTA INC. *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-212. Decided April 21, 1986.

Respondent was ordered to pay complainant, as reparation, $3,719.25 plus 13 percent interest per annum from October 1, 1985, until paid.

JOE PHILLIPS INC. *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-213. Decided April 21, 1986.

Respondent was ordered to pay complainant, as reparation, $650.00 plus 13 percent interest per annum from August 1, 1985, until paid.

MERIT PACKING COMPANY *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-214. Decided April 21, 1986.

Respondent was ordered to pay complainant, as reparation, $6,410.00 plus 13 percent interest per annum from August 1, 1985, until paid.

NICK DELIS CO. INC. *v.* ALEXANDER C. GUERRA and VIOLA A. GUERRA d/b/a V & A PRODUCE. PACA Docket No. RD-86-215. Decided April 21, 1986.

Respondent was ordered to pay complainant, as reparation, $10,575.50 plus 13 percent interest per annum from August 1, 1985, until paid.

GRIFFIN & BRAND OF MCALLEN INC. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-216. Decided April 22, 1986.

Respondent was ordered to pay complainant, as reparation, $1,020.40 plus 13 percent interest per annum from March 1, 1985, until paid.

VAL-MEX FRUIT COMPANY INC. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-217. Decided April 22, 1986.

Respondent was ordered to pay complainant, as reparation, $2,087.46 plus 13 percent interest per annum from March 1, 1985, until paid.

PAYETTE VALLEY FRUIT INC. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-218. Decided April 22, 1986.

Respondent was ordered to pay complainant, as reparation, $1,240.00 plus 13 percent interest per annum from February 1, 1985, until paid.

MCDONNELL & BLANKFARD INC. *v.* INTERSTATE PRODUCE INC. PACA Docket No. RD-86-36. Decided April 25, 1986.

Respondent was ordered to pay complainant, as reparation, $3,361.00 plus 13 percent interest per annum from June 1, 1985, until paid.

MICH KIM INC. a/t/a DICHTER BROS. & GLASS CO. *v.* BRANTZ WHOLESALE FOODS INC. PACA Docket No. RD-86-220. Decided April 25, 1986.

Respondent was ordered to pay complainant, as reparation, $7,919.35 plus 13 percent interest per annum from June 1, 1985, until paid.

SPADA DISTRIBUTING CO. INC. *v.* BLAS S. CATALANI d/b/a BLAS CATALANI BROKERAGE. PACA Docket No. RD-86-221. Decided April 25, 1986.

Respondent was ordered to pay complainant, as reparation, $1,660.00 plus 13 percent interest per annum from November 1, 1984, until paid.

NORTH COUNTY FRUIT SALES INC. *v.* PROGRESSIVE PRODUCE INT'L. PACA Docket No. RD-86-223. Decided April 28, 1986.

Respondent was ordered to pay complainant, as reparation, $3,505.05 plus 13 percent interest per annum from May 1, 1985, until paid.

GRANADA MARKETING INC. *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-224. Decided April 28, 1986.

Respondent was ordered to pay complainant, as reparation, $3,328.20 plus 13 percent interest per annum from December 1, 1984, until paid.

MACK DEMPSEY CO. *v.* REYNA BROTHERS. PACA Docket No. RD-86-225. Decided April 28, 1986.

Respondent was ordered to pay complainant, as reparation, $1,757.30 plus 13 percent interest per annum from June 1, 1985, until paid.

ROGER MAWBY CO. *v.* J. A. HOWELL PRODUCE. PACA Docket No. RD-86-226. Decided April 28, 1986.

Respondent was ordered to pay complainant, as reparation, $912.50 plus 13 percent interest per annum from July 1, 1985, until paid.

JOS. CIMINO FOODS INC. *v.* CONTINENTAL PRODUCE INC. PACA Docket No. RD-86-227. Decided April 28, 1986.

Respondent was ordered to pay complainant, as reparation, $17,288.00 plus 13 percent interest per annum from March 1, 1985, until paid.

P K M INC. a/t/a FANCIFUL COMPANY *v.* SUN FRESH PRODUCE CO. INC. PACA Docket No. RD-86-228. Decided April 29, 1986.

Respondent was ordered to pay complainant, as reparation, $1,794.00 plus 13 percent interest per annum from March 1, 1985, until paid.

CAL-MEX DISTRIBUTORS INC. *v.* P. J. PRODUCE CO. PACA Docket No. RD-86-229. Decided April 29, 1986.

Respondent was ordered to pay complainant, as reparation, $726.00 plus 13 percent interest per annum from May 1, 1985, until paid.

BURNAC PRODUCE INC. *v.* TERRY CROWDER d/b/a EBENEZER HYDROPONICS. PACA Docket No. RD-86-230. Decided April 29, 1986.

Respondent was ordered to pay complainant, as reparation, $4,016.60 plus 13 percent interest per annum from June 1, 1985, until paid.

DE BRUYN PRODUCE CO. *v.* FICOR MANUFACTURING COMPANY d/b/a BEATRICE CARAMEL APPLES. PACA Docket No. RD-86-231. Decided April 29, 1986.

Respondent was ordered to pay complainant, as reparation, $5,774.50 plus 13 percent interest per annum from November 1, 1985, until paid.

H. C. SCHMIEDING PRODUCE CO. INC. *v.* H & L SALES INC. PACA Docket No. RD-86-232. Decided April 29, 1986.

Respondent was ordered to pay complainant, as reparation, $3,667.50 plus 13 percent interest per annum from April 1, 1985, until paid.

MISSION FRUIT & VEGETABLES DISTRIBUTORS INC. *v.* UNION PRODUCE DISTRIBUTORS. PACA Docket No. RD-86-233. Decided April 30, 1986.

Respondent was ordered to pay complainant, as reparation, $5,258.40 plus 13 percent interest per annum from July 1, 1985, until paid.

SNOKIST GROWERS *v.* T & M MARKET SERVICES INC. a/t/a GET FRESH PRODUCE CO. PACA Docket No. RD-86-234. Decided April 30, 1986.

Respondent was ordered to pay complainant, as reparation, $2,499.00 plus 13 percent interest per annum from June 1, 1985, until paid.

TEXAS DISTRIBUTING CO. INC. *v.* BEN VASQUEZ PRODUCE INC. PACA Docket No. RD-86-235. Decided April 30, 1986.

Respondent was ordered to pay complainant, as reparation, $121,980.25 plus 13 percent interest per annum from May 1, 1985, until paid.

ADMIRAL PACKING COMPANY *v.* WEINSTEIN PRODUCE SALES INC. PACA Docket No. RD-86-236. Decided April 30, 1986.

Respondent was ordered to pay complainant, as reparation, $4,895.00 plus 13 percent interest per annum from September 1, 1985, until paid.

CAL VALLEY CITRUS INC. *v.* CITRUS WORLD INC. PACA Docket No. RD-86-237. Decided April 30, 1986.

Respondent was ordered to pay complainant, as reparation, $18,695.65 plus 13 percent interest per annum from October 1, 1985, until paid.

SPADA DISTRIBUTING CO. INC. *v.* FAIR WAY PACKING INC. PACA Docket No. RD-86-238. Decided April 30, 1986.

Respondent was ordered to pay complainant, as reparation, $5,695.00 plus 13 percent interest per annum from September 1, 1985, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS

FOUR STAR TOMATO, INC., *v.* REM BROKERAGE CO. INC. PACA Docket No. RD 86-129. Decided April 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on February 12, 1986, awarding reparation to the complainant in the amount of $9,862.50. By letter received March 4, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of February 13, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

H. SCHNELL & COMPANY, INC., *v.* MEDINA FRUITS & VEGETABLES, INC. PACA Docket No. RD-86-169. Decided April 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on March 3, 1986, awarding reparation to the complianant in the amount of $8,640.00. By letter received March 12, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of March 3, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

LINDEMANN FARMS, INC., *v.* GREAT WESTERN FARMS, INC., a/t/a FELIX ROCCO CO. PACA Docket No. RD-86-166. Order issued March 21, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF CONTINUANCE

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $8,266.40 against respondent in connection with transactions in interstate commerce involving shipments of cantaloupes. A copy of the formal complaint was served upon respondent, and respondent has not filed an answer thereto.

Complainant, Lindemann Farms Inc., is a corporation whose address is 22759 S. Mercey Springs Road, Los Banos, California. Respondent, Great Western Farms Inc a/t/a Felix Rocco Co., is a corporation whose address is P.O. Box 1426, Providence, Rhode Island. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of an order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, District of Massachusetts, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO. INC., *v.* J.V. CAMPISI, INC. PACA Docket No. RD-86-185. Decided April 23, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on April 4, 1986, awarding reparation to the complainant in the amount of $6,400.00. By letter received April 1, 1986, but not processed until after the Default Order was issued, respondent has moved that this matter be reopened after default.

Accordingly, the order of April 4, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

THE CROSSET COMPANY INC., *v.* KEVIN J. RE d/b/a J.M.J. PRODUCE.
PACA Docket No. RD-86-46. Order issued April 24, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $4,825.25 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent which failed to file an answer thereto, and a default decision was issued on December 3, 1985. However, the Department was subsequently notified that respondent had filed a petition in bankruptcy. Accordingly, on January 22, 1986, the default decision was vacated, and this matter was stayed pending completion of respondent's bankruptcy. The Department has been provided with a copy of an order of discharge of respondent herein, issued by the United States Bankruptcy Court for The Southern District of Ohio, dated February 28, 1986.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: NAVIERA BILBAINA. P.Q. Docket No. 103. Decided March 11, 1986.

Fronda Wood, for complainant.
Pro se, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (21 U.S.C. §§ 111 and 120), the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151–164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa–150jj) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, alleging that Naviera Bilbaina, respondent, violated the Acts and regulations promulgated thereunder (7 CFR §§ 330.100–300.400 and 9 CFR § 94.5 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Naviera Bilbaina, respondent, is a Spanish corporation whose agent in the United States is Allan Dean & Company, whose address is 2909 Bay to Bay Boulevard, Suite 404, Tampa, FL 33629.

2. On or about December 3, 1984, the respondent brought foreign origin garbage into Port Manatee, Florida, on its ship the M/V Deusto.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

Respondent Naviera Bilbaina is assessed a civil penalty of two hundred fifty dollars ($250) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: BAY CITY TURF, INC. P.Q. Docket No. 164. Decided March 11, 1986.

Fronda Woods, for complainant.
Pro se, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa-150jj), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Act and regulations promulgated thereunder (7 CFR §§ 301.81-301.81-10). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bay City Turf, Inc., respondent, is a corporation whose address is P.O. Box 1463, Bay City, Texas 77414.

2. On or about April 16, 1985, respondent offered 1008 yards of grass sod to Gibbons Trucking Co. for shipment from Matagorda County, Texas, to California.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of this proceeding. Therefore, such order and decision will be issued.

ORDER

The respondent Bay City Turf, Inc. is assessed a civil penalty of three hundred seventy-five dollars ($375). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: STEVE VANCE. P.Q. Docket No. 23. Decided March 12, 1986.

Terry Medley, for complainant.
Pro se, for respondent.

Decision by William Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act, as amended, and the Act of August 20, 1912, as amended (Acts), (7 U.S.C. §§ 150aa *et seq.* and §§ 151–164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Steve Vance, respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 301.52(b)). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Steve Vance, respondent, is an individual whose address is Rt. 3, Box 373, Texarkana, Texas 75503.

2. On or about September 26, 1983, the respondent moved interstate from Texarkana, Texas, a pink bollworm generally infested area, to Garland, Arkansas, a pink bollworm suppressive area, 93 bales of seed cotton.

3. On or about October 14, 1983, the respondent moved interstate from Texarkana, Texas, a pink bollworm generally infested area, to Belcher, Louisiana, a pink bollworm suppressive area 163 bales of seed cotton.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($250 per violation) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Terry L. Medley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: TIMUR CARRIERS LIMITED. P.Q. Docket No. 140. Decided March 13, 1986.

Kevin B. Thiemann, for complainant.
Pro se, for respondent.

Decision by Edward McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Timur Carriers Limited, respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 330.100 *et seq.* and 9 CFR § 94.5 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the

Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Timur Carriers Limited, respondent, is a company whose address is 18th Floor, Robina House, 1 Shenton Way #18-06, Singapore 0106, Republic of Singapore, and who is the owner of ship M/V TFL Democracy.

2. Timur Carriers Limited's agent for the purpose of service of process is Trans Freight Lines, Inc., 145 Route 46, Wayne, New Jersey 07470.

3. On or about May 5, 1985, the M/V TFL Democracy arrived in Jacksonville, Florida, after being at Le Havre, France, with foreign origin garbage on board.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty U.S. dollars ($250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Ave., S.W., Washington, D. C.

20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: TRANS WORLD AIRLINES. P.Q. Docket No. 83. Decided March 14, 1986.

Mark Dopp, for complainant.
Mary McGuire, New York, N.Y., for respondent.

Decision by Victor Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Trans World Airlines, respondent, is a corporation doing business at John F. Kennedy International Airport, Building 80, Jamaica, New York 11430.

2. On or about May 17, 1984, respondent was in possession of eight cartons of melons which arrived at John F. Kennedy International Airport, Jamaica, New York, on flight 803/31028 and said melons originated from Senegal.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and decision will be issued.

ORDER

The respondents is assessed a civil penalty of four hundred and fifty dollars ($450.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: OSCAR R. RODRIGUEZ. P.Q. Docket No. 153. Decided March 25, 1986.

Fronda Woods, for complainant.
Pro se, for respondent.

Decision by John Campbell, Administrative Law Judge.

CONSENT DECISION

On November 22, 1985, this proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a, 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the

Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Oscar R. Rodriguez, respondent, is an individual whose address is Box 1431, Ruidoso Downs, New Mexico 88346.

2. On or about May 22, 1985, at El Paso, Texas, respondent imported six mangoes from Mexico into the United States.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

Respondent Oscar R. Rodriguez is assessed a civil penalty of one hundred dollars ($100) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422–South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: SONIA HERNANDEZ. P.Q. Docket No. 155. Decided February 28, 1986.

Sherrie Kennedy, for complainant.
Pro se, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151–164a and 167) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on November 22, 1985. The complaint alleged that the respondent violated sections 319.56–2(e) and 319.15(a) of the regulations (7 CFR §§ 319.56–2(e) and 319.15(a)).

Copies of the complaint and the Rules of Practice governing proceedings under the Acts were served by the Hearing Clerk, by certified mail, upon respondent on December 2, 1985. On December 27, 1985, respondent was sent, by regular mail, a notice that her answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Sonia Hernandez, herein referred to as the respondent, is an individual whose address is 252 South 4th Street, Brooklyn, New York 11211.

2. On or about November 20, 1984, the respondent imported into the United States at Houston, Texas, from Mexico approximately eighteen (18) guava and two (2) pounds of apples, in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)) because the guava and apples were not imported under permit, as required.

3. On or about November 20, 1984, the respondent imported into the United States at Houston, Texas, from Mexico approximately twenty (20) nodes of sugarcane in violation of section 319.15(a) of the regulations (7 CFR § 319.15(a)) because the sugarcane was not imported under permit, as required.

CONCLUSION

By reason of the facts in the finding of fact set forth above, respondent has violated the Acts and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Respondent is hereby assessed a civil penalty of five hundred dollars ($500), which shall be paid within thirty (30) days from the date this Order becomes effective. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U. S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if issued after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on April 10, 1986.—Ed.]

In re: ALLIED AVIATION SERVICES INTERNATIONAL CORP. P.Q. Docket No. 162. Decided April 11, 1986.

Kris Ikejiri, for complainant.
John Scagnelli, New York, N.Y., for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1983, as amended (21 U.S.C.§ 111 and § 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and the Act of August 20, 1912, as amended (7 U.S.C. § 161 and 162) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Allied Aviation Services International Corp., violated the Acts and regulations promulgated thereunder (9 CFR Part 94 and 7 CFR Part 330). Respondent Allied Aviation Services International Corp. and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provision of this Consent Decision only, respondent Allied Aviation Services International Corp. admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review and other challenges or contest the validity of this decision.

2. Respondent Allied Aviation Services International Corp. also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

1. On or about June 6, 1985, the respondent violated sections 94.5(b)(1) and 330.400(b)(1) of the regulations (9 CFR § 94.5(b)(1) and 7 CFR § 330.400(b)(1)) because the respondent failed to unload foreign-origin garbage from Spain and Britain at the British Airways Terminal at John F. Kennedy International Airport, in tight, leakproof receptacles, as required.

2. On or about September 5, 1985, the respondent violated sections 94.5(b)(1) and 330.400(b)(1) of the regulations (9 CFR 94.5(b)(1) and 7 CFR 330.400(b)(1)) because the respondent failed to unload foreign-origin garbage from a British West Indies airways flight at John F. Kennedy International Airport, in tight, leak-proof receptacles, as required.

CONCLUSIONS

Respondent, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Allied Aviation Services International Corp. is assessed a civil penalty of two thousand five hundred dollars ($2,500.00) which shall be payable to "The Treasurer of the United States" by certified check or money order and which shall be paid on or before April 4, 1986 and sent to the following addresses.

Kris H. Ikejiri
Office of the General Counsel
Room 2422 South Building
U.S. Department of Agriculture
Washington, D.C. 20250–1400

Provided, however, the five hundred dollars ($500.00) shall not be due and will be held in abeyance for so long as,

1. By June 1, 1986, respondent has all of its employees at John F. Kennedy International Airport, Jamaica, New York, who handle foreign arrival flight materials attend a training program which shall be at least one (1) hour in duration.

2. A representative of the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, shall approve the content and method of the testing program prior to it being given and shall be informed of the schedule of training in order to monitor the classes as deemed necessary.

3. The training program shall include, but not be limited to, the following:

(a) An explanation of the appropriate regulations.

(b) A definition of what "garbage" is in the appropriate regulations.

(c) Include any available film, slides, or other training aids in foreign animal and plant diseases and pests.

(d) Specifically outline by illustration or pictures, proper foreign garbage handling procedures, step-by-step from the initial removal of garbage from an aircraft to proper disposal.

(e) The training program shall be presented in English and other languages, as appropriate.

And Provided Further, that if it is determined after an opportunity for hearing, as provided in the Rules of Practice (7 CFR § 131.1 *et seq.*), that any term of the above provision has not been, or is not being, complied with, the civil penalty held in abeyance shall be withdrawn and the $500.00 shall be due immediately.

And Provided Further, this Consent Decision and Order shall not abrogate or supersede "Compliance Agreement" number 16, signed on September 26, 1984 by the respondent and the complainant.

This Consent Decision and Order shall become effective on the day of service upon the respondent.

In re: AMALIA MENDEZ deLEON. P.Q. Docket No. 137. Decided February 25, 1986.

Sherry Kennedy, for complainant.
Pro se, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151–164a and 167) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on October 16, 1985. The complaint alleged that the respondent violated sections 319.27(a) and 319.27-3 of the regulations (7 CFR 319.27(a) and 319.27-3).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on October 26, 1985. On November 19, 1985, respondent was sent, by regular mail, a notice that her answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with

the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Amalia Mendez deLeon, herein referred to as the respondent, is an individual whose address is 2109 E. San Antonio Avenue, #217, El Paso, Texas 79901.

2. On or about July 30, 1984, the respondent imported into the United States at El Paso, Texas, from Mexico, approximately one (1) pound of Mexican limes, which are prohibited articles, in violation of sections 319.27(a) and 319.27-3 of the regulations (7 CFR §§ 319.27(a) and 319.27-3) which prohibit such importation.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Respondent is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be paid within thirty (30) days from the date this Order becomes effective. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U. S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if issued after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on April 14, 1986.—Ed.]

In re: ALLIED AVIATION SERVICE INTERNATIONAL CORPORATION. P.Q. Docket No. 147. Decided April 21, 1986.

Fronda Woods, for complainant.
Pro se, for respondent.

Decision by William Weber, Administrative Law Judge.

CONSENT DECISION

On November 7, 1985, this proceeding was instituted under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below. The parties have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Allied Aviation Service International Corporation, respondent, is a corporation whose address is International Arrivals Building, Room 2129, JFK International Airport, Jamaica, New York 11430.

2. On or about January 24, 1985, at John F. Kennedy International Airport, the respondent, by its employee Maria Jimenez, removed two apples and one orange from El Al Israel Airlines flight number 001.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

Respondent Allied Aviation Service International Corporation is assessed a civil penalty of three hundred seventy-five dollars ($375) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: MOVSOVITZ AND SONS OF FLORIDA, INC. P.Q. Docket No. 167. Decided April 21, 1986.

Fronda Woods, for complainant.
Isaac Levy, Jacksonville, Florida, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

On December 23, 1985, this proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Acts and regulations promulgated thereunder (7 CFR §§ 301.75-301.75-8). The parties have agreed that this proceeding should be terminated by

entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Movsovitz and Sons of Florida, Inc., respondent, is a corporation whose address is 3100 Hilton Street, Jacksonville, Florida 32203.

2. On or about June 7, 1985, at Jacksonville, Florida, the respondent offered to a common carrier, for shipment to Puerto Rico, at least seven boxes of Florida grapefruit, on invoice number 85-000800.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of this proceeding. Therefore, such order and decision will be issued.

ORDER

The respondent Movsovitz and Sons of Florida, Inc. is assessed a civil penalty of three hundred seventy-five dollars ($375). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day of this order is served upon the respondent.

In re: OGDEN FOOD SERVICE CORPORATION. P.Q. Docket No. 237. Decided April 28, 1986.

Joseph Pembroke, for complainant.
Pro se, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT ORDER

This proceeding was instituted under the regulations governing the handling and disposal of foreign-origin garbage (7 CFR 330.400 and 9 CFR 94.5) by a complaint filed by the Deputy Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Ogden Food Service Corporation (hereinafter "respondent") at its facility located at Building 146 John F. Kennedy International Airport, Jamaica, New York, violated the regulations and its compliance agreement with the Animal and Plant Health Inspection Service. This order is entered pursuant to the consent order provisions of the procedures adopted for use in this proceeding.

In its answer to the complaint the respondent admits the jurisdictional allegations in the complaint and specifically admits that the Administrator has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of a specified order.

The complainant has recommended that the order consented to by respondent be entered in settlement of this proceeding.

FINDINGS OF FACT

Respondent is a corporation and at all times material herein was doing business under a compliance agreement with PPQ, APHIS, USDA, to handle foreign-origin garbage at JFK International Airport, Jamaica, New York. Respondent's Building #146, Kitchens A & B facility at JFK International Airport, Jamaica, New York, was at all times material herein approved for the handling and disposing of foreign-origin garbage under the regulations (7 CFR 330.400 and 9 CFR 94.5) and has been operating under compliance agree-

ments (Nos. 5 and 6A) with the Animal and Plant Health Inspection Service, Plant Protection and Quarantine.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of the following order in settlement of this proceeding, the order will be entered.

ORDER

1. Compliance Agreements No. 5 and 6A, pertaining to Building #146, Kitchens A & B facility, between respondent and the Animal and Plant Health Inspection Service, United States Department of Agriculture, shall be withdrawn on March 14, 1986. However, such withdrawal shall be suspended for the period from March 14, 1986 through September 8, 1986 if respondent implements the procedures set forth in paragraph 2 below. In addition, if the procedures set forth in paragraph 2 below are implemented by respondent, the aforementioned compliance agreements will be automatically reinstated on September 8, 1986. Failure of respondent to act in accordance with the obligations set forth in paragraph 2 below will constitute grounds to revoke the suspension of the aforementioned withdrawal of Compliance Agreements No. 5 and 6A, but not for a period of more than one month.

2. Respondent, as a condition to the suspension of the withdrawal of the Compliance Agreements set forth in paragraph 1 above, agrees to the following continuing obligations at Building #146:

a. Implement a training and orientation program for all of its employees who handle or dispose of foreign-origin garbage. Respondent shall assure that only such trained employees handle foreign-origin garbage. The training shall include a minimum of one year of initial instruction by a PPQ-approved instructor. In addition, such trained employees shall be provided at least one hour of review training annually. The training and orientation program shall inform such employees of the content and purpose of the regulations as well as the provisions of the Compliance Agreements to assure proper handling of foreign-origin garbage in accordance with 7 CFR § 330.400 and 9 CFR § 94.5. The aforementioned training sessions shall emphasize the consequences to U.S. agriculture if foreign-origin plant or animal pests are introduced into the United States. Respondent agrees to maintain records of employee participation in the training program.

b. Promptly notify the PPQ office at JFK International Airport of any breakdown or malfunction of any garbage processing equipment used to process foreign-origin garbage.

c. Provide for the immediate pickup and proper handling and disposal of foreign-origin garbage by another approved facility (or in another manner approved by PPQ) if any of respondent's garbage processing equipment is inoperable or overloaded or if garbage cannot be immediately disposed of.

d. Appoint a "crew supervisor" who will be responsible for all foreign-origin garbage handling operations at Building No. 146. The crew supervisor will assure that all foreign-origin garbage will be handled in accordance with 7 CFR § 330.400 and 9 CFR § 94.5.

e. Designate Mr. Bill Smith, Vice President of Sales and Services, or his successor, as a representative to whom PPQ inspectors may contact concerning any matter set forth herein. In Mr. Smith's absence, PPQ inspectors may contact Mr. Joseph Nappi.

3. The PPQ personnel assigned to JFK International Airport will make the initial determination as to whether the conditions set forth in paragraph 2 have been met by respondent. Such determination will be immediately communicated to respondent's crew supervisor at Building No. 146 and to respondent's Vice President of Sales and Services.

4. Should a dispute arise between respondent and PPQ officials at JFK International Airport regarding respondent's compliance with the provisions of paragraph 2, the dispute may be submitted by either respondent or the PPQ officials to the Assistant to the Deputy Administrator, Animal Plant Inspection Service, Room 656 Federal Building, 6506 Belcrest Road, Hyattsville, Maryland 20782. The Assistant to the Deputy Administrator will arbitrate any and all such disputes after notice and informal hearing to both parties. The decision of the Assistant to the Deputy Administrator is final.

5. Release from any particular provision of this order shall not have any effect upon any other provision of this order.

6. This order shall not be construed to prevent the institution of action to withdraw approval to process foreign-origin garbage for any other violation of the regulations or a compliance agreement not covered in this order.

7. This order shall become effective on the day upon which service of this order is made upon respondent.

In re: ALOHA AIRLINES. P.Q. Docket No. 151 and 152. Decided April 30, 1986.

Joseph Pembroke, for complainant.
David M.K. Lum, Honolulu, Hawaii, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1903, as amended (Act) (7 U.S.C. §§ 151–164a and § 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that, Aloha Airlines, respondent, violated the Act and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Aloha Airlines, respondent, is a corporation whose mailing address is P. O. Box 30028, Honolulu, Hawaii 96820.

2. On or about April 6, May 3, and July 1, 1985, respondent moved baggage for transshipment to California.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand two hundred dollars ($1,200) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: GREGORIO A. MIRANDA. P.Q. Docket No. 104. Decided March 25, 1986.

Decision by John A. Campbell, Administrative Law Judge.

MOTION TO DISMISS COMPLAINT

For good cause shown, Complainant's Motion to Dismiss is hereby *granted.*

In re: MARIA DEPORRAS. P.Q. Docket No. 85. Decided March 28, 1986.

Clement McGovern, for complainant.
Pro se, for respondent.

Decision by Edward McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

By motion, filed March 24, 1986, complainant counsel requests that the complaint in this matter, filed on April 12, 1985, be dismissed on the grounds that prosecution is no longer warranted to effectuate the purposes of the program. For good cause shown:

IT IS ORDERED, that the complaint filed in this proceeding on April 12, 1985, be, and hereby is, dismissed.

In re: ROY LEON AND CO. INC. P.Q. Docket No. 70. Decided April 3, 1986.

Kris Ikejiri, for complainant.
Pro se, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's motion, filed April 1, 1986, the complaint is dismissed.

IT IS ORDERED, that the complaint issued in this matter on March 26, 1985, be, and hereby is, dismissed.

In re: PITMAN AND SONS, INC. P.Q. Docket No. 183. Decided April 14, 1986.

Sherrie Kennedy, for complainant.
Pro se, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's Motion to Dismiss, the complaint in this matter is dismissed.

IT IS ORDERED, that the complaint in this matter, filed February 11, 1986, be, and hereby is, dismissed.

In re: JOSE LUIS ALVAREZ. P.Q. Docket No. 159. Decided April 14, 1986.

Sherrie Kennedy, for complainant.
Pro se, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DISMISSAL OF COMPLAINT

Pursuant to Motion therefor, filed April 3, 1986, the Complaint filed herein on December 3, 1985, is hereby Dismissed. In accord-

ance with telephone conversation of this date with Attorney Sherrie Kennedy, the Complainant's Motion for Adoption of Proposed Decision, filed February 5, 1986, is nullified.

Copies hereof shall be served upon the parties.

In re: FRANCISCA PINO. P.Q. Docket No. 199. Decided April 21, 1986.

Fronda Woods, for complainant.
Pro se, for respondent.

Decision by John A. Campbell, Chief Administrative Law Judge.

DISMISSAL WITHOUT PREJUDICE

For good cause shown, complainant's motion to dismiss the complaint without prejudice, is granted.

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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

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UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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COURT DECISION

COUNTY LINE CHEESE COMPANY and MEADOW GOLD DAIRY *v.* JOHN R. BLOCK, SECRETARY, DEPARTMENT OF AGRICULTURE and ASSOCIATED MILK PRODUCERS, INC. Civil Action No. 85 C 1811. (USDA AMA Docket No. M 49-1.) Decision entered June 11, 1986.

Garrett B. Stevens, for defendant.
Sydney Berde, St. Paul, Minnesota, for defendant intervenor.
John H. Vetne, Peterborough, New Hampshire, for plaintiffs (petitioners).
Dorothea A. Baker, Administrative Law Judge.

Donald A. Campbell, Judicial Officer.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Memorandum Opinion and Order entered by Ann Claire Williams, Judge.

MEMORANDUM OPINION AND ORDER

County Line Cheese Company and Meadow Gold Dairy, both divisions of Beatrice Foods Company, brought this action under § 8(c)(15)(B) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608(c)(15)(B) (1980) (the "Act"), seeking review of a final adjudicatory decision by the Secretary of Agriculture of the United States (the "Secretary"). The Secretary, through his Judicial Officer, dismissed plaintiffs' petition for relief from an audit adjustment which costs plaintiffs $328,003.44. Associated Milk Producers, Inc. ("AMPI") has intervened in this action and asks the court to uphold the Secretary's decision. All parties have moved for summary judgment. For the reasons set forth below, the court affirms the Secretary's decision.

In order to understand the issues in this case, it is necessary to make a brief foray into the byzantine labyrinth of the Agricultural Marketing Agreement Act. As the Supreme Court pointed out in *Zuber* v. *Allen*, 396 U.S. 168 (1969), two peculiar characteristics of the milk industry account for a natural instability in the market:

> [The milk industry has a] basic two-price structure that permits a higher return for the same product, depending on its ultimate use, and the cyclical characteristic of production.
>
> Milk has essentially two end uses: as a fluid staple of daily consumer diet, and as an ingredient in manufactured dairy products such as butter and cheese. Milk used in the consumer market has traditionally commanded a premium

> price, even though it is of no higher quality than milk used for manufacture. While cost differences account for part of the discrepancy in price, they do not explain the entire gap. At the same time the milk industry is characterized by periods of seasonal overproduction. The winter months are low in yield and conversely the summer months are fertile. In order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months.

Zuber v. *Allen*, 396 U.S. at 172–73.

The Court went on to show that this oversupply was easily exploited by milk distributors, or "handlers." Milk for fluid consumption is highly perishable; it is thus natural that nearby producers should supply the fluid needs of any given market. However, handlers can manipulate the market to their advantage by acquiring milk for fluid use from geographically distant farmers, even paying a higher price than those farmers could get from their ordinary buyers—cheese manufacturing plants. Once these handlers had saturated their local market with milk from distant producers, local farmers were forced to sell their milk for lower-priced manufacturing purposes. With this scenario combined with the seasonal glut periods natural to the industry, farmers had to increase production, and, the Court observed, "the disequilibrium snowballs." *Id.* at 173.

The chaos that resulted from these practices was greatly magnified by a further collapse in prices during the Depression. *Id.* at 174. Congress responded by enacting the Agricultural Marketing Agreement Act. One of the goals of the Act is to allocate among all milk producers the benefits of higher-priced fluid use and the burdens of oversupply. The vehicle for achieving this is the regional milk marketing order which provides for minimum prices which each handler must pay producers for their milk. Since producers receive the same price regardless of the milk's ultimate use, competition for the fluid market is eliminated and farmers can maintain their herds so as to supply the region's dairy needs as a whole. *Id.* at 177–81.

The burden of supplying the fluid market now shifts to the handlers. All handlers pay a uniform minimum price; those who primarily supply fluid needs will therefore reap a windfall; those whose milk will go to manufacturing plants will be overcharged. The Act neutralizes this inequity by authorizing a "producer settlement fund" which is maintained by a Market Administrator. Han-

dlers who distribute primarily fluid (or Class I) products must pay into the fund the difference between the uniform price they paid to producers and the premium Class I price they received on the retail market. Handlers who distribute milk primarily for manufacturing purposes such as cheese (Class II or III) are entitled to draw from the fund the difference between the uniform price they paid the producers and the lower Class II or III price they received. *Id.* at 174-79. Clearly, there are benefits to participating in this pool, and just as clearly, the Secretary, and through him the Market Administrator, must be able to define and monitor the qualifications that producers and handlers must meet in order to participate.

The Indiana Milk Order at issue in this case requires that in order to qualify as a pool supply plant a supply plant must deliver at least 50 percent of its milk to a pool distributing plant. 7 CFR § 1049.7 (1968). The assessments against the plaintiffs resulted from audit adjustments by the Market Administrator who determined that County Line, a supply plant, and Meadow Gold, a distributing plant, had not met the Indiana Order's requirements for pool status. The series of transactions at issue involved shipments by County Line to Meadow Gold. The milk was not needed at Meadow Gold, so it was sent on to a non-pool manufacturing plant owned by County Line. The Market Administrator disqualified these shipments from the pool since the milk, although it entered Meadow Gold's premises, was not "shipped to" Meadow Gold as the Market Administrator construed that term. For a milk shipment to be "shipped to" a plant, said the Market Administrator, it must be pumped into that plant. By disqualifying these shipments, County Line fell below the Indiana Order's 50 percent requirement and lost its pool status. Meadow Gold was forced to re-classify its shipments from County Line as non-pool milk. Plaintiff's Complaint at 5, 6.

Plaintiffs argue that this court should reverse the Secretary's decision because the Market Administrator's construction of 7 CFR § 1049.7(b) is arbitrary and capricious, with no rational relationship to the purposes of the Act. (See, *Lewes Dairy, Inc.* v. *Freeman,* 401 F.2d 308, 317 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969) for the standard of review which this court must apply). This contention has no merit. The Secretary clearly explained the policy behind the Indiana Order in 33 Fed. Reg. 18,282, 18,288-89 (1968) and 26 Fed. Reg. 67, 69-70 (1961) (both rulemaking decisions are relevant since the 1968 Indiana Order presently in force incorporates by reference the 1961 Decision):

> Pool plant status should not be determined solely on an occasional shipment of milk to the market. . . . Such a method for determining which plants shall be subject to regulation would not provide a workable basis for administering an order for the Indianapolis marketing area. . . .
>
> Essential to the operation of a marketable pool is the establishment of performance standards to apply uniformly to all plants. . . .
>
> Performance standards should be such that any plant which has as its major function the supplying of milk to the market would pool its sales and share in the marketwide equalization. On the other hand, plants only casually, or incidentally, associated with the market should not be subject to complete regulation. Neither should they be permitted or required to equalize their sales with all plants in the market. If a milk plant were to be permitted to share on a pro rata basis the Class I utilization of the entire market without being genuinely associated with the market, then the differentials paid by users of Class I milk could be dissipated without accomplishing their intended purpose. If a plant were to be qualified and fully regulated merely by making a token shipment of milk or cream into the market for sale as Class I milk, then any milk plant which found itself in a position where it was selling a smaller share of its milk in Class I than the average for all regulated handlers might make such shipment and receive equalization payments from the pool.

26 Fed. Reg. 67, 69–70 (1961).

This reasoning by the Secretary is clear and rationally related to the purposes of the Act. Plants do not have to associate with the regulated market. But if they do, they must really associate, which means making more than occasional shipments. The Market Administrator was fully justified in construing the Secretary's language that milk must be "shipped to" to mean what it obviously must mean: it must be pumped into the plant, not merely greeted at the door and sent somewhere else. To hold otherwise would destroy the integrity of the Indiana market; if supply plants could join the pool by having less than 50 percent of their shipments "shipped to" pool distributing plants, they could share in the benefits of the pool, withdrawing payments from the producer settlement fund, without sharing the burdens.

Plaintiffs make much of the "absurd" requirement by the Market Administrator that the transactions at issue could have complied with the Indiana Order had County Line pumped its milk into Meadow Gold, pumped it back out, and continued on its way to the County Line manufacturing plant. Such a "sham" transaction, argue plaintiffs somewhat disingenuously, is wasteful and destructive of milk quality. In the court's view, whatever absurdity exists is entirely of plaintiff's own making. As is clear throughout both the 1968 and 1961 Indiana Orders, the Secretary contemplated that milk would not be shipped to a distributing plant unless it was needed there. As such, a requirement that the shipment be pumped into the plant would be an effective way of assuring that such milk properly belonged in the regulatory scheme for that region. While the original rationale behind the Order may have assumed that milk does not get shipped somewhere unless needed there, the Order itself does not mention "need." The Market Administrator cannot be concerned with the motive behind any particular shipment of milk. The court agrees with defendant intervenor AMPI that a milk order cannot be administered on a transactional basis. AMPI's brief at 33. The Order was promulgated with certain goals in mind, but, as with any rulemaking, it is not always possible to anticipate every permutation of behavior which will be governed by the rule. If plaintiffs choose to arrange their affairs so as to bring out a latent absurdity in a rule, they are free to do so. This does not free them from the rule's requirements, of which they were well aware.

If plaintiff's construction of "shipped to" were allowed, County Line would never have to deliver milk to Meadow Gold, yet all of it's milk could be driven past Meadow Gold's gates and then County Line would be entitled to draw from the producer settlement fund. The Market Administrator was justified in disallowing such an assault on the purpose behind the plain meaning of the Act. While his construction does not close the gap between milk shipped and milk needed, it is consistent with the Secretary's goals. It is up to the Secretary, if he sees fit, to modify the Indiana Order so as to prevent the kind of sham transaction which apparently was not foreseen when the 1968 Order was established. It is certainly not appropriate, either on judicial review or in an agency adjudicatory proceeding, to effect a rule change. *See* Decision and Order of the Judicial Officer 58-63; *see also, In re Clover Leaf Dairy Co.*, 15 Agric. Dec. 339, 353-354 (1956).

Plaintiffs are not required to become part of the regulatory scheme. If they do wish to qualify, however, it is up to them to arrange their affairs so as to comply with the clear guidelines of the

Indiana Order. They will not be permitted to exploit a lacuna in the regulatory scheme which already works in their favor and—quite incredibly—demand that the gap be widened so that they can partake of the benefits of the market pool without associating themselves with the market.

The Decision and Order of the Secretary's Judicial Officer is therefore affirmed.

PROCEEDINGS ON PETITIONS

In re: VALLEY FARMS, INC. AMA Docket No. M 4-22. Decided April 15, 1986.

Handler—books and records, disclosure of information—confidentiality of records—pool plant—milk packaged and distributed not reported—denial of relief requested.

Sanford S. Marateck, Shamokin, PA, for petitioner.
Donald Tracy, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a proceeding under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*, hereinafter referred to as the "Act"), instituted by petitioner, a partially regulated handler, subject to federal Milk Order No. 4, hereinafter referred to as "the Order" (7 CFR 1004). The amended petition filed herein on June 6, 1985, challenges the Market Administrator's authority to audit and examine all books and records pertaining to all sales and dispositions of milk by petitioner. The Market Administrator seeks to examine such records to verify petitioner's reports and determine petitioner's obligations under this order.

Respondent, Administrator Agricultural Marketing Service, filed an answer on July 8, 1985.

An oral hearing was held on October 30, 1985, in Philadelphia, Pennsylvania. Petitioner was represented by Sanford Marateck, Esq., Shamokin, Pennsylvania. Respondent was represented by Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C. At the close of the hearing the time was fixed for the filing of briefs.

PERTINENT STATUTORY AUTHORITY

8d. Books and records; disclosure of information.

(1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 607 of this title, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not

more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office. 7 USCA 608d

Pertinent Order Provisions

Order No. 4

Milk In The Middle Atlantic Marketing Area

7 CFR 1004.1 et seq. (as of Jan. 1, 1985)

§ 1004.7 Pool plant.

(a) A plant from which during the month a volume not less than 40 percent in the months of September through February, and 30 percent in the months of March through August, of its receipts is disposed of as Class I milk (except filled milk) and a volume not less than 15 percent of such receipts is disposed of as route disposition (other than as filled milk) in the marketing area. . . .

§ 1004.8 Nonpool plant.

"Nonpool plant" means a plant other than a pool plant. The following categories of nonpool plants are further defined:

(a) . . .

(b) . . .

(c) "Partially regulated distributing plant" means a plant which is not a pool plant, from which fluid milk products in consumer-type packages or dispenser units are disposed of as route disposition in the marketing area during the month. . .

§ 1004.9 Handler.

* * * * * * *

(a) Any person in his capacity as the operator of:

(1) A pool plant;

(2) A partially regulated distributing plant;

* * * * * * *

§ 1004.30 Reports of receipts and utilization.

(a) On or before the eighth day after the end of each month each handler with respect to each of his pool plants shall report for the month to the Market Administrator in the detail and on forms prescribed by the Market Administrator as follows:

(1) The quantities of skim milk and butter fat contained in:

(i) Receipts of producer milk (including such handler's own production);

(ii) Receipts of fluid milk products from other pool plants and milk received from a cooperative association for which it is a handler pursuant to § 1004.9(c); and

(iii) Receipts of other source milk;

(2) Inventories of fluid milk products on hand at the beginning and end of the month; and

(3) The utilization of all skim milk and butterfat required to be reported pursuant to this paragraph, showing separately in-area route disposition, except filled milk, and filled milk route disposition in the area;

(b) Each handler who operates a partially regulated distributing plant shall report as required in paragraph (a) of this section, except that receipts of milk from dairy farmers shall be reported in lieu of producer milk; such report shall include a separate statement showing the quantity of reconstituted skim milk in fluid milk products disposed of on routes in the marketing area;

§ 1004.32 Other reports.

(a) Each pool handler shall report to the Market Administrator in detail and on forms prescribed by the Market Administrator as follows:

(1) On or before the 25th day after the end of the month for each pool plant, his producer payroll for such month which shall show for each producer.

(i) His name and address;

(ii) The total pounds of milk received from such producer;

(iii) The average butterfat content of such milk; and

(iv) The net amount of the handler's payment, together with the price paid and the amount and nature of any deduction;

(2) Such other information with respect to receipts and utilization of butterfat and skim milk as the Market Administrator shall prescribe.

(b) . . .

(c) Each handler operating a partially regulated distributing plant who does not elect to make payments pursuant to § 1004.76(b) shall report the same information as required in paragraph (a) of this section with respect to dairy farmers from whom he receives milk.

7 CFR Part 1000—General Provisions, of Federal Marketing Orders

§ 1000.5 Handler responsibility for records and facilities.

Each handler shall maintain and retain records of his operations, and make such records and his facilities available to the Market Administrator. If adequate records of a handler, or of any other persons, that are relevant to the obligation of such handler are not

maintained and made available, any skim milk and butterfat required to be reported by such handler for which adequate records are not available shall not be considered accounted for or established as used in a class other than the highest priced class.

(a) Records to be maintained. (1) Each handler shall maintain records of his operations (including, but not limited to, records of purchases, sales, processing, packaging, and disposition) as are necessary to verify whether such handler has any obligation under the order, and if so, the amount of such obligation. . . .

(2) Each handler shall keep such other specific records as the Market Administrator deems necessary to verify or establish such handler's obligation under the order.

(b) Availability of records and facilities. Each handler shall make available all records pertaining to such handler's operations and all facilities the Market Administrator finds are necessary for such Market Administrator to verify the information required to be reported by the order and/or to ascertain such handler's reporting, monetary or other obligation under the order. . . .

FINDINGS OF FACT

1. Petitioner, Valley Farms, Inc., is a handler of milk as defined in section 1004.9 of the Order.

2. Petitioner's principal place of business is located at 1860 East Third Street, Williamsport, Pennsylvania, where petitioner operates a milk processing plant.

3. The predecessor of the petitioner, Foodcraft, Inc., conducted a partially regulated plant in Sunbury, Pennsylvania, as early as 1974. In 1979, Petitioner came into being as a result of a merger with Foodcraft, Inc., and continues to process its milk as a partially regulated plant.

4. Petitioner markets fluid products in 23 counties of north central Pennsylvania, but only 3 counties, namely, Dauphin, Perry and Juniata, are regulated under the Order.

5. Auditors for the Market Administrator of Order No. 4 sought to examine all of the books and records of the petitioner. At that time petitioner claims it was a party to a rulemaking proceeding involving proposals to redefine Federal Orders No. 2 and No. 4, to regulate areas in which petitioner markets its milk. Petitioner objected to the request to audit for the reason that petitioner believed that information gathered from a dairy becomes public information after an audit and may be used at the rulemaking hearing to petitioner's detriment. It was petitioner's position that the extension of the Order into its area would increase the petitioner's blend price

if the petitioner's entire operation were fully regulated under Order No. 4 and Order No. 2.

6. Petitioner refused to permit the Market Administrator to examine the records he requested until the United States District Court in Pennsylvania ordered petitioner to do so in June 1985. Petitioner had no objection to the examination of its records concerning its sales in the three counties presently regulated under Order No. 4.

7. In 1983 the Secretary of Agriculture conducted a formal rulemaking proceeding to consider amending Orders 4 and 2.

8. The Market Administrator, Order No. 4, took no position on any of the proposals at that proceeding. (Tr. 36)

9. The Secretary did not use or introduce in that proceeding any information traceable in any way to petitioner. (Tr. 36)

10. The general statistical information introduced by the Market Administrator at the rulemaking proceeding is obtained from handlers' reports. (Tr. 40, 41)

11. On the basis of a field survey audit, the Market Administrator discovered that milk packaged by petitioner and distributed in four stores within the marketing area, had not been reported by petitioner. (Tr. 36, 37)

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. The following conclusions are based upon the record evidence and applicable statutory and regulatory provisions enumerated herein.

1. The Act authorizes the Secretary, through his agent the Market Administrator, to examine any records of a handler, such as petitioner, which the Secretary needs to determine the petitioner's obligations under the Order. 7 U.S.C. 608d(1). The Secretary has promulgated regulations to carry out this authority. 7 CFR 1000.5, 1004.30.

2. The Act prohibits the Market Administrator from using specific, identifiable information obtained from a handler in an audit, in a proceeding to amend an Order. 7 U.S.C. 608d(2).

3. The confidentiality of petitioner's records is not violated by the conduct of an audit by the Market Administrator during the pendency of a proceeding to consider amending an order.

4. The relief requested by petitioner should be denied.

DISCUSSION

I

The handler's burden to establish, by way of reports and records, his utilization of milk has been repeatedly affirmed by the Court and Judicial Officer.

> "Thus the system imposes a primary obligation upon all handlers to make complete and accurate reports of their milk purchases and utilization, and a secondary obligation upon such handlers as are disclosed by those reports to be indebted to the Fund to pay the amounts found due. It is obvious that the successful operation of the system depends upon their prompt compliance with these requirements, (1) to make reports from which the administrator obtains the data upon which to base the uniform price and ascertain which handlers shall pay into the Fund and which receive payments therefrom, and (2) to make such payments as are called for by the administrator. . . ." *United States* v. *Turner Dairy Co.*, 162 F.2d 425, 426 (CA 7, 1947), *cert den.* 332 U.S. 836 (1947).
>
> "The emphasized language of Sec. 927.44 of the Order would seem to place the burden of establishing that the skim milk has been "otherwise utilized or disposed of" on the handler. Only the records of the handler or his consignees will show this. Any endeavor to place this burden on the Market Administrator would be unrealistic, if not futile. . . .
>
> "Nor is there merit in the contention of the plaintiff that the Market Administrator's ruling places a burden of proof on the handler at a non-pool plant. The burden is categorically placed on the pool plant handler, though the records of the non-pool plant must be relied on to sustain the burden of proving that the skim milk did not ultimately enter the marketing area. That ways and means of evading the prohibition of such entry may be resorted to, does not invalidate the requirement. . . ." *Newark Milk & Cream Co.* v. *Benson*, (D. N.J. 1959) 19 A.D. 54, 57 *aff'd.* 287 F.2d 681, (CA 3. 1961)
>
> "The order requires the handler to make reports to the Market Administrator showing the milk handled and the classes in which it was used, under the terms of the order. All milk is placed in Class One by the Market Administra-

tor unless proof be furnished by the handler of its use in Class Two. Any arbitrary action of the Market Administrator in rejecting proof of proper classification is reviewable. A similar provision in a milk order was approved in *United States* v. *Ridgeland Creamery Co.*, D.C. 47 F.Supp. 145, loc. cit. 149. The provision as to burden of proof appears to this Court a reasonable and fair method of determining classification of milk. The handler is in possession of all facts and records upon which knowledge as to the use of milk and the grades in which it should be placed, must be based. Why shouldn't the burden be placed in such hands, so that upon the basis of facts showing the use of milk, the handler can furnish the evidence reasonably necessary to the Market Administrator? Under such circumstances, it certainly would be an unusual and awkward regulation to place the burden upon the Market Administrator. Such a provision in the marketing order is a part of the method prescribed by the Administrator for the classification of milk and we find nothing in its terms contrary to the Act." . . . *Bailey Farm Dairy Co., et al* v. *Jones*, 61 F. Supp. 209, 225, (E.D. Mo. 1945), *aff'd* 157 F.2d 87 (CA 8, 1946) *cert den.* 329 U.S. 788.

"Petitioners have another grievance in that they seek Class III–C for some cream that they contend did not come to the International plant but went directly from the 60th Street Station in the City of New York to Country Club and Costa. The auditors and the Market Administrator allowed as Class III–C the cream for which there were supporting tickets or documents showing the direct movement claimed. The auditor was diligent in searching for such documents. Oral testimony either to the Market Administrator or in this proceeding is not an adequate substitute for the keeping of records from which the classification claimed can be verified. *Hogansburg Milk Company, Inc.* v. *Marvin Jones, War Food Administrator,* U. S. District Court, N.D. N.Y., March 16, 1946,* affirming In re Hogansburg Milk Company, Inc., 4 A.D. 285 (1945). . . ." *In re Dellwood Dairy Co., Inc., et al*, 6 A.D. 1107, 1120 (1947).

"Ogden claims first that its reports should have been accepted by the Market Administrator. Section 941.3(b) of the order requires the Market Administrator to "verify" handlers' reports by audit of handler's records. To "verify" means to establish the truth of, or to confirm. It seems ob-

vious that in the absence of supporting records, and in view of the results of the sampling by the Market Administrator Ogden's reported butterfat utilization should not have been accepted . . ." *In re Ogden Dairy Company* 2 A.D. 494 (1943), *aff'd. Ogden Dairy* v. *Wickard* 157 F.2d 445.

II

All Records Of A Regulated Handler Are Subject To Audit

A handler, such as petitioner, must file reports every month detailing, *inter alia*, its distribution and utilization of milk. 7 CFR 1004.30 and 32. From these reports the Market Administrator makes a preliminary determination of the handler's obligations under the order. (Tr. 42) That determination is then adjusted where necessary based on a subsequent audit. (Tr. 43) *In re Hygenic Dairy Company, et al.*, 9 A.D. 693, 700.

The Market Administrator must determine whether a handler operates a fully or partially regulated pool plant. As explained below, he must be able to see records of all of a handler's operations to do this. (Tr. 34)

One of the key elements of the Order is a producer-settlement or equalization fund ("fund"). (7 CFR § 1004.70) Handlers must account to this fund based on their disposition of milk. (7 CFR §§ 1004.71, 72) Because this fund is used to equalize the obligations of all handlers based on their usage of milk and to compensate producers equitably, any handler's inaccurate reporting impacts throughout the order.

A handler which operates a fully regulated plant must account to the fund for all of its Class I and Class II disposition within and outside the Order area, while a handler operating a partially regulated plant need equalize only its in-area Class I disposition. The Market Administrator determines a handler's status, under the terms of the Order, based on the percentage of its Class I disposition that is within the Order area. If 15 percent or more of a handler's Class I disposition is within the Order area, the handler is fully regulated (provided 30 or 40 percent or more of its volume is disposed of as Class I). (7 CFR § 1004.7).

To make such a percentage calculation, the Market Administrator must know the handler's total receipts and disposition, as well as the quantity of in-area and out-of-area disposition. In addition, all of a handler's other obligations under the Order are predicated on an accurate accounting of its sales and other dispositions.

The Market Administrator must be able to examine a variety of records in order to verify a handler's reports. (Tr. 35) Just as the

Internal Revenue Service may need to look at bank records, account ledgers, and many other items to verify a tax return, there are records such as load sheets and accounts receivable that can be used to verify milk reports. The Judicial Officer, in the *Hygenic Dairy* case, *supra* at 700, held: "The extent of the auditing necessary to verify reports is largely a matter of discretion with the Market Administrator. . . ."

Petitioner urges (brief pp. 3–4) that since only 6% to 8% of its total sales and only 3 of 23 counties are covered by Order No. 4, all of the books and records, including the general ledger, should not be made subject to review by the auditors of the Federal Market Administrator. Petitioner contends further that this is especially true when it is a party to a proposal to extend the jurisdiction of either Federal Order No. 4 or No. 2 to all of its operations, "for the reason that such an audit would reveal information that could be used in testimony at hearings that would be adverse to the Petitioner and beneficial to the proponents of the extension of the Order." However, petitioner's argument has no merit, and should not deter the necessary administration of the Order.

Whether or not a handler is fully or partially regulated depends on the *percentage* of its total milk which is distributed within the Order area. The Market Administrator determines this by dividing a handler's total distribution into its in-area distribution. 7 CFR 1004.7(a), 1004.8(c), and 1004.9(a)(2). This cannot be done unless the Market Administrator knows and can verify petitioner's total distribution. Whether a handler is fully or partially regulated depends on all of the information obtained in the audit. The Order provides standards which establish what the Market Administrator must know, *e.g.*, petitioner's total receipts and distribution, while the Act sets out the sort of documentation he may examine.

Petitioner's reliance on the *Lehigh Valley* and *Willow Farmers* cases is unavailing. While *Lehigh Valley* (370 U.S. 76) is a case which dealt with trade barriers and milk pricing; this case involves the Secretary's authority to conduct an audit of a regulated handler's books and records. The *Willow* case (90 F. Supp. 195) involved the question of the adequacy of the records maintained by the handler, and not a refusal to make records available.

In addition, the audit is necessary to verify a handler's obligation to the pool. (Tr. 34, 42) Petitioner admits that at one point it failed to report all of its in-area sales. (Tr. 30) The Market Administrator's testimony is that the only way to uncover such errors in petitioner's reports is to conduct a complete audit. (Tr. 35, 37) Because a business has many potentially corroborative or conflicting

records the Secretary must be able to see all the records, as evidenced by the following exchange:

> Q. How can you verify the information or the reports that you received if you cannot see records relating to all of the sales and receipts of a given handler? (Emphasis added.)
>
> Mr. SHINE: We can't. (Tr. 35)

III

Confidentiality Of The Petitioner's Records

The Secretary conducted a formal rulemaking proceeding pursuant to the Act (7 U.S.C. § 608c(3)(4)) and the Administrative Procedure Act (5 U.S.C. §§ 553, 556). Such proceeding is governed by the Rules of Practice set out in 7 CFR § 900.1-18. There is no connection between the Market Administrator's administration and enforcement of the Order's provisions via an audit and a rulemaking proceeding. The Act prohibits all officers and employees of the Department from releasing any information relating to an individaul handler furnished under section 8d(1) in, *inter alia*, a rulemaking proceeding. Violation of this prohibition is a criminal offense with penalties of up to $1,000 or one year in prison, or both. 7 U.S.C. § 608d(2). Cf: *United States* v. *Levine* 129 F.2d 745 (CA 2, 1942).

The Market Administrator provides only general statistical evidence at a rulemaking proceeding. (Tr. 36) These statistics are not "traceable or identifiable in any way by individual handler." (Tr. 36) Moreover, the statistics are compiled from the handler's monthly reports. (Tr. 41)

Because the statistical information submitted at a rulemaking proceeding is not traceable to an individual handler, the pendency of such a proceeding cannot violate the confidentiality of petitioner's records.

ORDER

The relief requested by petitioner is denied.

This decision and order shall be final and effective 35 days after service upon petitioner unless appealed to the Judicial Officer within 30 days. (7 CFR 900.64(c), 900.65)

Copies hereof shall be served on the parties.

[Decision and Order became final May 23, 1986—Ed.]

DISCIPLINARY DECISIONS

In re: MORGAN OUTLAW, AQ Docket No. 241. Decided May 2, 1986.

Interstate movement infectious animal—Civil Penalty—Consent.

Kevin Thiemann, for complainant.
Michael W. Lonsberry, Monticello, AR, for respondent

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Morgan Outlaw, respondent, violated the Act and regulations promulgated thereunder (7 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Morgan Outlaw, respondent, is an individual whose address is Rt. 1 Box 237, Hamburg, Arkansas 71646.

2. On or about August 4, 1984, the respondent moved one (1) equine infectious anemia reactor horse from Hamburg, Arkansas, to Bastrop, Louisiana.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred fifty dollars ($150.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, 12th and Independence Avenue, S. W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: MARGY CANNON, AQ Docket No. 242. Decided May 5, 1986.

Interstate movement of infectious animal—Civil Penalty—Consent.

Kevin Thiemann, for complainant.
Louis B. Jones, Jr., Forrest City, AR, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, 122), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Margy Cannon, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Margy Cannon, respondent, is an individual whose address is 836 Riverview #C-20, Jackson, Mississippi 39202.

2. On or about May 21, 1985, the respondent moved one (1) equine infectious anemia reactor horse interstate from Jackson, Mississippi, to Weldon, Arkansas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred fifty dollars ($150.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S.W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: LANCE TARVER and TOMMY COLEMAN, AQ Docket No. 221. Decided March 26, 1986.

Brucellosis exposure, no accompanying figures—Civil Penalty—Default.

Fronda Woods, for complainant.
Respondents, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that the respondents violated section 78.8 of the regulations promulgated thereunder (9 CFR § 78.8). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondents.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136), respondents were informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Neither respondent filed an answer during the twenty-day period allowed. Respondents' failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondents' failure to file answers also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondents are deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Lance Tarver, respondent, is an individual whose address is Route 1, Box 666, Bossier City, Louisiana 71112.

2. Tommy Coleman, respondent, is an individual whose address is Route 2, Box 180, Marshall, Texas 75671.

3. On or about May 10, 1984, respondents moved three brucellosis-exposed cattle from Bossier City, Louisiana, to Corsicana, Texas,

in violation of 9 CFR § 78.8(a)(2), because the cattle were not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

4. On or about June 20, 1984, respondents moved fifteen brucellosis-exposed cattle from Bossier City, Louisiana, to Corsicana, Texas, in violation of 9 CFR § 78.8(a)(2), because the cattle were not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

5. On or about January 27, 1984, respondents moved at least one brucellosis-exposed cow from Bossier City, Louisiana, to Corsicana, Texas, in violation of 9 CFR § 78.8(a)(2), because the cow was not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

6. On or about May 31, 1984, respondent Tommy Coleman moved four brucellosis-exposed cattle from Bossier City, Louisiana, to Corsicana, Texas, in violation of 9 CFR § 78.8(a)(2), because the cattle were not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

CONCLUSIONS

Respondents have failed to file answers to any of the allegations in the complaint. The consequences of such a failure were explained to the respondents in the complaint and in the letter of service that accompanied it. By their silence respondents have admitted all of the material allegations of fact in the complaint and have waived a hearing.

By reason of the Findings of Fact set forth above, respondents have violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

1. Respondent Lance Tarver is hereby assessed a civil penalty of one thousand five hundred dollars ($1500), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

2. Respondent Tommy Coleman is hereby assessed a civil penalty of two thousand dollars ($2000), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondents, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Default Decision and Order became final on May 6, 1986, for respondent Lance Tarver, and became final on May 19, 1986, for respondent Tommy Coleman.]

In re: JIM DOSS, RONALD O. EHRLICH and DR. PHILLIP SMITH, D.V.M., AQ Docket No. 136. Decided May 9, 1986.

Interstate movement of animals—Civil Penalty—Consent.

Fronda Woods, for complainant.
Stow Witever, Jr., Greeley, CO, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION FOR RONALD O. EHRLICH

On December 14, 1984, this proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint, alleged, *inter alia*, that Ronald O. Ehrlich, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that the proceeding with respect to respondent Ronald O. Ehrlich should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Ronald O. Ehrlich specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the pro-

ceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ronald O. Ehrlich, respondent, is an individual whose address is P.O. Box 60, Milliken, Colorado 80543.

2. On or about June 7, 1984, respondent caused to be moved at least one cow from Abilene, Texas to Milliken, Colorado.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred dollars ($100) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: BONNIE LAMBETH, AQ Docket No. 231. Decided May 14, 1986.

Interstate movement of animals—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Damon Young, Texarkana, AR, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent, Bonnie Lambeth, violated the Act and regulations promulgated thereunder (9 CFR § 75.4 *et seq.*). The parties have agreed that this proceeding should be termi-

nated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Bonnie Lambeth, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, Bonnie Lambeth, also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bonnie Lambeth, respondent, is an individual whose address is Route 2, Box 436, DeQueen, Arkansas 71832.

2. On or about February 15, 1985, the respondent moved interstate an EIA reactor horse from DeQueen, Arkansas, to Idabel, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred fifty dollars ($750.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: TEXAS LIVESTOCK MARKETING ASSOCIATION, INC., DUDE HARRISON and A. J. LINDSEY, AQ Docket No. 141. Decided May 20, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Clement McGovern, for complainant.
Linda Goehman Smith, Fort Smith, TX, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. Section 111 and Section 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Texas Livestock Marketing Association, Inc., A. J. Lindsey and Dude Harrison violated the Act and regulations promulgated thereunder (9 CFR Section 71.1 *et. seq.*). The respondents and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by them in connection with this proceeding.

FINDINGS OF FACT

1. Respondent Texas Livestock Marketing Association, Inc., is a corporation incorporated under the laws of the State of Texas and having its principal place at Union Stock Yards, P. O. Box 1227, San Antonio, Texas 78924.

2. Respondents Dude Harrison and A. J. Lindsey are individuals whose address is Union Stock Yards, P. O. Box 1227, San Antonio, Texas 78294.

3. On or about November 7, 1983, respondents moved cattle interstate from San Antonio, Texas, to Plant City, Florida.

4. On or about March 13, 1984, respondents moved cattle interstate from San Antonio, Texas, to Plant City, Florida.

5. On or about May 14, 1984, respondents moved cattle interstate from San Antonio, Texas, to Plant City, Florida.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondents are assessed a civil penalty of six thousand dollars ($6,000.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day of the service upon the respondents.

In re: JOHNNY DOBSON, AQ Docket No. 251. Decided May 20, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint

filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Johnny Dobson violated the Act and regulations promulgated thereunder (9 CFR Part 78). Respondent Johnny Dobson and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Johnny Dobson admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Johnny Dobson also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Johnny Dobson, respondent, is an individual whose address is Route 6, Box 503, Sulphur Springs, Texas 75482.

2. On or about January 3, 1985, the respondent moved interstate from Paris, Texas, to Omaha, Nebraska, approximately two cattle.

CONCLUSIONS

Respondent Johnny Dobson having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Johnny Dobson is assessed a civil penalty of one hundred fifty dollars ($150.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Depart-

ment of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Order shall become effective upon service of the respondent.

In re: JIMMY HUGHES, AQ Docket No. 253. Decided May 20, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Sherrie Kennedy, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR §§ 71.18 and 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admits the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the Respondents in connection with this proceeding.

FINDINGS OF FACT

1. Jimmy Hughes, herein referred to as the respondent, is an individual whose address is 206 Robin Way, Mt. Vernon, Texas 75457.

2. On or about May 16, 1985, the respondent moved interstate at least one (1) cow from Giles and Stratton Auction, Inc. in Bossier City, Louisiana, to Paris Livestock Commission Company in Paris, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Decision and Order will be issued.

ORDER

1. The Respondent, Jimmy Hughes, is assessed a civil penalty of five hundred doliars ($500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

2. This order shall become effective on the day upon which service of this Order is made upon the Respondent.

In re: CLARK BUFORD, AQ Docket No. 244. Decided May 23, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act), (21 U.S.C. § 111 and § 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Clark Buford violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*). Respondent Clark Buford and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Clark Buford admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies

the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Clark Buford also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Clark Buford, respondent herein, is an individual whose address is Route 3, Box 516, Cordele, Georgia 31015.

2. On or about January 29, 1985, the respondent moved at least 12 cattle from Arabi, Georgia, interstate to Roanoke, Alabama.

CONCLUSIONS

Respondent Clark Buford having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Clark Buford is assessed a civil penalty of one thousand dollars ($1,000.00) which shall be payable to "The Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, on or before May 30, 1986.

This Decision and Order shall become effective on the day it is filed by the Administrative Law Judge with the Hearing Clerk.

In re: ROBERT "BOB" CODY, AQ Docket No. 252. Decided May 29, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111 and § 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Robert "Bob" Cody violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*) Respondent Robert "Bob" Cody and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent Robert "Bob" Cody admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Robert "Bob" Cody also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Robert "Bob" Cody, respondent herein, is an individual whose mailing address is Route 4, Box 9, Sulphur Springs, Texas 75482.

2. On or about December 6, 1984, the respondent moved interstate from Paris, Texas, to Durant, Oklahoma, approximately three (3) cattle.

3. On or about December 13, 1984, the respondent moved interstate from Paris, Texas, to Durant, Oklahoma, approximately four (4) cattle.

4. On or about January 3, 1985, the respondent moved interstate from Paris, Texas, to Durant, Oklahoma, approximately two (2) cattle.

CONCLUSIONS

Respondent Robert "Bob" Cody having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order, in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Robert "Bob" Cody is assessed a civil penalty of seven hundred fifty dollars ($750.00) which shall be payable to the "Treasurer of the United States," by check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before June 30, 1986.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: DONALD CONRAD, AQ Docket No. 235. Decided June 3, 1986.

Interstate movement of postparturient cattle—Civil Penalty—Consent.

Clement McGovern, for complainant.
Gene Krekel, Burlington, IA, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the

Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Donald Conrad, herein referred to as the respondent, is an individual whose address is Route 1, West Point, Iowa 52656.

2. On or about June 17, 1985, the respondent moved interstate 11 postparturient cows and 11 calves from Wyaconda, Missouri, to West Point, Iowa.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

Respondent is assessed a civil penalty of seven hundred dollars ($700.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: GUTMAN BROTHERS, LTD., AQ Docket No. 225. Decided June 17, 1986.

Interstate movement of cattle, no documents—Civil Penalty.

Jaru Ruley, for complainant.
Joseph Nelkin, Baltimore, MD, for respondent.

Decision by Donald A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR §§ 71.18 and 78.1 *et seq.*). An initial Decision and Order was issued on March 17, 1986, by Administrative Law Judge Victor W. Palmer (ALJ) assessing civil penalties totalling $2,500.

On April 21, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on June 9, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR §§ 71.18 and 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance

[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was initiated by a complaint filed on December 23, 1985, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on two separate occasions the respondent transported cattle interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of sections 71.18 and 78.9(a) of the regulations (9 CFR §§ 71.18 and 78.9(a)). On or about April 10, 1984, the respondent moved at least eleven cattle interstate without a certificate or an owner's or shipper's statement, or other acceptable document, containing prescribed information. Then on or about March 20, 1985, the respondent moved nine cattle interstate without proper identification by either Department-approved backtags or Animal and Plant Health Inspection Service-approved eartags and without being accompanied by a certificate or an owner's or shipper's statement, or other acceptable document, containing prescribed information. In his answer, the respondent failed to deny or otherwise respond to any of the material allegations contained in the complaint, thereby, for the purposes of this proceeding, being deemed to have admitted the allegations and waived a hearing. (See 7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Gutman Brothers, Ltd., is a corporation incorporated under the laws of the State of Maryland and having its principal office address at 5905 Simmonds Avenue, Baltimore, Maryland 21215.

2. On or about April 10, 1984, the respondent moved at least eleven cattle, over two years of age, interstate from Hagerstown, Maryland, to Codorus, Pennsylvania, in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle were not accompanied interstate by an owner's or shipper's statement, or other acceptable document, containing prescribed information.

3. On or about April 10, 1984, the respondent moved at least eleven cattle, over two years of age, interstate from Hagerstown, Maryland, to Codorus, Pennsylvania, in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)) in that the cattle were not accompanied interstate by a certificate, as required.

4. On or about March 20, 1985, the respondent moved nine cattle, over two years of age, interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle were not accompanied interstate by an owner's or shipper's statement, or other acceptable document, containing prescribed information.

5. On or about March 20, 1985, the respondent moved nine cattle, over two years of age, interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle were not properly identified by either Department-approved backtags or Animal and Plant Health Inspection Service-approved eartags, as required.

6. On or about March 20, 1985, the respondent moved nine cattle, over two years of age, interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)) in that the cattle were not accompanied interstate by a certificate, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 71.18 and 78.9(a) of the regulations (9 CFR §§ 71.18 and 78.9(a)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to deny or otherwise respond to the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)–(c), .139):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

The complaint filed in this case advised respondent that "Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation" (Complaint at 3). In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent enclosed a copy of the rules of practice and expressly advised respondent that failure to "plead specifically to any allegation of the complaint shall constitute an admission of such allegation." The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which

> to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Notwithstanding these explicit directions and warnings, respondent filed an answer which states in its entirety: "In reply to your letter of Dec.20.85 we kindly request an oral hearing in the above matter." Accordingly, the ALJ's entry of a default Decision and Order was clearly warranted. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,[2] respondent has shown no basis for setting aside the default decision here.[3] The rationale for the Department's position in this respect is stated in *In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986), as follows:

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[2] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3] *See In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986); *In re Cuttone*, 44 Agric. Dec. ____ (Aug. 20, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396–97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a $10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). Last month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not file a timely answer and did not choose to "set forth any explanation at this time" when his (untimely) answer was filed.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [5] If respondent were permitted to raise the defenses which he explained for the first time on appeal to the Judicial Officer, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to raise these defenses at this time.

[5] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent, Gutman Brothers, Ltd., is hereby assessed a civil penalty of $2,500 ($500 per violation). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422 South Bldg., United States Depart-

ment of Agriculture, Washington, D.C. 20250–1400, within 30 days from the service of this order.

In re: GORDON GIBSON, AQ Docket No. 250. Decided June 17, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Lonnie Turner, Ozark, AR, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Gordon Gibson violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*). Gordon Gibson and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth below and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Gordon Gibson admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Gordon Gibson also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Gordon Gibson, respondent, is an individual whose address is Route 1, Box 301, Hartman, Arkansas 72842.

2. On or about October 29, 1984, the respondent moved interstate from Coal Hill, Arkansas, to Moffett, Oklahoma, approximately five cattle.

CONCLUSIONS

Respondent Gordon Gibson having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Gordon Gibson is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to, "The Treasurer of the United States," by certified check or money order and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before June 30, 1986.

This Decision and Order shall become effective upon service of the respondent.

In re: BILLY E. ROWAN, AQ Docket No. 187. Decided April 14, 1986.

Interstate shipment of infectious animals—Default—Civil Penalties.

Sally Stratmoen, for complainant
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on June 25, 1985. The complaint alleged that the respondent violated sections 78.9(d)(3) and 75.4(c) of the regulations (9 CFR §§ 78.9(d)(3) and 75.4(c)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on July 1, 1985. On July 26, 1985, respondent was sent, by regular mail, a notice that his answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the com-

plaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Billy E. Rowan, respondent, is an individual whose mailing address is Route 1, Box 357, New Albany, Mississippi 38652.

2. On or about April 2, 1984, the respondent moved interstate at least one (1) bull from Miller Livestock Company located in DeQuincy, Louisiana, within a Class C state, to Grenada Livestock Exchange located in Grenada, Mississippi, which moved other than in accordance with the applicable regulations because the bull was not accompanied by a certificate or other document, as required by section 78.9(d)(3) of the regulations. (9 CFR § 78.9(d)(3))

3. On or about June 9, 1984, the respondent shipped two (2) equine infectious anemia reactor horses, named Domino and Casey, from the Lipscomb Brothers Horse Sale located in Como, Mississippi, to the White Horse Sale located in Moulton, Alabama, in violation of section 75.4(c) of the regulations (9 CFR § 75.4(c)) because the horses moved interstate other than to an approved slaughtering establishment for immediate slaughter or to a designated diagnostic or research facility, as required.

CONCLUSION

By reason of facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Respondent is hereby assessed a civil penalty of one thousand dollars [$1,000] ($500 per count), which shall be paid within thirty (30) days from the date this Order becomes effective. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sher-

rie Kopka Kennedy, U. S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if issued after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal within 30 days to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and Order became final and effective on June 17, 1986.—Ed.]

In re: WILLIAM C. FILSINGER, DVM, VA Docket No. 37. Decided May 12, 1986.

Violation of Accreditation Standards—Suspension.

Sherrie Kennedy, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of such Accreditation (9 CFR § 160.1 *et seq.*), by a Complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint was filed with the Hearing Clerk on February 6, 1986. The Complaint alleged that Respondent violated the Standards for Accredited Veterinarians (Standards) (9 CFR § 161.2).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on February 21, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Respondent was informed in the Complaint and the letter of service that an Answer should be filed with the Hearing Clerk within twenty (20) days after service of the Complaint, and that failure to file an answer either denying or otherwise responding to the allegations in the Complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. On March 20, 1986, Respondent was sent, by regular mail, a notice that his Answer had not been received by the Hearing Clerk in the allotted time. More than

twenty (20) days have elapsed since Respondent was served with the Complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an Answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Dr. William C. Filsinger, respondent, is an individual whose mailing address is Route 5, Box 335A, Cumberland, Maryland 21502.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Maryland under the provisions of the regulations of Title 9, Code of Federal Regulations, Part 160–162.

3. On or about April 14, 1982, April 26, 1983, and May 8, 1984, respondent brucellosis and tuberculosis tested cattle for Deremer Brothers Dairy located in Keyser, West Virginia in violation of paragraph (d) of the Standards (9 CFR § 161.2(d)) because the testing was not done in accordance with instructions issued to the respondent by the Veterinarian in Charge or the State Animal Health Official, or both, which instructions permit such testing only in States in which a veterinarian is accredited.

CONCLUSION

By reason of the facts in the findings of fact set forth above, Respondent has violated the Standards for Accredited Veterinarians. Therefore, the following Order is issued.

ORDER

Respondent's veterinarian accreditation is hereby suspended for a period of three (3) months, provided that, if the Respondent performs any actions during such suspension for which veterinary accreditation is required, then Respondent's veterinary accreditation shall be revoked. Before such action is taken, Respondent will be afforded an opportunity for a hearing concerning the matter.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Default Decision and Order became final and effective on June 20, 1986—Ed.]

In re: LONGINO HALLEY, SR., AQ Docket No. 258. Decided June 30, 1986.

Fed or permitted feeding of untreated garbage to swine—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Swine Health Protection Act, as amended (Act) (7 U.S.C. § 3801 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Longino Halley, Sr. violated the Act and regulations promulgated thereunder (9 CFR § 166.1 *et seq.*). Longino Halley, Sr. and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Longino Halley, Sr. admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Longino Halley, Sr. also waives any action against the United StatesDepartment of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Longino Halley, Sr., respondent, is an individual whose mailing address is 317 Chicago Boulevard, Lake Village, Arkansas 71653.

2. From on or about January 23, 1985, to May 1, 1986, the respondent operated a facility for the treatmet of garbage to be fed to swine.

3. From on or about January 23, 1985, to May 1, 1986, the respondent fed or permitted the feeding of garbage to swine at his facility in Lake Village, Arkansas.

CONCLUSIONS

Respondent Longino Halley, Sr. having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent Longino Halley, Sr. is assessed a civil penalty of two thousand dollars ($2,000.00). However, the civil penalty shall be held in abeyance so long as the,

1. respondent does not operate a facility for the treatment of garbage knowing it is to be fed to swine unless respondent holds a valid permit issued pursuant to the Act; and

2. respondent does not feed or permit the feeding of garbage to swine except in accordance with the Act and regulations promulgated thereunder (9 CFR § 166.1 *et seq.*).

And Provided Further, that if it is determined after an opportunity for hearing, as provided in the Rules of Practice (7 CFR § 1.131 *et seq.*) that any term or provision of the Order has not been, or is not being, complied with, the civil penalty held in abeyance shall be withdrawn and the $2,000.00 shall be due immediately.

This Consent Decision and Order shall become effective on the day of service upon the respondent.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: HORACE R. COX, AQ Docket No. 160. Decided May 1, 1986.

Complaint dismissed.

Robert Broussard, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown by complainant, the complaint that was filed herein against Horace R. Cox on March 27, 1985, is herewith dismissed.

In re: DOUG SASSEEN, and RANDALL HOOVER, d/b/a OZARKS REGIONAL STOCKYARD, AQ Docket No. 229. Decided May 30, 1986.

Complainant's motion—Dismissed.

Fronda Woods, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's motion, filed May 23, 1986,

IT IS ORDERED, that the complaint issued in this matter on January 21, 1986, be, and hereby is, dismissed.

DISCIPLINARY DECISIONS

In re: MARLIN U. ZARTMAN, d/b/a GILBERTSVILLE SALES STABLES, AWA Docket No. 292. Decided March 21, 1986.

Failure to maintain adequate program of disease control and veterinary care, evidenced by acceptance of sick animals for sale—Civil Penalty—Cease and desist from accepting sick animals.

Robert Ertman, for complainant.
Dennis L. O'Connell, Gilbertsville, PA, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

The complainant alleges that respondent on two occasions, March 17 and 31, 1984, ". . . failed to maintain an adequate program of disease control and veterinary care, as evidenced by the acceptance of sick animals . . . for sale." Complainant's paragraphs 4 and 5.

On March 17, 1984 respondent had six cats found by complainant's inspectors to be exhibiting clear symptoms of mild contagious illness (something akin to a common cold in a human being, with symptoms of a running nose and eyes).

Then, on March 31, 1984 complainant's inspectors found two rabbits, a cat, a guinea pig, and a dog exhibiting symptoms of minor illness, possible injury, and/or disease. The evidence does not establish any serious condition, disease or injury.[1]

These animals constitute a very tiny fraction of the 280 animals at the auction on March 17, and 398 animals on March 31, 1984.

Further, the symptoms of the illness or injury were sufficiently clear to give fair warning to respondent's employees that the animals were not healthy at time they were accepted earlier that day.

Complainant contends that the acceptance of these animals for sale at the auction constitute violation of a duty to maintain an adequate program of disease control and veterinary care at the auction. (9 CFR 3.10(a), 3.34(a), and 3.59(a). These provisions are identical, but apply to dogs and cats (Subpart A), guinea pigs and hamsters (Subpart B), and rabbits (Subpart C), of Part 3 (Standards)). (9 CFR 3.1)

It is concluded that if respondent had maintained an adequate program for disease control and prevention, his employees would not have accepted these animals.

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[1] For example, they range from several sick cats (with pnemonities, a running nose and eyes like a common cold in people), a sick dog, a couple sick rabbits and a guinea pig with sores on its back.

The regulations are not fully satisfied by having a veterinarian inspect the animals shortly before sale. The regulations do not limit respondent's duty to avoid *sale* of sick, diseased, or injured animals, but require respondent to *maintain a program to control and prevent disease from existing or spreading.*

> "Programs of disease control and prevention, euthanasia, and adequate veterinary care shall be established and maintained under the supervision and assistance of a doctor of veterinary medicine." 9 CFR 3.10(a), 3.34(a) and 3.59(a).

Thus, the violations as charged in the complaint are established here.

Prior to the March 17 and 31, 1984 inspections, this respondent had been charged, inter alia, with similar minor violations. *In re Marlin D. Zartman d/b/a, Gilbertsville Sales Stables,* 44 Agric. Dec ___ (1985). (See slip opinion attached to respondent's reply brief, of the *Decision and Order* of the USDA Judicial Officer decision, AWA Docket No. 259, 2/27/85. (*"Zartman I"*). See also *Order Denying Petition for Reconsideration, In re Zartman et al* 44 Agric. Dec. ___ (1985) USDA JO decision, AWA Docket No. 259 filed 4/15/85. A copy of the slip opinion also is attached to Respondent's Reply Brief).

Trial of the issues in *Zartman I* case took place just two months before the March 17 and 31, 1984 inspections made here.

Respondent's counsel contends that the March 17-31 inspections were "retaliatory" in nature, prompted by the apparently successful defense that respondent had raised in *Zartman I, supra.* In fact, this impression proved to be accurate.

Respondent now claims a variety of investigational irregularities or illegalities by complainant's investigators, in particular reference to the March 31, 1984 investigation. These are irrelevant, immaterial and not of much substance, factually or legally, insofar as the merits are concerned—i.e., whether respondent violated the pertinent law and regulations.

Respondent presents a plausible argument in support of his "retaliatory" theory, but it cannot be used to offset a violation, if one exists. What weight or bearing it may have on the departmental sanction policy is not here argued or briefed.

Assuredly, a program of disease control and prevention need not be "perfect" in the sense that it *always* prevents a contagiously sick animal from being accepted at, for example, a busy weekly auction sale. *Zartman I, supra,* slip opinion page 13.

But this is the second such occurrence. Further, these violations happened when respondent and his employees should have been sensitive to the problem, just 60 days after a two day trial of that issue, inter alia.

Therefore, while the incidents of March 17 and 31, 1984 are not flagrant, they are repeated violations.[2]

In additional, respondent again raises here certain legal issues which were raised in *Zartman I* but not resolved at the time of this trial.

The USDA Judicial Officer disposed of those issues in *Zartman I* in a manner that is binding here.

> "At the outset, respondent raises a serious question as to whether the Secretary is authorized to promulgate standards applicable to the operator of an auction sale as to the care, treatment, housing, feeding, watering, and sanitation of animals."

Section 12 of the Act provides (7 U.S.C. § 2142):

> § 2142. *Humane standards and recordkeeping requirements at auction sales*
>
> The Secretary is authorized to promulgate humane standards and recordkeeping requirements governing the purchase, handling, or sale of animals, in commerce, by dealers, research facilities, and exhibitors at auction sales and by the operators of such auction sales. The Secretary is also authorized to require the licensing of operators of auction sales where any dogs or cats are sold, in commerce, under such conditions as he may prescribe, and upon payment of such fee as prescribed by the Secretary under section 2153 of this title.

If § 12 of the Act is read by itself, no serious question is presented as the Secretary's authority. That is, the authority given to the Secretary to promulgate humane standards governing the "handling" of animals by operators of auction sales would clearly authorize the standards at the issue here.

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[2] The complainant might on occasion issue only a warning to licensee, or, in appropriate circumstances, contingent upon the record of that licensee, issue and formal complaint, as was done here.

In addition, the Secretary is authorized by § 12 of the Act to license the operators of auction sales where dogs or cats are sick "under such conditions as he may prescribe." Dogs and cats are sold at respondent's auction, and the Secretary has prescribed that auction operators must comply with the standards for other animals subject to the Act, as well as dogs and cats (9 CFR § 2.100(a)). That is, one of the conditions the Secretary has prescribed is (9 CFR § 2.100(a)).

> § 2.100. *Compliance with standards.*
>
> (a) Each dealer, exhibitor, operator of auction sales, and research facility shall comply in all respects with the standards set forth in Part 3 of this subchapter setting forth the standards for the humane handling, care, treatment, and transportation of animals . . .

The "standards set forth in Part 3 of this subchapter" are the standards that are involved in this case (9 CFR § 3.1 *et seq.*). Hence, pursuant to the authority in § 12 of the Act, the Secretary has prescribed broad and exacting standards, applicable to all animals subject to the Act, that must be complied with by auction operators.

The legislative history of the Animal Welfare Act of 1970, which added the provisions as to auction operators, states as to § 12 (H.R. Rep. No. 91-1651, 91st Cong., 2d Sess. 11 (1970))

> Section 13.—This section (i.e., § 12 of the Act) would also authorize the Secretary to license the operators of auction sales, where any dogs or cats are sold and such sales are affecting commerce. In addition, the section would extend the recordkeeping and standards of humane handling under the Act to the purchase, handling, and sale of animals, as defined in the bill, rather than only dogs or cats, at auction sales by dealers, research facilities, exhibitors and by the operators of the auction sales.

Hence it would appear from the literal language of § 12 and its legislative history that § 12 gives the Secretary broad authority to impose on auction operators standards of humane handling of all animals subject to the Act.

The ambiguity in this case arises when § 12 of the Act, quoted above, is read in conjunction with § 13 of the Act, which does not expressly apply to auction operators.[2] Section 13 provides (7 U.S.C. § 2143(a)):

> § 2143. *Humane standards for animals transported in commerce*
>
> (a) *Authority of Secretary to promulgate standards*
>
> The Secretary shall promulgate standards to govern the humane *handling, care, treatment,* and transportation of animals by dealers, research facilities, and exhibitors. Such standards shall include minimum requirements with respect to *handling, housing, feeding, water sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, temperatures, adequate veterinary care,* including the appropriate use of anesthetic, analgesic or tranquilizing drugs, when such use would be proper in the opinion of the attending veterinarian of such research facilites, and separation by species when the Secretary finds such separation necessary for the humane handling, care, or treatment of animals. The Secretary shall also promulgate standards to govern the transportation in commerce, and the *handling, care, treatment* in connection therewith, by intermediate handlers, air carriers, or other carriers, of animals consigned by any dealers, research facility, exhibitor, operator of an auction sale, or other person, or any department, agency, or instrumentality of the United States or of any State or local government, for transportation in commerce. The Secretary shall have authority to promulgate such rules and regulations as he determines necessary to assure humane treatment of animals in the course of their transportation in commerce including requirement such as those with respect to *containers, feed, water, rest, venti-*

[2] "As noted by complainant, the Department has consistently construed the term "dealer" to include "auction operators." However, to say the least, some ambiguity arises from the fact that § 12 of the Act applies, inter alia, to "dealers" and "operators of such auction sales," whereas § 13 applies expressly to "dealers," but not the operators of auction sales."

lation, temperature, and handling. (Emphasis added.)

In § 13 of the Act, quoted immediately above, it would appear that the word "handling" is used in a manner that does not include "care," "treatment," "housing," "feeding," "watering," "sanitation," "ventilation," "veterinary care," and "shelter from extremes of weather and temperature." To construe the word "handling" in § 13 of the Act as broad enough to include all of such other terms would make the additional terms in § 13 surplusage. "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule tht 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." ' " [sic] *Ex Parte Public Nat'l Bank of NY,* 8 U.S. 101, 104 (1928).

Nonetheless, this is remedial legislation "to insure that animals . . . are provided humane care and treatment" (7 U.S.C. § 2131(1)), and it has been the settled and contemporaneous construction of the Act by the administrative officials charged with the responsibility for achieving the congressional purpose that the Secretary has authority to impose on auction operators the standards involved in this proceeding. Although the issue is not free from doubt, I believe that the Secretary acted within his statutory authority." *Zartman I, supra* pages 3–7 of slip opinion.

The evidence sustains complainant's allegations that respondent on two occasions in March 1984 failed to maintain an adequate program of disease control and prevention as evidenced by the acceptance of contagiously sick animals in violation of regulations.

Nothing here shows a $600.00 civil penalty ($300 each for the March 17 and March 31, 1984 violations) as inappropriate or unwarranted, when consideration is given to the size of the business, the gravity of the violations, the good faith and history of prior violations, by this respondent.

Reliable, substantial and persuasive evidence establish is that respondent violated the regulations and statute as charged in the complaint.

ORDER

Respondent is assessed a civil penalty of $600.00 dollars ($300 for the March 17 and $300 for the March 31, 1984 violations).

Respondent shall pay this civil penalty by certified check or money order made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Marketing Division, Office of the General Counsel (Attention Robert A. Ertman) United States Department of Agriculture, Washington D.C. 20250.

This civil penalty shall be paid within 90 days from the date this Decision and Order becomes final.

Respondent shall cease and desist from accepting animals showing signs or symptoms of illness, disease or injury, in violation of his duty to establish and maintain a program of disease control and prevention.

This Decision and Order will become final without further proceedings thirty five (35) days after service unless appealed within thirty (30) days after service. (7 CFR 1.140(c) & 1.45(a)).

[Decision and Order became final on May 6, 1986.—Ed.]

In re: STATE UNIVERSITY OF NEW YORK, AWA Docket No. 346. Decided May 12, 1986.

Research facility—construction and maintenance of interior surfaces—proper storage of food and bedding—training program for handlers—Civil Penalty—Consent.

John Griffith, for complainant.
Sanford Levine, for respondent.

Decision by John Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent State University of New York has a mailing address of Office of University Counsel, State University Plaza, Albany, New York 12246.

2. At all material times herein, the respondent operated a research facility subject to and registered under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent State University of New York shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156 and the standards and regulations issued thereunder, 9 CFR §§ 1.1-3.142 and shall cease and desist from any violation thereof. In addition to complying with all other requirements of the Act, regulations and standards, respondent shall within ten (10) days of the effective date of this decision bring its animal care facility into compliance with the standards for the proper construction and maintenance of interior surfaces under 9 CFR § 3.2 and the proper storage of food and bedding under 9 CFR § 3.1.

Respondent shall establish and maintain a training program to assure that all individuals involved in the care and handling of animals or the maintenance of respondent's facility are given adequate training in the proper care and handling of animals and the proper maintenance and sanitation of animal care facilities as required by the Act, regulations and standards.

Respondent shall distribute a copy of this decision to all of its personnel who are responsible for the care and handling of research animals and the maintenance and sanitation of animal care facilities subject to the Act. Respondent shall maintain an ongoing information program to insure that such personnel are aware of the provisions of this decision.

Respondent shall, within thirty (30) days after the effective date of this order, send the Area Veterinarian in Charge a written report setting forth the steps it has taken to implement the requirements of this order.

Respondent is assessed a civil penalty of $1,500.00 which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: LOGAN COLLEGE OF CHIROPRACTIC, AWA Docket No. 345. Decided May 23, 1986.

Research facility—failure to file annual report—Civil Penalty—Consent.

Robert Frisby, for complainant.
Michael P. Casey, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that the respondent violated the Act and the regulations issued pursuant to the Act, 9 CFR §§ 1.1–2.130. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in the complaint and specifically admits that the Secretary has jurisdiction in this matter, admits that it failed to file its annual report for 1984 fiscal year by December 1, 1984, but did file the report on December 14, 1984, denies the remaining allegations in the complaint, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Logan College of Chiropractic is a Missouri corporation and its mailing address is 1851 Schoettler Road, Chesterfield, Missouri 63017.

2. At all times material herein, respondent was registered under the Act as a Research Facility (Registration No. 43–32).

3. Respondent failed to file its annual report for the 1984 fiscal year by December 1, 1984, but did file the report on December 14, 1984.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Logan College of Chiropractic shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from failing to file annual reports in a timely manner with the APHIS as required by the Act and the regulations.

Respondent is assessed a civil penalty of $100 payable by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: JIM and MARY FOSTER, d/b/a OAK LEAF KENNELS, AWA Docket No. 371. Decided May 30, 1986.

Dealers—engaged in business without a license—improper storage of food—improper sanitization of facilities—overcrowding—Civil Penalty—Consent.

Howard Haas, Mktg. Div., for complainant.
Mark S. Wasinger, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

The respondents Jim and Mary Foster are individuals doing business as Oak Leaf Kennels at Rt. 1, Montgomery City, MO 63361. The respondents, at all times material herein, were dealers within the meaning of the Act. The respondents, at all times material herein, were not licensed under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Operating in any capacity for which a license is required under the Animal Welfare Act and the regulations issued thereunder without having applied for and obtained a license as required by the Act and the regulations;

(2) Failing to store food in containers for protection against infestation or contamination as required by 9 CFR § 3.1(c);

(3) Failing to ensure that the indoor building surfaces are impervious to moisture and in condition to be readily sanitized as required by 9 CFR § 3.2(d);

(4) Failing to ensure that dogs are not overcrowded in outside cages as required by 9 CFR § 3.4(b)(2); and

(5) Failing to remove excreta from wood slat floors in outside cages, remove trash accumulations, treat wood in outside cages in order to permit adequate cleaning and sanitation, and adequately clean and sanitize indoor wood cages as required by 9 CFR § 3.7.

Respondents are jointly and severally assessed a civil penalty of $250.00 which shall be paid by a certified check or money order payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: RICK STEPHENS, AWA Docket No. 382. Decided June 3, 1986.

Dealer—engaged in business without a license—Civil Penalty--Consent.

Howard Haas, Mktg. Div., for complainant.
Robert Evenson, Pineville, MO, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondent willfully violated provisions of the Act and of the regulations and standards issued thereunder (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

Respondent Rick Stephens is an individual whose address is Route 1, Rocky Comfort, Missouri. Respondent, at all times material herein, was a dealer within the meaning of the Act. Respondent, at all times material herein, was not licensed.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, his agents and employees, shall cease and desist from violating the provisions of the Animal Welfare Act and the regulations and standards issued thereunder.

Respondent is prohibited for a period of five (5) years from engaging in business in any capacity for which a license is required under the Act. Respondent may apply for a license five years from the effective date of this decision.

Respondent is assessed a civil penalty of $1,000.00 of which $300.00 shall be paid by certified check or money order made payable to the Treasurer of the United States. The remaining $700.00 is hereby suspended and shall be held in abeyance, provided the respondent does not violate any of the provisions of this order within five (5) years from the date this order become effective.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: CITY OF NEW BEDFORD, MASSACHUSETTS, AWA Docket No. 386. Decided June 6, 1986.

Exhibitor—improper housing facilities—Civil Penalty—Consent.

Bradley Flynn, Mktg. Div., for complainant.
Rosalind Poll Brooker, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. The City of New Bedford is a municipality in the State of Massachusetts.

2. The respondent, at all times material herein, was owner and operator of Buttonwood Park Zoo, Post Office Box C–804, New Bedford, Massachusetts 02740.

3. The respondent, at all times material herein, was a licensed exhibitor under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, its agents and employees, directly or indirectly through any corporation, trust, or device whatsoever, shall cease and desist from:

1. Failing to house animals in enclosures that are structurally sound and constructed of material of such strength as appropriate for the animal involved;

2. Failing to otherwise maintain its facilities in compliance with section 3.125 of the standards (9. CFR § 3.125 (1986));

3. Failing to maintain any enclosure for marine mammals in a structurally sound condition;

4. Failing to otherwise maintain its marine mammal facilities in compliance with section 3.101 of the standards (9. CFR § 3.101 (1986)).

Respondent is hereby assessed a civil penalty of $1,000. Payment of such penalty is suspended, provided that, within one year of the date this order is entered, respondent spends in addition to the funds already allocated to Buttonwood Park Zoo, $1,000 on the maintenance and upgrading of animal enclosures at Buttonwood Park Zoo. As evidence that such condition is performed, within one year of the date of this order entered, respondent will prepare a report detailing both appropriated and actual expenditures devoted to the maintenance and upgrade of such animal enclosures. Respondent will send this report to the Animal and Plant Health Inspection Service, 424 Trapelo Road, Building 133, Waltham, Massachusetts 02154.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: HENRY HAMPTON, d/b/a HAMPTON ENTERPRISE, AWA Docket No. 372. Decided June 18, 1986.

Dealer—Civil Penalty—Suspension—Consent.

Robert Frisby, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1–3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations contained in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Henry Hampton is an individual doing business as Hampton Enterprise and his address is Route 1, Box 208A, Mount Ulla, North Carolina 28125.

B. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (No. 55–B–69) issued pursuant to the Act.

CONCLUSION

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Henry Hampton shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131–2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1–3.142, and shall cease and desist from any violation thereof.

Respondent is assessed a civil penalty of $1,000 to be paid by certified check or money order and made payable to the Treasurer of the United States.

Respondent's license is hereby suspended for fourteen (14) days and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: DONALD D. FOSTER, d/b/a WHITE GATE KENNELS, AWA Docket No. 375. Decided June 18, 1986.

Dealer—Civil Penalty—Suspension—Consent.

Robert Frisby, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by John Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Donald D. Foster is an individual doing business as White Gate Kennels and his mailing address is Route 3, Box 201A, Macon, Missouri 63552.

2. The respondent, at all times material herein, operated as a dealer within the meaning of the Act and held a Class B license (No. 43-HS) issued pursuant to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Donald D. Foster shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof.

Respondent is hereby assessed a civil penalty of $5,000. Of this amount, $3,000 is to be paid by certified check or money order made payable to the Treasurer of the United States. The remaining $2,000 is suspended provided the respondent complies with the Act and the regulations and standards issued thereunder. If, after notice and hearing, the respondent is found to have violated the Act or the regulations and standards issued thereunder, this $2,000 shall become due and payable by certified check or money order made payable to the Treasurer of the United States.

Respondent's license is suspended for thirty (30) days and thereafater until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: JONI BOOTH, AWA Docket No. 289. Decided May 29, 1986.

Robert Frisby, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

ORDER TO DISMISS

Complainant has moved to dismiss this case.

In support of complainant's motion, complainant has stated that the respondent has surrendered her dealer's license (No. 43 LLT) and no longer operates as a dealer under the Animal Welfare Act.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is ordered that this complaint be dismissed.

In re: GARY QUAS, d/b/a BAMBI PARK, AWA Docket No. 379. Decided June 25, 1986.

Howard Haas, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

ORDER TO DISMISS

Complainant has moved to dismiss this case.

In support of this motion, complainant has stated that respondent is no longer operating the business which gave rise to the charges in this case and has surrendered his license. Under these circumstances the complainant believes that further formal proceedings are unnecessary to achieve the purposes of the Act.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is hereby ordered that this complaint be dismissed without prejudice.

In re: GREEN LAKE MEATS, INC., FMIA Docket No. 89. Decided June 30, 1986.

Harold Reuben, Reg. Div., for complainant.
James L. Quarles, III, Washington, DC, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown in complainant's Motion for Dismissal of Complaint, the complaint that was filed herein against Green Lake Meats, Inc., on May 14, 1985, is herewith dismissed.

DISCIPLINARY DECISIONS

In re: JEFFREY M. RILEY and JOE P. RILEY, P&S Docket No. 6553. Decided May 5, 1986.

Market agency—dealer—misrepresentation of weights—false documentation—faulty scale—Civil Penalty—Prohibited from engaging in business—Consent.

Jory Hochberg, for complainant.
Ernest Van Hooser, Kansas City, MO, for respondent.

Decision by Edward McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Order to Show Cause filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Order to Show Cause and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jeffrey M. Riley and Joe P. Riley, hereinafter referred to as the respondents, are partners doing business as Lexington Sales Company. Respondents' principal place of business is located at Lexington, Tennessee, and their business mailing address is P. O. Box 393, Lexington, Tennessee 38351.

2. The respondents, at all times material herein, were:

(a) Engaged in the business of conducting and operating the Lexington Sales Company stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock on a commission basis at the stockyard;

(c) Engaged in the business of a dealer buying and selling livestock in commerce for their own account; and

(d) Dealers and market agencies within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

(e) Not registered with the Secretary of Agriculture in any capacity subject to the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Jeffrey M. Riley and Joe P. Riley, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Weighing livestock at other than true and correct weights;

2. Preparing or issuing scale tickets, buyers' invoices, accounts of purchase, or any other documents evidencing the purchase or sale of livestock, which show false or incorrect weights for such livestock;

3. Paying the owners or sellers of livestock on the basis of false or incorrect weights; and

4. Failing to maintain and operate their livestock scale in strict conformity with the requirements of section 201.73-1 (INSTRUCTIONS FOR WEIGHING LIVESTOCK) of the regulations (9 CFR § 201.73-1).

Respondent Jeffrey M. Riley is prohibited from engaging in business and operating subject to the Act as a dealer, market agency or stockyard owner for a period of 90 days, and during such time may not register with the Secretary of Agriculture as a market agency or a dealer under the Act.

Respondent Joe P. Riley is prohibited from engaging in business and operating subject to the Act as a dealer, market agency or stockyard owner for a period of 60 days and during such time may not register with the Secretary of Agriculture as a market agency or a dealer under the Act.

Respondents are jointly and severally assessed a civil penalty in the amount of Four Thousand Dollars ($4,000.00).

The provisions of this order shall become effective May 1, 1986.

Copies of this decision shall be served on the parties.

In re: LAWRENCE KOEBKE, P&S Docket No. 6603. Decided March 27, 1986.

Dealer—engaging in business without proper bonding—failure to pay full purchase price—Default.

Thomas Heinz, P&S DIV., OGC, for complainant.
Respondent, *pro se*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Lawrence Koebke, hereinafter referred to as the respondent, is an individual whose business mailing address is R.R. 1, Traer, Iowa 50675.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent was notified by certified mail on March 13, 1985, that the $60,000.00 surety bond maintained to secure the perform-

ance of his livestock obligations under the Act was being terminated on June 4, 1985. Respondent was further notified on April 22, 1985, that it was necessary for him to file an increased bond in the amount of $65,000.00 and that if he continued his livestock operations under the Act without adequate bond or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account without having and maintaining an adequate bond or its equivalent as required by the Act and the regulations.

3. (a) The respondent, on or about the dates and in the transactions set forth in paragraph III of the complaint, in connection with his operations as a dealer subject to the Act, purchased livestock in commerce and failed to pay, when due, the full purchase price of such livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Koebke, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations; and

2. Failing to pay, when due, for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of twenty-eight (28) days and thereafter until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the twenty-eight (28) day period.

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR § 1.130 *et seq.*).

[Decision and Order became final on May 5, 1986.—Ed.]

In re: RANCHERS AND FARMERS LIVESTOCK AUCTION, INC., and L. KIRBY POWELL, P&S Docket No. 6692. Decided May 5, 1986.

Market agency—dealer—insolvency—custodial account—misuse of funds—suspension—prohibited from operating as dealer or market agency—Consent.

Jory Hochberg, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent named herein does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jursidictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ranchers and Farmers Livestock Auction, Inc., hereinafter referred to as the corporate respondent, is a corporation with its principal place of business located at Burlington, Colorado. Its business mailing address is Box 635, Burlington, Colorado 80807.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Ranchers and Farmers Livestock Auction, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis, and as a dealer to buy and sell livestock for its own account.

3. L. Kirby Powell, hereinafter referred to as respondent Powell, is an individual whose business mailing address is Box 635, Burlington, Colorado 80807.

4. Respondent Powell is, and at all times material herein was:

(a) President, manager and a substantial stockholder of the corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent;

(c) Engaged in the business of conducting and operating the stockyard;

(d) Engaged in the business of selling livestock on a commission basis at the stockyard and buying and selling livestock in commerce for his own account; and

(e) A market agency and a dealer, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, and employees, successors and assigns, and respondent Powell, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from:

1. Operating as a dealer or market agency while their current liabilities exceed its current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondents as compensation for services rendered or for other lawful marketing charges;

4. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock; and

5. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

Respondent Ranchers and Farmers Livestock Auction, Inc., is suspended as a registrant under the Act for a period of twenty one (21) days and thereafter until it demonstrates that its current liabilities do not exceed its current assets. When respondent demonstrates that its current liabilities do not exceed its current assets, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the twenty one (21) day period of suspension. Respondents have demonstrated that the deficit in their custodial account has now been eliminated.

Respondent Powell is prohibited from operating as a dealer or a market agency subject to the Act, or from being employed by a dealer or market agency subject to the Act, for a period of 21 days.

The provisions of this order shall become effective May 4, 1986.

Copies of this decision shall be served upon the parties.

In re: CORN STATE MEAT COMPANY, INC.; TERRANCE P. (TERRY) PRINCE, JR.; and JAMES L. WIGGS. P&S Docket No. 6427. Decided May 8, 1986.

Packer—Commercial bribery—Civil penalty.

The Judicial Officer reversed Judge McGrail's civil penalty determination, and increased the civil penalty assessed jointly and severally against respondents from $25,000 to $50,000. The ALJ's cease and desist order was affirmed, as were the findings that respondents engaged in commercial bribery from 1979 to 1981, primarily by splitting their profits on resale with three employees of two firms from which respondents bought meat products. Responsible hearsay is admissible in USDA proceedings. Where there are closely held corporations, the disciplinary order can be made applicable to the officers and stockholders who operated the corporation. Commercial bribery violates the P&S Act. Complainant need only prevail by a preponderance of the evidence. The failure of the individual respondents to testify gives rise to the inference that their testimony would have been adverse to their position.

Proof of injury or likelihood of injury is not required in commercial bribery cases. Severe sanction policy explained. The *Bosma* decision, requiring the Department to produce evidence that the penalty will not affect the person's ability to continue to do business, is erroneous, but, in any event, that issue is irrelevant here since respondent corporation is already out of business. In addition, commercial bribery is so inimical to the meat packing industry that a civil penalty for commercial bribery adversely affecting the person's ability to continue in business would be in the public interest.

Thomas C. Heinz, for complainant.
Timothy W. Shuminsky, Sioux City, Iowa, for respondents Corn State and Terrance P. (Terry) Prince, Jr.
Gary E. Wenell, Sioux City, Iowa, for respondent James L. Wiggs.
Edward H. McGrail, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on February 10, 1986, by Administrative Law Judge Edward H. McGrail (ALJ) in which he found that respondents engaged in "commercial bribery" from 1979 to 1981, primarily by splitting their profits on resale with three employees of two firms from which respondents bought meat products. The ALJ ordered respondents to cease and desist from such activities, and respondents were assessed, jointly and severally, a $25,000 civil penalty.

On March 13, 1986, complainant, seeking a $50,000 civil penalty, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On April 4, 1986, respondent Wiggs filed a response in the nature of a cross-appeal, asking that the complaint be dismissed or the penalty suspended. On April 24, 1986, the case was referred to the Judicial Officer for decision.

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* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

Based upon a careful consideration of the record, the ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with changes too minor to itemize, except that the civil penalty is increased to $50,000, and the last two sentences of the discussion of page 28 headed "Sanction" (relating to the $25,000 civil penalty) are deleted. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter the "Act", instituted by a complaint and notice of hearing filed on October 10, 1984, by the Packers and Stockyards Administration hereinafter "the complainant". The complaint alleged that the corporate respondent, under the direction, management and control of the individual respondents, made payments to three employees of two meat packing companies for the purpose of inducing and influencing these employees to negotiate purchase and sale contracts favoring the corporate respondent, such payments being made without the knowledge or consent of the companies by whom they were employed. By reason of these facts, the respondents were alleged to have violated sections 202(a) and 202(b) of the Act (7 U.S.C. §§ 192(a), 192(b)).

Respondents filed an answer admitting that the individual respondents were owners, officers and managers of the corporate respondent, that the corporate respondent made some payments to the employees named in the complaint but denying that these payments were made for the purpose of inducing and influencing these employees to negotiate purchase and sale contracts favoring the corporate respondent, and further denying that the payments were made without the knowledge or consent of the employers. Respondents alleged they have not knowingly or intentionally violated the Act.

An oral hearing was held before the undersigned on July 16 and 17, 1985, in Sioux City, Iowa. Respondent Corn State and respondent Terrance P. (Terry) Prince, Jr., were represented by Timothy W. Shuminsky, Esquire, Sioux City, Iowa, and respondent James L. Wiggs, was represented by Gary Wenell, Esquire, Sioux City, Iowa. Complainant was represented by Thomas C. Heinz, Esquire, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. Four witnesses were called to testify by Complainant. Complainant introduced eight exhibits into evidence. Respondents proffered no witnesses or documentary evidence. The parties were

granted leave to file simultaneous briefs on or before August 26, 1985. Such briefs have been filed and duly considered.

STATEMENT OF LAW

Sections 202(a) and 202(b) of the Packers and Stockyards Act (7 U.S.C. § 192(a), 192(b)) provide:

> It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

RESPONDENT COMPANY, AND RELATED COMPANIES

Prior to any discussion of the record, an understanding of the Respondent company, and related companies is necessary.

Corn State Meat Company, Inc. (Corn State)

At all times material herein was engaged in the business of marketing meats, meat food products, or livestock products in unmanufactured form acting as a wholesale broker, dealer or distributor, and hence was a packer within the meaning of the Act. Its place of business was located at 916 Grandview Boulevard, Sioux City, Iowa 51101. (Answer, paragraphs I., 1.(a) and 1.(b)(1)). It occupied approximately 1,000 feet of space at this location which included a lobby area where the bookkeeper was located, three offices and some closet space. Corn State is no longer engaged in business (Tr. 130).[1]

Respondent Prince was the president, vice-president, an owner, manager, director and controller of Corn State. Respondent Wiggs was secretary, treasurer, an owner, manager, director and controller of Corn State (Answer, paragraphs I., 2.(a)(b), I., 3.(a)(b)).

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[1] Reference to exhibits are designated "CX" to indicate those submitted by complainant. No exhibits were offered by respondents. References to the hearing transcript are designated "Tr.".

P. & P. Trading Co., Inc. (P&P)

At all times material here was a brokerage house that brokered meat products between dealers and suppliers (Tr. 35). Respondents Wiggs and Prince were the owners and operators of P&P. As of January 30, 1979, it occupied the same office facilities as did Corn State, 916 Grandview Boulevard, Sioux City, Iowa, 51101 and had the same telephone number (CX 5, p. 5; Tr. 39–41, 130).

Country Products, Ltd. (Country Products)

At all times material here was a brokerage house that brokered meat products between dealers and suppliers. The articles of incorporation show that Respondents Wiggs and Prince, and Lee Schroeder were its directors and stockholders. Mr. Schroeder was its sole employee. It, too, occupied the same office facilities as did Corn State and P&P, 916 Grandview Boulevard, Sioux City, Iowa 51101, and had the same telephone number (CX–6, p. 19; Tr. 40–41, 130, 144, 160).

Farmland Foods, Inc. (Farmland) is a packer presently operating plants in Iowa and Nebraska. It is a cooperative owned by its member ranchers and farmers and maintains its headquarters in Kansas City, Missouri (Tr. 61).

Iowa Beef Processors, Inc. (IBP) is a packer with a multi-plant operation headquartered in Dakota City, Nebraska (Tr. 112–113).

DISCUSSION AND CONCLUSIONS

Mr. Merle Paulsen has been employed by the Marketing and Practices Branch, Packers and Stockyards Administration, U.S. Department of Agriculture (P&S) as a marketing specialist and as an auditor for approximately six years. Prior to that he was employed as an auditor by the State of Nebraska, and as an accountant in private industry. His present duties include investigation of trade practice violations under the Packers and Stockyards Act. In the course of his duties he examined the records of Corn State Meat Co., Inc. (Corn State) to determine if that company or any of its employees had committed any such trade practice violations (Tr. 15–16, 127)

His examination of the records of Corn State, which also included records of P&P and Country Products, disclosed checks, general ledger sheets and invoices which contained entries and notes regarding payments made by Corn State to the following individuals:

Robert (Bob) Ingram

Thirteen checks drawn on the account of Corn State between March 14, 1979 and March 6, 1981, were made payable to Robert or Bob Ingram, and endorsed by him. An additional check, number 807, dated October 9, 1979, was made payable to (sic) "R. H. B. for Bob Ingram," in the amount of $2,938.90. It was endorsed by Rufenacht, Bromagen and Hertz, West Point, NE (R.B.H.), a commodity broker, and deposited to its "Customer Segregated Funds Account." Three other checks dated February 12, 1980, April 17, 1980, May 12, 1980 and numbered 1038, 1148, and 1177, respectively, were made payable to the Northwestern National Bank. Two of the checks, numbers 1038 and 1177, were not endorsed while the third of these checks, number 1148, was endorsed by "Ellen Maximona." The majority of the seventeen checks were signed by Respondent Terry Prince and two were signed by Respondent James Wiggs. They totalled $43,012.15 (CX-1; Tr. 17-18, 39, 127-128, 131, 133, 151).

Copies of the general ledger sheets obtained from Corn State, Account No. 74, "Consultant Fees-Brokerage Fees," reflected Robert Ingram as recipient of not only the monies from the thirteen checks endorsed by him, but also of the monies represented by check No. 807 made payable to "R. H. B. for Bob Ingram" and the three checks, nos. 1038, 1148 and 1177, made payable to the Northwestern National Bank (CX-4, p. 1, line 27; p.2, lines 12, 17, 21; Tr. 19-20, 39, 41-43). Each of the checks tabulated by Mr. Paulsen on CX-1, have a corresponding entry on CX-4 by date, name and amount.

Mr. Paulsen testified that he had talked to the bookkeeper at Corn State, Ellen Maximona, who advised him that she cashed all three of the above checks made payable to Northwestern National Bank and turned the money over to Respondents Prince and Wiggs (Tr. 133-134).

Mr. Paulsen also obtained invoices from the records of Corn State showing sales made to it by Farmland during the period January 3, 1979-July 7, 1980 which were handled through P&P and resold by Corn State. It appears that the procedure followed by the companies was to handle the purchases from Farmland through P&P and bill the final purchaser on Corn State invoices (CX-5, p. 97). Although twenty-three transactions were tabulated by

Mr. Paulsen, he could not determine whether monies from four of these transactions were actually paid to Robert Ingram.[2] Additionally, the undersigned noted two other transactions amounting to $1,000.00 where it could not be determined whether monies were actually paid to Robert Ingram.[3] Eliminating these six transactions, the total amount of money designated for Robert Ingram by Corn State over this period of approximately one and a half years was $16,181.15 (CX-5, p. 1).

The tabulation for Robert Ingram, CX-5, p. 1, is an index to the transactions which follow on pp. 2-102. For example, CX-5, p. 1, line 1, lists Farmland invoice number 99100 showing a sale to Corn State amounting to $24,090.55. CX-5, p. 2, shows the actual invoice from Farmland, while CX-5, pp. 3-4, show the transaction being handled by P&P, and CX-5, p. 5, shows the final billing by Corn State. It is noted on CX-5, p. 4, that the amount of $500.00 is designated "to Ingram." Similarly, CX-5, p. 1, line 2, lists Farmland invoice number 28030, showing a sale to Corn State amounting to $6,800.00. CX-5, p. 6, shows the actual invoice, while CX-5 pp. 7-8, 10 shows the transaction being handled by P&P, and CX-5, p. 9 shows the eventual billing by Corn State. It is noted on CX-5, pp. 10-11, that $200.00 is designated for "Ingram." Other notations are also found on these invoices, e.g., "4633 Ingram-⅓ of net profit", and "⅓ to Ingram-$3,498.35" (CX-5, pp. 99-100); "Pd. Ing. 1 1d in May" (CX-5, p. 93). In following the above sequence, each line of the tabulation on CX-5 may be traced to the actual invoices and billing on pp. 2-102. Each transaction, with the exceptions of the six transactions, *supra*, contain notations of the various amounts paid to "Ingram" over this period.[4] It is also noted that the invoices of Corn State and P&P are signed alternately by Respondents Wiggs and Prince (CX-5, pp. 9, 41, 46, 48, 54, 55, 63, 68, 72, 81, 85, 89, 94).

Joseph (Joe) T. Sixta

Five checks drawn on the account of Corn State between August 29, 1980 and December 9, 1980, were made payable to, and endorsed by, Joe Sixta. However, one of these

[2] CX-5, p. 1, lines 4, 6, 7, 8 (pp. 17-22; pp. 26-29; pp. 31, 33-36; pp. 32, 37-38).

[3] CX-5, p. 1, lines 16, 19 (pp. 66-69; pp. 79-83).

[4] CX-5, pp. 15, 23, 42, 48, 50, 54, 59, 64, 72, 77, 90, 96, 100.

checks, no. 1460, dated October 24, 1980, was endorsed by Joe Sixta "For Deposit of Lee Schroeder Only". A sixth check, number 1245, dated July 5, 1980, was made payable to, and endorsed by, Lee Schroeder. Three additional checks, numbers 1150, 1199, and 1227, dated April 2, 1980, May 27, 1980, and June 10, 1980 respectively, were made payable to the Northwestern National Bank and were also endorsed by Lee Schroeder. Six of the above nine checks were issued by Respondent Prince, and three were issued by Respondent Wiggs. The checks amounted to a total of $4,207.59 (CX-2).

As with Mr. Ingram, *supra*, Mr. Paulsen testified that each of these checks can be traced to Corn State's general ledger sheets, account number 74, *supra* (CX-4). Notations on the general ledger sheets show that although check numbers 1150, 1199 and 1227 were made payable to the Northwestern National Bank and endorsed by Lee Schroeder, the recipient of the monies from these three checks, $90.00, $100.00 and $100.00 respectively, was Joe Sixta (CX-4, p. 2, lines 18, 23, 24). The general ledger sheets also show that the monies from check number 1245 in the amount of $250.00, made payable to, and endorsed by, Lee Schroeder, and check number 1460 in the amount of $1,428.82, made payable to Joe Sixta and endorsed for deposit by Lee Schroeder, were paid to Joe Sixta (CX-4, p. 2, line 27, p. 3, line 21).

It is noted here that P&S Investigator Skram, *infra*, testified that Mr. Lee Schroeder advised him that he cashed the above checks made out to Northwestern National Bank (numbers 1150, 1199, 1227), and the one made payable to himself (number 1245), and gave the cash to Joe Sixta (Tr. 147-148).

Mr. Paulsen obtained copies of invoices from the records of Corn State which show five sales of products to Corn State by IBP, as well as two purchases from Corn State by IBP. The aggregate of monies designated for Joseph Sixta from the transactions amounts to $2,941.88 (CX-6, p. 1).

The tabulation for Joseph Sixta, CX-6, p. 1, is an index to each of the individual invoices found in CX-6, pp. 2-23. For example, CX-6, p. 1, line 1, lists IBP invoice number 44J04003A, showing a sale to Corn State in the amount of $7,998.00. CX-6, p. 2, shows the actual IBP invoice for this

transaction, while CX-6, p. 3, shows the Corn State invoice for the resale of these products. A notation on this Corn State invoice shows that a payment of $274.93 was designated for "Sixta". Similarly, CX-6, p. 1, line 2, lists IBP invoice number 40J21008B showing a sale to Corn State in the amount of $23,760.00. CX-6, p. 4 shows the actual IBP invoice for this transaction while CX-6, p. 5, shows the Corn State invoice for the resale of these products. A notation on this Corn State invoice shows that a payment of $272.25 was designated for "Sixta". Additionally, CX-6, p. 1, line 3, lists IBP invoice number 40J28009A which, after deduction of an overbilling, amounted to $23,940.00. CX-6, p. 6, shows the overbilling on actual invoices of IBP and Corn State, while CX-6, p. 7, shows the invoice for the resale of these products by Corn State. A notation on this Corn State invoice shows that $745.88 is designated for "Sixta". The total monies designated for "Sixta" on CX-6, pp. 3, 5, 7, amounts to $1,293.06. The two checks issued by Corn State to Joe Sixta, numbers 1350 and 1395 in the amounts of $200.00 and $1,093.06 (CX-6, pp. 8, 9), respectively, total the exact amount designated for "Sixta" on CX-6, pp. 3, 5, 7, $1,293.06. These checks are also tabulated on CX-2, p. 1 and copies included in CX-2, pp. 6, 7. They are also recorded on Corn State's general ledger sheet, account number 74 (CX-4, p. 3, lines 10, 14). It is noted here that Respondent Wiggs issued check number 1350, and Respondent Prince issued check number 1395. Both checks were endorsed by "Joe Sixta".

Finally, there are two other transactions to be noted which trace payments to Joe Sixta through invoices of IBP, Corn State and checks issued by Corn State. The tabulation, CX-6, p. 1, line 4, lists IBP invoice number 40K11012A showing a sale to Corn State in the amount of $23,940.00. CX-6, p. 10, shows the actual IBP invoice while CX-6, p. 11, shows the Corn State invoice for the resale of these products. A notation on this Corn State invoice shows that a payment of $1,428.82 was designated for "Sixta". CX-6, p. 12, is a copy of a Corn State check, number 1460, issued to Joe Sixta by Respondent Prince in the amount of $1,428.82. This check is endorsed by Joe Sixta "For Deposit of Lee Schroeder Only". This is a copy of the same check noted above, no. 1460, and can also be traced to Corn State's account number 74 (CX-2, p. 8; CX-4, p. 3, line 21).

The second of these transactions is a purchase of products by IBP from Corn State. CX-6, p. 1, line 7, lists IBP purchase order number P.O. 95928-S in the amount of $4,385.55. CX-6, p. 6, is a copy of this purchase order showing the IBP agent for the purchase as "Joseph T. Sixta". In this instance, the sale to IBP was initiated through Country Products, Ltd., by Lee Schroeder (CX-6, p. 22). A notation on the Country Products invoice designated "$90.00—Pd.—consultant fee". Check number 1150 in the amount of $90.00, *supra*, was issued by Respondent Prince on the account of Corn State and made payable to Northwestern Bank. As noted previously, it was endorsed and cashed by Lee Schroeder and the money turned over to Joe Sixta (CX-6, p. 23; CX-2, p. 1,2). This check is traceable to Corn State's account number 74, wherein the amount of the check dated April 21, 1980, is designated for "Sixta" (CX-4, p. 2, line 18).

Other notations also appear on Corn State and P&P invoices, e.g., Corn State invoice number 4810 contains the notation "figure Sixta" (CX-6, p. 14). P&P's invoice for the same transaction contains the notation "Sixta gets cut—do not [know] how much until profit figured" (CX-6, p. 16).

Donald (Don) D. Erickson

Three checks drawn on the account of Corn State between August 20, 1980 and October 10, 1980, were made payable to the Northwestern National Bank, numbers 1333, 1356 and 1442. The first check, number 1330, was endorsed by "Bobbie Maximona". The remaining two showed no endorsement. The total of the three checks amounted to $2,500.00 and were issued by Respondent Prince (CX-3).

Mr. Paulsen testified that these checks can also be traced to the general ledger sheets, account number 74, *supra* (CX-4). Although these checks were made out to the Northwestern National Bank, the general ledger sheets show that these monies, $1,000.00, $1,000.00 and $500.00, respectively, were paid to Donald Erickson (CX-4, p. 3, lines 7, 12, 18; Tr. 133-134). Mr. Paulsen further testified that Ellen "Bobbie" Maximona was the office manager and bookkeeper at the Corn State office location.

Mr. Joseph E. Skram has been employed by P&S, USDA, since 1978, first as a Marketing Specialist and for the last four years as a Packer and Poultry Specialist. Prior to 1979, he was a consultant to

several meat packers. He participated with Mr. Paulsen in the investigation of this matter. During the course of the investigation he interviewed Mr. Lee Schroeder who advised him he was an employee of Corn State, a director, an organizer and sole employee of Country Products, but that he had no association with P&P. During the course of the interview, Mr. Schroeder identified three Corn State checks made payable to Northwestern National Bank, and endorsed by him, numbers 1150, 1199, 1227, and one Corn State check made payable to, and endorsed by Lee Schroeder, number 1245, as being checks he cashed and later turned the monies from these checks over to Joe Sixta (CX-2, pp. 2-5; Tr. 143-148, 154-160).

Mr. Skram testified that he also interviewed Ms. "Bobbie" Maximona who he identified as the office manager and bookkeeper at the Corn State office location. Ms. Maximona identified Corn State checks made payable to Northwestern National Bank, numbers 1333, 1356 and 1442, as being checks she cashed and later turned the monies over to Respondents Wiggs and Prince. She explained that she probably endorsed check number 1333 because the bank employee did not recognize her as an employee of Corn State, and did not have to endorse the other two checks, numbers 1356 and 1442, because on those dates the teller did recognize her. She further advised Mr. Skram that the ultimate recipient of the monies from these three checks was Donald Erickson and that she noted his name in the general ledger sheet opposite the dates on which the checks were drawn (CX-3, pp. 2-3; CX-4, p. 3, lines 7, 12, 18; Tr. 149-151, 158-159).

During the course of his investigation Mr. Skram also contacted the office of RB&H at West Point, Nebraska, and determined that they had handled some transactions for Robert Ingram (Tr. 152).

Mr. Steven J. Bernard testified he has held the position of Director of Security, IBP, Inc., Dakota City, Nebraska (IBP) since August 2, 1983. In this position he has access to personnel files of all IBP employees. These files show that Joseph Sixta was employed by IBP as manager-in-charge of variety meats and was responsible for the merchandising of all commodities, except sausage, as well as customer relations. Mr. Bernard worked with Mr. Sixta for a short period of time before Mr. Sixta was terminated from IBP (Tr. 86-87, 94, 114).

Over the years, IBP has had a "Conflict of Interest" policy which was substantially the same as the present one, except that the current one is a little more in depth. The current policy was revised on November 11, 1982, and circulated on January 26, 1983. Personnel files of IBP show that Mr. Sixta had signed a copy of IBP's con-

best copy available

flict of interest policy statement on March 19, 1979, June 28, 1980, and April 2, 1982. This policy prohibits employees from engaging in any activities which could conflict with their duties to IBP, and specifically ". . . prohibits employees from accepting any gifts, loans or other favors from business contacts," as well as, ". . . any activity which might place an employee of IBP under any obligation, or might improperly influence his business judgment, to an outside firm or person who might reasonably expect at a future date to benefit by that obligation." Violation of such policy could result in appropriate disciplinary action, including discharge (CX-8; Tr. 114, 120-123).

Mr. Bernard, together with two other officials of IBP, the executive vice-president and a vice-president who was also legal counsel, were present on the afternoon of October 3, 1983, when Mr. Sixta was questioned by investigators of the Marketing Practices Branch, Packers and Stockyards Administration, United States Department of Agriculture (P&S), Messrs. Merle Paulsen and Joseph E. Skram, concerning alleged improprieties in Mr. Sixta's dealings with the Respondents. Mr. Paulsen presented certain checks to Mr. Sixta and requested an explanation as to why he had received them. As Mr. Bernard recalled, Mr. Sixta acknowledged his signature as the endorser on the checks but was vague in his recollection as to how he happened to receive the monies represented by the checks (Tr. 95-96, 98-99, 112).

Subsequent to this meeting with the P&S investigators, Mr. Sixta met alone with Mr. Bernard and the other two IBP officials. They advised Mr. Sixta that if such allegations were true IBP could not tolerate them since his actions violated IBP's conflict of interest policy. Mr. Sixta finally admitted that one of the checks for $1,000 was an impropriety on his part and did violate IBP's conflict of interest policy. He acknowledged he had endorsed another check for $600.00 which had been issued by Respondent Terry Prince. However, Mr. Sixta advised them that he did not believe the total amount of money Mr. Paulsen alleged he received, $4,882.00, was quite as much as he actually received. He could not recall whether he had received any cash from the Respondents. At the end of the interview with Mr. Bernard and the other IBP officials, Mr. Sixta was discharged because of his violations of the IBP conflict of interest policy, was taken to his office to clear out his belongings, and left the premises that afternoon. Although discharged, personnel records show that Mr. Sixta was allowed to resign effective October 4, 1983 (Tr. 99-100, 107-108).

Mr. Donald Erickson was described by Mr. Bernard as an Assistant Vice President of IBP in charge of boxed beef sales, and having

been employed by IBP since approximately 1972–1973. Following the interviews and the discharge of Mr. Sixta, there was a similar meeting with Mr. Erickson at which Mr. Bernard, the same two IBP officials, and P&S investigators, Messrs. Paulsen and Skram, were present. Mr. Paulsen presented documentation from Corn State records to Mr. Erickson showing three payments Mr. Erickson received from Respondent Terry Prince, two in the amount of $1,000 each, and one in the amount of $500. Mr. Erickson stated that one of the payments for $1,000 was a loan from Respondent Prince. However, he acknowledged that as of the date of the interview, approximately 3 years later, he had not repaid the amount of the loan. As Mr. Bernard recalled, Mr. Erickson showed no further cooperation with the P&S investigators (Tr. 87, 100, 119).

When the two P&S investigators left the room, Mr. Erickson advised Mr. Bernard and the other two IBP officials that he wished to leave the employment of IBP immediately. When pressed for the circumstances surrounding the receipt of payments from Respondents, Mr. Erickson stated that the payments were considerations made to him and he realized he had violated the IBP conflict of interest policy. At this point he advised Mr. Bernard and the other two IBP officials that it would be to his best interest not to discuss the allegations further. Mr. Erickson was discharged from IBP at that meeting; however, his personnel file reflects he was permitted to resign effective October 4, 1983. This file also reflected he signed IBP's conflict of interest policy statement on November 21, 1977, June 28, 1980, and February 3, 1983. The above facts to which Mr. Bernard testified are recorded in a memorandum he drew up on October 10, 1983 (Tr. 87, 100–101, 104, 108, 113, 122–123).

Mr. David L. Poole is the Director of Personnel, Farmland Foods, Inc., Kansas City, Missouri (Farmland), which is engaged in the production and sale of meat products. Mr. Robert Ingram was employed from July 24, 1978 until June 27, 1980, as the sales manager of Farmland's beef products plant at Garden City, Kansas. Mr. Ingram was terminated when the plant closed due to its nonprofitability. Mr. Poole testified that during the period of employment of Mr. Ingram, Farmland always had a conflict of interest policy pertaining to its employees. This policy was set forth in an Employee's Handbook, was updated annually and each time was brought to the attention of its employees. Essentially the policy forbade an employee from engaging in any business which is in competition with the company, and the acceptance of any gifts from any party engaged in dealings of any kind with Farmland, except those of limited value. Until the Packers and Stockyards investigators advised him of the investigation concerning Mr. Ingram, neither he

nor the President of the company were aware of Mr. Ingram receiving any monies from outside sources in regard to his position as sales manager. Nor was he aware of any other executives of the company who were. Had it been known, it would certainly have been cause for terminating his employment with Farmland (CX-9; Tr. 47-57, 65-67, 78).

Mr. W. Wayne MacDonald has held the position of Marketing Specialist, Meat Merchandising Branch, P&S, USDA, for the past seven years and prior to that held the position of Meat Grader with the USDA for approximately nine years. He was present during all of the testimony given at the hearing in this matter. Based on the record, he testified the P&S, USDA, considers the violations charged in this matter as serious since they have an anti-competitive effect on the industry and undermine the trust placed in employees buying and selling meat products, as well as consumer trust in the marketing of meats.

Because of this unwholesome effect, P&S, USDA, seeks a cease and desist order, as well as a civil penalty of fifty thousand dollars ($50,000) to be assessed jointly and severally against the respondents. P&S, USDA, believes the monetary penalty to be appropriate and necessary as it will be an effective deterrent in precluding such activities in the future, not only to the respondents involved here, but also those in similar positions in the meat industry. In reaching this conclusion Mr. MacDonald acknowledges he had not talked with anyone in the industry regarding respondents' activities, but that it was based on the record in this matter and on his long experience in the meat industry. Nor did he contact other like firms in the industry to determine whether they had been affected by the activities of the respondents (Tr. 166-174-177, 179, 186).

Some of the above evidence was received into the record over objection by respondents based on court rules and judicial proceedings thereunder, e.g., hearsay. However, as stated and ruled on in the record, and as here repeated, administrative agencies are not bound by the strict rules of procedure applicable in court proceedings. The rules of procedure adopted by the USDA for adjudicatory hearings are designed to admit all relevant, probative, and material evidence which responsible persons are accustomed to rely on unless it is unduly repetitious. This has been well established by rulings in administrative hearings before the USDA, and by the courts. *In re Corona Livestock Auction*, 36 A.D. 1285, 1311 (1977), *rev'd on other grounds sub nom. Corona Livestock* v. *U.S.D.A.*, 607 F2d 811 (9th Cir. 1979); *In re DeJong Packing Co.*, 36 A.D. 1181, 1222-1223 (1977), *aff'd sub nom. DeJong Packing Co.* v. *U.S.D.A.*, 618 F2d 1329 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980). See

also 1 Davidson, *Agricultural Law*, § 3.22 and cases cited therein at fn. 113. The object in an administrative hearing is to obtain all of the relevant facts free from any of the restrictive rules applicable to judicial proceedings. Moreover, responsible hearsay is admissible in USDA administrative proceedings. *In re American Fruit Purveyors, Inc.*, 30 A.D. 1542, 1574 (1971).

A second preliminary matter which must be addressed here is the argument by counsel for Corn State and respondent Prince that respondents Prince and Wiggs are not "packers" as defined by Section 191 of the Act (7 U.S.C. § 191), since from the record it "appears" that they are only employees of Corn State. Accepted by these respondents is the definition of "packer" found in *Hedrick* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025 (E.D. Pa. 1978), i.e., the company must be closely held ". . . and all officers, jobs, decisions and actions taken are by the same person or persons, . . ." (Shuminsky Brief, pp. 4-5). It is noted here that: 1) respondent's answer admits respondent Prince was the president, vice president, stockholder and manager of Corn State, and that respondent Wiggs was the secretary, treasurer, stockholder and manager of Corn State (Ans. Para I 2(b), 3(b)); 2) respondent Wiggs' Brief acknowledges Terry Prince and James L. Wiggs are Corn State's two owners (Wenell Brief, p. 1) and; 3) unrefuted testimony of record shows respondents Prince and Wiggs as officers and owners (Wiggs-25%, Prince-75%), controlling the operations of Corn State (Tr. 40, 182; see also fn. 4, *supra*). Thus, this argument is totally without merit. It is noted here that Hendrick also stands for the proposition that the corporate device cannot immunize individual defendants from liability once it is found that they are "persons" and "packers" under the P&S Act. *Ibid.* at 1031.

There is no doubt from the record established here that respondents Prince and Wiggs not only owned and controlled Corn State but also P&P, and that they, together with Lee Schroeder, were organizers of Country Products. Further, that meat products were purchased in commerce from Farmland and IBP, as well as sold to IBP. There is also no doubt that Messrs. Ingram, Sixta and Erickson were not brokers or consultants, nor did they perform any legitimate services for Corn State for which they would be entitled to a commission or brokerage fee from Corn State, and certainly not a share of the profit on the resale by Corn State of meat products purchased from Farmland and IBP. It is clear from the records obtained from Corn State that payments were made to Messrs. Ingram, Sixta and Erickson by the respondents, such payments being made in the form of checks and cash to Messrs. Ingram and Sixta, and cash to Mr. Erickson—the cash originating in the form

of checks issued to Northwestern National Bank and endorsed and cashed by Lee Schroeder or Ms. Maximona, employees of Corn State. All checks were drawn on the account of Corn State and signed alternately by respondents Prince and Wiggs. The checks made out to Northwestern National Bank can be traced to Corn State's account no. 74, "Consultant Fees—Brokerage Fees". This is corroborated by statements made to P&S investigators that these checks were cashed and the money turned over to Joe Sixta (Lee Schroeder); that money from the checks was turned over to respondents Prince and Wiggs and notations were made in the general ledger sheets, account no. 74, that the cash was eventually given to Donald Erickson (Ms. Maximona).

The record further shows that the purchases from Farmland and IBP were hand recorded first on P&P invoices but eventually billed to the ultimate customer on Corn State typed invoices, and that both sets of invoices, together with several from Country Products, were entirely obtained from the records of Corn State. Notations on the handwritten invoice copies of P&P show a pattern of payments made on the basis of a percentage of profits made by Corn State on the resale of meat products purchased from Farmland and IBP (Ingram, Sixta), or a rounded dollar amount still based on the amount of profit on each transaction with either Farmland or IBP. In the case of Robert Ingram, the record shows that he was terminated from Farmland when the plant in which he was employed was closed due to its unprofitable operation. It may well be that Mr. Ingram's activities in his dealings with Corn State may have contributed to the demise of this plant. Mr. Ingram was not interviewed by P&S investigators to determine the reason for payments to him by Corn State. However, when the evidence of payments was presented to officials of Farmland, it was their judgment that had these payments been known to Farmland, Robert Ingram would have been discharged from that company because of violation of its conflict of interest policy. As noted previously, the checks and cash which can be connected with checks issued by Corn State and paid to Robert Ingram, amounted to $43,012.15. However, while Corn State's account no. 74 records the check payments to Robert Ingram, it does not record the amounts designated for Robert Ingram found on the invoices obtained from Corn State (CX-5). Thus, considering the $16,181.15 designated for Robert Ingram on these invoices together with the above total from checks and cash, respondents Prince and Wiggs, through Corn State, paid Robert Ingram a total of $59,193.30 over the period January 31, 1979—March 6, 1981 to suborn his fiduciary obligations to Farmland.

With regard to Joseph Sixta, the record has established that the checks and cash payments which can be traced to him through Corn State's account no. 74 amounted tc $4,207.59. However, in Mr. Sixta's case, the amounts of three of the checks, nos. 1350, 1395, ($200 + $1,093.06 = $1,293.06) and no. 1460 ($1,428.82) are duplications of the amounts designated for "Sixta" on invoices obtained from Corn State's records (CX-6, p. 1) and recorded in Corn State's account no. 74 (CX-4, p. 3, lines 10, 14, 21). Thus, when the amounts of these checks are deducted from the invoice amounts designated for Joseph Sixta, and the $220 difference is added to the total amount of the checks, the overall amount paid by respondents Prince and Wiggs, through Corn State, to suborn Joseph Sixta's fiduciary obligations to IBP during the period April 21, 1980—December 9, 1980, is $4,427.59. As noted from the interviews with Joseph Sixta, he acknowledged endorsing the checks from Corn State when they were presented to him and admitted that at least one of them was an impropriety that did violate IBP's conflict of interest policy. He also acknowledged other payments from Corn State by stating he did not believe he had received as much as the $4,882.00 alleged to have been received by him. Because he had violated IBP's conflict of interest policy he was discharged by that company but officially allowed to resign from IBP.

Finally, with regard to Donald Erickson, the record shows that three payments, totalling $2,500.00, were made to him by Corn State during the period August 20, 1980–October 10, 1980. Although checks for this amount were made out to Northwestern National Bank, interviews by P&S investigators determined that the cash proceeds from these checks were turned over to respondents Prince and Wiggs, and that this cash was eventually turned over to Donald Erickson and recorded in Corn State's account no. 74. As noted from the interviews with Mr. Erickson, he stated that one payment of $1,000 was a loan from respondent Prince but he acknowledged he had not repaid this loan after an approximate three-year period. He also acknowledged that the payments made to him by Corn State were "considerations" which were violations of IBP's conflict of interest policy. As with Mr. Sixta, Mr. Erickson was also discharged on the spot, but officially allowed to resign from IBP.

What is not clearly demonstrated in this record is the purpose of the payments made by Corn State to the individuals employed by Farmland and IBP. It is clear, however, that the receipt of such payments was not known to the employers of the individuals and certainly Farmland and IBP received no benefit from these payments. Had it been known, they would have been discharged in the

case of Robert Ingram, and discharged sooner in the cases of Joseph Sixta and Donald Erickson. Therefore, it can be only concluded that these payments by respondents Prince and Wiggs were made *sub rosa* for an illegitimate purpose, i.e., influencing these individuals to provide favorable concessions in their dealing with Corn State's purchases. Corn State's inducing or bribing these individuals to obtain favorable concessions for Corn State disadvantages other purchasers competing with Corn State and undermines the sale structure of the sellers. Each of the individuals receiving payments from respondents Prince and Wiggs were in charge of sales for their respective products. Each were open to inducement by respondents to provide favorable terms or prices in their sales to Corn State. In some instances involving Messrs. Ingram and Sixta payments were made on the basis of a percentage of the profit Corn State earned on the resale of the meat products purchased from Farmland and IBP. This is corroborated in the record where it is shown that odd amounts of money, down to the last penny, were paid to Robert Ingram (CX-1, p. 1; CX-5, p. 1) and Joseph Sixta (CX-2, p. 1; CX-6, p. 1). Other round dollar amounts, $200, $500, $1,000, although not a specific percentage of profit earned by Corn State on its resales, appear to be a fixed pattern of fees still based on the amount of profit. For example, $500 was designated for Robert Ingram on profits of Corn State sales ranging from $2,288.85 to $8,160.42 (CX-5, p. 1), while amounts ranging from $90 to $250 were paid to Joesph Sixta (CX-2, p. 1; CX-6, p. 1). It is noted here that, although amounts paid to Donald Erickson can be traced to Corn State's account no. 74, "Consultant Fees-Brokerage Fees", there are no invoices of record to which these payments may be connected. However, they were acknowledged by Mr. Erickson as being "considerations" paid to him by Corn State. Such "considerations" caused him to request termination of his employment with IBP because of the further acknowledgement by Mr. Erickson that he had violated IBP's conflict of interest policy.

From the record as a whole it must be concluded that the payments by respondents Prince and Wiggs to the employees of Farmland and IBP can only be considered commercial bribery, i.e., payments made to employees or agents of buyers or seller, without benefit to their employer, and without the employer's knowledge and consent, in order to induce or hold patronage. *In re National Beef Packing Company*, 36 A.D. 1722, *aff'd* 605 F.2d 167 (10th Cir. 1979). Such activity has long been established as an unfair trade practice by the USDA under Section 202 of the Packers and Stockyards Act (7 U.S.C. § 192), as well as under Section 5 of the Federal Trade Commission Act (FTC Act) (15 U.S.C. § 45). Both Sections of

these Acts were enacted to prevent unfair trade practices in their incipiency because such practices as commercial bribery lack any redeeming value, evince bad business morals, and have a pernicious effect on competition. Anti-competitive practices properly deemed unfair under the FTC Act also reach Section 202 of the P&S Act. *National Beef, supra; In re Gol-Pak Corp.*, 27 A.D. 228, 234 (1968); *In re Hygrade Food Products Corporation*, 26 A.D. 825, 830–831 (1967); *Armour & Co.* v. *United States*, 402 F.2d 712, 722 (7th Cir. 1968); *Standard Distributors* v. *Federal Trade Commission* 211 F2d 7, 13 (1954); *Fashion Originator's Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 463, 466 (1941); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 693 (1948).

Further, unfair trade practices are not confined to those where competitive injury has already resulted, but include those where there is reasonable likelihood that the purpose will be achieved. *DeJong Packing Co.* v. *U.S.D.A.*, 618 F.2d 1329, 1337 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980). See *Swift & Co.* v. *United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Wilson & Co.* v. *Benson*, 286 F.2d 891, 895 (7th Cir. 1961); cf. *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 322 (1966). Since Section 202 of the P&S Act is designed to stop unfair trade practices in their incipiency before competitive injury has been suffered, and to reach special mischief and injury in the meat products industry, actual injury need not be shown. *National Beef, supra; Swift & Co., supra; Bruhn's Freezer Meats* v. *U.S.D.A.* 438 F.2d 1332, 1336 (8th Cir. 1971); *Central Coast Meats, Inc.* v. *U.S.D.A.*, 541 F.2d 1325 (9th Cir. 1976); *DeJong Packing, supra; Armour & Co., supra.* The likelihood of competitive injury is present here since the bribery injures the employer by depriving him of the maximum obtainable profits, *Grace* v. *E. J. Kozin*, 538 F.2d 170 (7th Cir. 1976).

Finally, in a recent decision involving Iowa livestock dealers the court stated: "A practice is 'unfair' under § 213(a) if it injures or is likely to injure competition." *Farrow* v. *USDA*, 760 F.2d 211, 214 (8th Cir. 1985). See, also, *In re World Wide Meats, Inc.*, 34 A.D. 71 (1975) (Consent); *In re Vernon Calhoun Packing Co., Inc.*, 34 A.D. 1364 (1975) (Consent).

As is usual in cases of alleged activities to restrain commerce, the Government is without the aid of direct testimony that the defendants entered into any agreement. It is compelled to rely on inferences drawn from their course of conduct as a whole. *Interstate Circuit* v. *United States*, 306 U.S. 208, 221, 59 S Ct., 467, 472 (1939); *National Beef, supra*, at 1735. The inference drawn from all of the evidence of record is that respondents made payments to employees of Farmland and IBP to suborn their fiduciary obligations to these

employers, and thus have violated Sections 202(a) and (b) of the Act.

The further inference that must be drawn is an adverse one to the respondents who were present during the entire oral hearing in this matter but did not take the stand to testify. It must be concluded that their silence raises the inference that had they testified their testimony would have been adverse to their position. See *In re James Grady*, et al. 45 A.D. ___ (January 31, 1986) (Slip Opinion, pp. 65-66); *In re Apex Meat Company*, 44 A.D. ___ (Sept. 5, 1985) (Slip Opinion, pp. 32-33); *In re Mattes Livestock Auction Market, Inc.* 42 A.D. 81, 101-102, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 A.D. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984).

SANCTION

Complainant here seeks a cease and desist order, as well as a civil penalty of fifty thousand dollars ($50,000) to be assessed jointly and severally. Severe sanctions for violations of the Department's regulations has been an established policy. *In re Braxton Worsley*, 33 A.D. 1547, 1556-1571 (1974); see also *In re Donald Hageman, S&H Hogs, Inc.*, et al., 42 A.D. 531, 546 (1983) and cases cited therein. Indeed, as Mr. MacDonald testified, the violations charged, and found, are serious because of their anti-competitive effect on the industry and the undermining of the trust placed in employees buying and selling meat products, as well as consumer trust in the marketing of meats. Mr. MacDonald, representing P&S views, believes that such a large monetary sanction is appropriate and necessary as an effective deterrent in precluding such activities in the industry in the future.

FINDINGS OF FACT

1. (a) Corn State Meat Company, Inc., hereinafter "Corn State," at all times material herein was an Iowa corporation with its principal place of business located at 916 Grandview Boulevard, Sioux City, Iowa 51101.

(b) Corn State at all times material herein was:

(1) Engaged in the business of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer or distributor in commerce; and

(2) A packer, within the meaning and subject to the provisions of the Act.

(c) Corn State is no longer engaged in business.

2. (a) Terrance P. (Terry) Prince, Jr., hereinafter referred to as respondent Prince, is an individual who resides at 134 Cook Drive, Sioux City, Iowa 51103.

(b) Respondent Prince at all times material herein was the president and vice-president and an owner, manager, director and controller of Corn State.

3. (a) James L. Wiggs, hereinafter referred to as respondent Wiggs, is an individual who resides at 2839 Summit Street, Sioux City, Iowa 51104.

(b) Respondent Wiggs at all times material herein was the secretary and treasurer and an owner, manager, director and controller of Corn State.

4. P&P Trading Co. was a brokerage house owned by respondents Prince and Wiggs and located in the same offices occupied by Corn State. Country Products, Ltd., also was a brokerage house which shared the same facilities and which was operated by respondents Prince and Wiggs and Lee Schroeder.

5. Farmland Foods, Inc., hereinafter "Farmland", is a packer headquartered in Kansas City, Missouri.

6. Iowa Beef Processors, Inc., hereinafter "IBP", is a packer headquartered in Dakota City, Nebraska.

7. Robert (Bob) Ingram, is an individual who during the period July 24, 1978, until July 27, 1980, was employed by Farmland as sales manager at Garden City, Kansas. Mr. Ingram was responsible for the sale and marketing of beef products produced by the Garden City plant. He personally handled a number of sales accounts.

8. Joseph L. (Joe) Sixta is an individual who was employed by IBP from prior to March 19, 1979 until October 3, 1984, when he was discharged because of violation of IBP's conflict of interest policy. Officially he was allowed to resign on October 4, 1984. He was the manager in charge of variety meats whose responsibilities included pricing, sales and customer relations.

9. Donald (Don) Erickson is an individual who was employed by IBP from approximately 1972-1973 until October 3, 1984, when he was discharged because of violation of IBP's conflict of interest policy. Officially, he was allowed to resign on October 4, 1984. At the time of his discharge he held the position of vice-president for boxed beef sales. He had certain customers he was responsible for on a daily basis.

10. During the period from at least 1979 up to the present, Farmland has had a policy regarding employee conflicts of interest. That policy states in part:

> No employee shall engage, directly, or indirectly, in any business which is in competition in any area or in any activity with his employer corporation, without the written consent of such employer . . .
>
> No employee shall accept any gift or gifts except those of limited value from any party engaged in dealings of any kind with his employer corporation.
>
> It shall be the duty of every employee to promptly notify his supervisor of any present or future holdings or transactions which may be in violation of the foregoing policy or policies (CX-9, Tr. 53).

This conflict of interest policy is communicated to new employees when first hired and is brought to the attention of employees annually.

11. During the period from March 19, 1979, up to the present, IBP has had a policy regarding employee conflicts of interest. The January 26, 1983, written version of that policy states in part:

> It is the policy of IBP not only to avoid any practice that might be detrimental to the corporation's interest, but also to avoid actions or practices that might be so construed. Any employee who believes that any practice in which he is engaged, or of which he is aware, may be so construed should immediately report it to his supervisor and to the Legal Division.
>
> This policy prohibits employees from accepting any gifts, loans, (other than from established lending institutions), or other favors from business contacts. It also prohibits the acceptance of entertainment (during or after business hours), business lunches and dinners, except when specifically believed beneficial to the Company and on the provision that they be reciprocated on the next appropriate occasion. It further prohibits any other activity which might place an employee of IBP under obligation, or might improperly influence his business judgment, to an outside firm or person who might reasonably expect at a future date to benefit by that obligation (CX-8, p. 4).

This conflict of interest policy was communicated periodically to all upper-level IBP employees, and specifically to Mr. Sixta and Mr. Erickson on various occasions between 1979 and 1983. Both men signed compliance statements acknowledging receipt.

12. During the period January 31, 1979, through March 6, 1981, a total of $59,193.30 in checks and cash was paid by respondents Prince and Wiggs to Robert Ingram. On three occasions, payments were first converted to cash by Ellen "Bobbie" Maximona, the Corn State bookkeeper, who then gave the cash to her employers, respondents Prince and Wiggs, and then made notations in Corn State's account number 74 that such cash payments were given to Robert Ingram.

13. During the period April 21, 1980, through December 9, 1980, a total of $4,427.59 in checks and cash was paid by respondents Prince and Wiggs to Joseph Sixta. On four occasions, the payments were channeled through Lee Schroeder, an employee of respondents. Mr. Sixta acknowledged receiving money from respondents.

14. During the period August 20, 1980, through October 10, 1980, respondents Prince and Wiggs made three payments totaling $2,500.00 to or for the benefit of Donald Erickson.

15. Respondents accounted for these payments to or for the benefit of Robert Ingram, Joseph Sixta and Donald Erickson in their account number 74, titled, "Consultant Fees, Brokerage Fees" (CX-4). There is no credible evidence Mr. Ingram, Mr. Sixta or Mr. Erickson rendered consulting, brokerage or any other legitimate services to respondents.

16. The payments made to Ingram were in fact a designated portion of the profits generated by the Corn State resale of products purchased by Corn State from Farmland. In some instances it appears Ingram got ⅓ of the profits. In other instances, the payments apparently were calculated as an arbitrary portion of the profits, usually $500.00 per load.

17. The payments made to Sixta were in fact a designated portion of the profits generated either by the Corn State resale of IBP products or by the Corn State sale of products to IBP. In most instances the payments apparently were calculated as an arbitrary portion of the profits.

18. Robert Ingram violated Farmland's conflict of interest policy by sharing the profits generated by the Corn State resale of meat products purchased from Farmland. If Mr. Ingram had provided paid consulting services to Corn State (and there is no evidence that he did), that also would have violated Farmland's conflict of interest policy. The executive management of Farmland was unaware Ingram was receiving money from Corn State. If management had been so aware, Ingram's receipt of money from Corn State would have been cause to terminate his employment.

19. Joseph Sixta violated IBP'S conflict of interest policy by sharing in the profits generated by the Corn State resale of meat prod-

ucts purchased from IBP and the Corn State sale of products to IBP. On October 3, 1984, when Mr. Sixta admitted to IBP management that he had violated his employer's conflict of interest policy, he was immediately fired.

20. On October 3, 1984, Donald Erickson admitted to IBP management that he had violated IBP's conflict of interest policy by receiving money from Corn State, a customer and a supplier of IBP, in return for unspecified "considerations". His employment was immediately terminated.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

I. The ALJ's Findings and Inferences Are Supported by the Record.

Respondent Wiggs, the only respondent who filed a response to complainant's appeal, argues that the evidence does not support the ALJ's findings of fact [5] because unreliable hearsay was admitted, and there is no evidence that the payments were made for the purposes of bribery. However, as the ALJ correctly noted (slip op. at 18-19), responsible hearsay is freely admitted in our Department's administrative proceedings, and the hearsay admitted here was of the sort upon which responsible persons are accustomed to rely. Furthermore, even without the hearsay evidence, the record contains adequate documentary evidence and admissions to support the ALJ's inference that the payments were made "*sub rosa* for an illegitimate purpose, i.e., influencing these individuals to provide favorable concessions in their dealing with Corn State's purchases" (slip op. at 24).

In addition, neither respondent Wiggs nor respondent Prince testified in this proceeding, notwithstanding the fact that both individual respondents were present during the entire hearing (Tr. 5, 191-92). Under the settled principle that has been followed in many proceedings before this Department,[6] and which has been

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[5] Complainant need only prevail by a preponderance of the evidence. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[6] *E.g.*, *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 Agric. Dec. ___ (Feb. 27, 1986); *In re Grady*, 45 Agric. Dec. ___ (Jan. 31, 1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. ___ (Oct. 17, 1985); *In re Saylor*, 44 Agric. Dec. ___ (Sept. 20, 1985) (decision on remand); *In re Petty*, 43 Agric. Dec. ___ (Oct. 31, 1984), *appeal docketed*, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ___ (Oct. 6, 1983); *In re Farrow*, 42 Agric. Dec. ___ (Sept. 21, 1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits

Continued

followed in many judicial proceedings,[7] I infer that their testimony would have been adverse to their interests here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch* v. *Archer,* Cowp. 66, quoted with approval in Wigmore, *Evidence* § 285 (3d ed. 1940).

II. Proof of Injury or Likelihood of Injury Is Not Required in Commercial Bribery Cases.

Respondent Wiggs argues (Appeal Response at 10):

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affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

[7] 2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States* v. *Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-27 (1939); *Kirby* v. *Tallmadge*, 160 U.S. 379, 383 (1896); *Karavos Compania, Etc.* v. *Atlantica Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union* v. *NLRB*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co.* v. *Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cromling* v. *Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman* v. *CIR*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co.* v. *Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer* v. *Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles* v. *Lentin*, 151 F.2d 615, 619 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co.* v. *Ratcliff*, 108 F.2d 253, 256-57 (C.C. P.A. 1939); *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 867-68 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

> The complainant failed to produce the evidence required by *Central Coast Meats, Inc.* v. *U.S. Department of Agriculture*, 541 F.2d 1325 (1976–9th Cir.) and *Corona Livestock* v. *U.S. Department of Agriculture*, 607 F.2d 811 (1979–9th Cir.) to support the sanctions they have requested.

Presumably respondent Wiggs is arguing that the Department failed to prove that the commercial bribery involved here was likely to cause injury.

However, W. Wayne MacDonald, a marketing specialist in the Meat Merchandising Branch of the Packers and Stockyards Administration, with 25 years experience in the meat business (Tr. 173), testified as an expert witness that the commercial bribery involved here would have an anti-competitive effect on the industry and would undermine the trust that the two meat suppliers to respondents (Farmland and IBP) had in their employees (Tr. 166–88). Furthermore, as stated above, the record supports the ALJ's inference that the payments to the employees of IBP and Farmland were made for an illegitimate purpose to influence these individuals to provide favorable concessions in their dealing with respondents. Nonetheless, as shown below, in commercial bribery cases the Department does not have to prove injury or likelihood of injury.

Since the broad terms "unfair," "unjustly discriminatory," and "deceptive" used in §§ 202(a) and 312(a) of the Act are not defined, "their meaning must be determined by the facts of each case within the purposes of the Packers and Stockyards Act." [8] The terms are not so vague or uncertain, however, as to be an unconstitutional delegation of legislative authority.[9]

The Secretary "has broad powers under Section 202(a) with regard to trade practices which are 'unfair' in that they conflict with the basic policies of the various antitrust statutes, even though the practices may not actually violate those statutes." [10] "Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the

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[8] *Capital Packing Co.* v. *United States*, 350 F.2d 67, 76 (10th Cir. 1965). Cases under § 202 of the Act are discussed in Annot. 5 A.L.R. Fed. 729 (1970).

[9] *Farmers Livestock Comm'n Co.* v. *United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (3-judge ct.); *O.V. Handy Bros. Co.* v. *Wallace*, 16 F. Supp. 662, 664–66 (E.D. Pa. 1936); and *see United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932).

[10] *Armour & Co.* v. *United States*, 402 F.2d 712, 717 (7th Cir. 1968); and *see DeJong Packing Co.* v. *USDA*, 618 F.2d 1329, 1335 n.7 (9th Cir.) (2–1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Farrow*, 42 Agric. Dec. ___ (Sept. 21, 1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits aff'd; suspension order rev'd); *cf. FTC* v. *Motion Picture Adv. Co.*, 344 U.S. 392, 394, 396 (1953) (construing "unfair" method of competition under FTC Act).

Federal Trade Commission (15 U.S.C. § 45) and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic." [11]

The use of adjectival qualifications such as "unjustly" and "undue" "enjoin the Department and courts to apply a rule of reason in determining the lawfulness of a particular practice under Section 202(a) and (b)." [12]

It has been held that in construing these terms, substantial weight must be given to whether the business activities were carried on "in good faith by normally fair methods not 'heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression.' " [13]

Specifically, it is well settled that commercial bribery is an unfair, unjustly discriminatory, and deceptive practice which is violative not only of § 202(a) of the Packers and Stockyards Act, but also the Robinson-Patman amendments to the Clayton Act (15 U.S.C. § 13(c)), and it is an unfair practice under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45).[14] As stated in *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728–29 (1977), *aff'd*, 605 F.2d 1167, 1168–69 (10th Cir. 1979):

> Commercial bribery is the "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors." 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).
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> The practice has been held violative of the Robinson-Patman amendments to the Clayton Act (15 U.S.C. § 13(c)), *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943); *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (D. Idaho 1964), and it has been recognized as an unfair trade practice under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45), where it is ap-

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[11] *Armour & Co.* v. *United States*, 402 F.2d 712, 722 (7th Cir. 1968). *Accord*, *In re Farrow*, 42 Agric. Dec. ____ (Sept. 21, 1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits aff'd; suspension order rev'd).

[12] *Armour & Co.* v. *United States*, 402 F.2d 712, 717 (7th Cir. 1968).

[13] *Swift & Co.* v. *Wallace*, 105 F.2d 848, 856 (7th Cir. 1939).

[14] *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728–36 (1977), *aff'd*, 605 F.2d 1167, 1168–69 (10th Cir. 1979); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 552–53 (1981); *In re Gol-Pak Corp.*, 27 Agric. Dec. 228, 232–35 (1968); *In re Hygrade Food Prods. Corp.*, 26 Agric. Dec. 825, 829–32 (1967).

plied to secret gifts or payments by sellers to employees or agents to induce them to promote purchases of the sellers' product by the employer of the agent or employee. *American Distilling Co.* v. *Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939). Numerous administrative proceedings have been initiated against the practice by the Federal Trade Commission, resulting in orders prohibiting it. 2 CCH *Trade Regulation Reporter*, ¶ 7,903.

Likewise, the Packers and Stockyards Administration considers the practice an unfair and deceptive one. Consent and default cease and desist orders have been entered against commercial bribery and related practices. See, *e.g.*, *In re Dold Packing Co.*, 33 A.D. 775 (1974); *In re Robel Beef Packers, Inc.*, 31 A.D. 516 (1972); *In re Ed. Miniat, Inc.*, 28 A.D. 601 (1969); *In re Swift and Company*, 26 A.D. 638 (1967); *In re Hebron Packing Co., Inc.*, 25 A.D. 1006 (1966); *In re Marhoefer Packing Co.*, 25 A.D. 739 (1966); *In re South Chicago Packing Co.*, 20 A.D. 844 (1961). Decisions granting a cease and desist order have also been issued after administrative hearings in *In re Gol-Pak Corporation*, 27 A.D. 228 (1968), and in *In re Hygrade Food Products Corporation*, 26 A.D. 825 (1967).

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

> '. . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. 'No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy . . .' 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).

The erosive effect was succinctly described by a Packers and Stockyards Administration witness:

> It seems to me that the person making the bribe has kind of the inside track on the business and can exclude competitors because of this relationship with the buyer . . . [P]rice and quality will frequently take a lesser place in making the buying decision when there is consideration of a bribe or gift of some sort. (Tr. 105).

Since commercial bribery is inherently unfair, unjustly discriminatory and deceptive, it is not necessary to show in a particular case that the commercial bribery involved caused injury or was likely to cause injury.

The Department has consistently taken the position that in order to prove that *any* practice is "unfair" under §§ 202(a) (7 U.S.C. § 192(a)) or 312(a) (7 U.S.C. § 213(a)) of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and that it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury.[15]

A contrary view has been expressed in only a few, atypical cases (four from the Ninth Circuit). In *Armour & Co.* v. *United States*, 402 F.2d 712, 717-23 (7th Cir. 1968), involving coupon rebates to ultimate consumers on bacon packages, the Seventh Circuit held that the evidence must show either predatory intent or that the coupon practice was likely to result in injury to competition to be in violation of § 202(a).

In *Central Coast Meats, Inc.* v. *USDA*, 541 F.2d 1325, 1327 (9th Cir. 1976) (2-1 decision), in which the Department contended that a packer engaged in an "unfair" practice by being a packer and a dealer, the Ninth Circuit questioned the Secretary's argument that "actual injury need not be shown and that § 202(a) may be used to uproot unfair practices in their incipiency." The court held that

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[15] *E.g., In re ITT Continental Baking Co.*, 44 Agric. Dec. ___ (Mar. 18, 1985), *final order*, 44 Agric. Dec. ___ (Oct. 24, 1985) (consent cease and desist order and $10,000 civil penalty); *In re Walti, Schilling & Co.*, 39 Agric. Dec. 119, 149-50 (1978); *In re Hines*, 35 Agric. Dec. 113, 123-24 (1976); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 161-76 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision); and *see Swift & Co.* v. *United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman* v. *USDA*, 363 F.2d 81, 85 (5th Cir. 1966); *Wilson & Co.* v. *Benson*, 286 F.2d 891, 895 (7th Cir. 1961); *Hyatt* v. *United States*, 276 F.2d 308, 312 (10th Cir. 1960); *Daniels* v. *United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *cf. FTC* v. *Texaco, Inc.*, 393 U.S. 223, 225-26 (1968); *FTC* v. *Motion Picture Adv. Co.*, 344 U.S. 392, 394-95 (1953); and *Corn Prods. Refining Co.* v. *FTC*, 324 U.S. 726, 738 (1945) (the last three cases involve incipiency doctrine under FTC Act).

"the Secretary must show that the conduct in question [packer-dealing] is likely to produce the sort of injury the Act is designed to prevent" (*id.*).

In *Corona Livestock Auction, Inc.* v. *USDA*, 607 F.2d 811, 814 (9th Cir. 1979), in which the Department contended that a unique method of conducting a livestock sale was "unfair" because livestock buyers present at the sale were not permitted to bid on livestock, but could only accept or reject a predetermined price set by the salesman, who rotated the opportunity to accept or reject the price among the potential buyers, the Ninth Circuit repeated that the *Central Coast* case requires the agency to establish that a particular practice is "likely to produce the sort of injury the Act is designed to prevent."

In *DeJong Packing Co.* v. *USDA*, 618 F.2d 1329, 1336-37 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980), in affirming the Department's position that a group boycott of a livestock auction market by meat packers was an "unfair" practice, the Ninth Circuit held that the agency must show a "reasonable likelihood" of an undue restraint of competition.[16]

The Department does not agree with the decisions in the *Central Coast*, *Corona*, and *Armour* cases,[17] and adheres to its consistent policy set forth above.

In *Bosma* v. *USDA*, 754 F.2d 804, 808 (9th Cir. 1984), the court quoted its *Central Coast Meats, Inc.* holding that the Department must show that the challenged conduct "is likely to produce the sort of injury the Act is designed to prevent." The court found that actual harm resulted when an auction operator purchased livestock from consignments for speculation. *Id.* 808-09. However, notwithstanding its holding that proof of a likelihood of injury was necessary as to that particular type of violation, the court also held in the same case that the failure of the auction operator to inform

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[16] In *Swift & Co.* v. *United States*, 317 F.2d 53, 56 (7th Cir. 1963), the Judicial Officer had held that proof of injury to competition, as required by § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, was unnecessary to establish a violation of § 202(a) of the Packers and Stockyard Act. The court, however, did not decide whether that conclusion is correct "since it found that the point is academic" (*id.*).

[17] *See In re ITT Continental Baking Co.*, 44 Agric. Dec. ___ (Mar. 18, 1985), *final order*, 44 Agric. Dec. ___ (Oct. 24, 1985) (consent cease and desist order and $10,000 civil penalty); *Western Iowa Farms Co.* v. *Sioux City Stock Yards*, 38 Agric. Dec. 1296, 1322 n.12 (1979), *aff'd*, 629 F.2d 502 (8th Cir. 1980) (2-1 decision); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1602 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 171-77 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision).

consignors that he was the actual purchaser of their livestock was "inherently unfair" because "the market agent had a fiduciary duty to his consignors," and that such failure "may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm" (754 F.2d at 809). Hence the Ninth Circuit recognized in *Bosma* that whether a specific showing of actual harm is necessary depends on the type of violation alleged.

Finally, in *Farrow* v. *USDA*, 760 F.2d 211, 215 (8th Cir. 1985), involving an agreement by two competitors not to compete for certain cows at an auction market, the court held that "actual injury" need not be proven because the "purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered." The court said that "the Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation" (*id.* 215).

If the cases requiring proof of a likelihood of injury are to be followed (which we believe is unsound), they should only be followed in the same types of cases in which the holdings were made. Holdings in all cases should be confined and limited to the facts under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821). That principle was applied in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626–27 (1935), with respect to the decision in *Myers* v. *United States*, 272 U.S. 52 (1926), in which it is said that the numerous expressions in the *Myers* case beyond the "narrow point actually decided" do not come within the rule of *stare decisis* (295 U.S. at 626). Again the principle was followed in *Osaka Shosen Kaisha Line* v. *United States*, 300 U.S. 98, 102–04 (1937), with respect to the prior decision in *Taylor* v. *United States*, 207 U.S. 120, 124–25 (1907).

Many types of practices have been held to be "unfair" under the Packers and Stockyards Act without any proof of predatory intent or likelihood of injury. For example, it is an "unfair" practice for a livestock market agency to engage in business without a bond irrespective of any likelihood of injury. *E.g., In re Hoth*, 36 Agric. Dec. 1812, 1817–19 (1977). In *Hoth*, the livestock market agency contended that there was no need for him to have a bond since he bought livestock only for a large packing agency, which was bonded, and he operated only with the packer's funds and paid for all livestock with checks drawn on the packer. There was no real "likelihood"

of injury there, but the market agency's practice of operating without his own bond was, nonetheless, held to be an "unfair" practice.

If proof of a likelihood of injury were required in cases involving the failure of a respondent to have the required bond, all, or almost all, of the bonding violation cases would be dismissed. It would be virtually impossible to predict, in advance, that a particular respondent was *likely* to go broke owing money for livestock. We know from experience that a number of firms will go broke each year and that without the required bond, there will be injury to livestock sellers. But we do not have a crystal ball to enable us to make a finding of fact that the failure of a *particular respondent* to have a bond is *likely* to result in injury.

Similarly, careless or deliberate false weighing is an "unfair" practice under the Act irrespective of any proof of predatory intent or likelihood of injury.[18] Anyone who thinks that the likelihood of injury in a false weighing case is obvious is unaware of the intricacies of false weighing violations. For example, a livestock buying station might increase the price to compensate for the short weight, or regular buyers at a livestock auction market, who would know of the short weights, might increase their bids in consideration of the short weights. All false weighing is routinely held to be an "unfair" practice, without proof as to whether there is a likelihood of injury, and in many cases, it would have been difficult, if not impossible, to prove such a likelihood.

Similarly, with respect to custodial account violations, the Department has always taken the position that it is an unfair practice for a livestock auction market to fail to properly maintain a Custodial Account for Shippers' Proceeds irrespective of any likelihood of injury.[19] And in custodial account violation cases, the De-

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[18] *In re Muehlenthaler*, 37 Agric. Dec. 313, 321, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Loretz*, 36 Agric. Dec. 1087, 1095 n.5 (1977); *In re Townsend*, 35 Agric. Dec. 1604, 1622 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1819 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1577 n.24 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 526 n.24 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 317 n.24 (1974).

[19] *In re Powell*, 41 Agric. Dec. 1354, 1361 (1982); *Hyatt and Ward* v. *United States*, 276 F.2d 308, 309–13 (10th Cir. 1960); *Daniels* v. *United States*, 242 F.2d 39, 41–42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019, 1020–23 (8th Cir. 1932); *In re Roseth*, 39 Agric. Dec. 28, 36 (1980), *aff'd per curiam*, 636 F.2d 1224 (8th Cir. 1980) (unpublished); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310–11, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Sechrist Sales Co.*, 36 Agric. Dec. 665, 667, 673 (1977); *In re Hardy*, 33 Agric. Dec. 1383, 1398–1406 (1974); *In re Miller*, 33 Agric. Dec. 53, 59–62, *aff'd per curiam*, 498 F.2d 1088 (5th Cir.

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partment has never been required to prove a likelihood of injury.[20] For example, in *Daniels* v. *United States*, 242 F.2d 39, 40–42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957), the court held:

> The improper handling and use of the shippers' proceeds is plainly contrary to the Act, 7 U.S.C.A. §§ 205, 208 and 213(a), and of the regulations (9 CFR § 201.40–201.42.) The argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required. Federal Trade Commission *v.* Raladam Co., 316 U.S. 149, 152, 62 S.Ct. 966, 86 L.Ed. 1336; Fashion Originators' Guild of America *v.* Federal Trade Commission, 312 U.S. 457, 466, 668, 61 S.Ct. 703, 85 L.Ed. 949.

Similarly, in *Bowman* v. *USDA*, 363 F.2d 81, 85 (5th Cir. 1966), the court held:

> And the Act is designed to "* * * prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required." Daniels *v.* United States, 7 Cir., 1957, 242 F.2d 39, 42.

In fact, in most custodial account cases, the Department would be unable to prove a likelihood of injury. Although we know from experience that about 10 to 20 auction markets go broke each year, and that about 3 to 6 of them will not have a bond adequate to cover the total losses, we do not have a crystal ball that would enable us to make a finding of fact that the failure of a *particular respondent* to maintain his custodial account properly is *likely* to result in injury.

As stated in Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law* 282 (1981) (footnotes omitted):

1974); *In re Bowman*, 23 Agric. Dec. 1065, 1068–71 (1964); *In re Bowman*, 23 Agric. Dec. 1074, 1086–87 (1964), *aff'd*, 363 F.2d 81, 85–86 (5th Cir. 1966).

[20] *In re Roseth*, 39 Agric. Dec. 28, 33, *aff'd*, 636 F.2d 1224 (8th Cir. 1980) (unpublished); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Miller*, 33 Agric. Dec. 53, 62–63, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *Bowman* v. *USDA*, 363 F.2d 81, 84–86 (5th Cir. 1966); *Hyatt and Ward* v. *United States*, 276 F.2d 308, 310–13 (10th Cir. 1960); *Daniels* v. *United States*, 242 F.2d 39, 40–42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019, 1020–23 (8th Cir. 1932).

> The fact that no one suffered from a particular custodial account shortage is no defense, since it is the duty of the Packers and Stockyards agency to prevent potential injury by stopping unlawful practices in their incipiency. However, if the likelihood of injury test as applied in some judicial decisions were applied to custodial account violations, most of the complaints filed alleging custodial account violations would be dismissed. Rarely would it be possible to prove that injury would likely result from a particular custodial account shortage. Usually there would be a reasonable expectation that the time lag between the writing and cashing of the checks would prevent a default. Frequently there would be a line of credit from the bank. Almost always there would be a bond that could be relied on to cover part of any losses.
>
> The most that could be shown is that if all or many of the market agencies selling livestock generally had custodial account shortages, there would be a likelihood that some of them would result in injury. Accordingly, it is the department's position that where there is a custodial account shortage, there is no need to show injury or likelihood of injury in a particular case. No court has required proof of a likelihood of injury in custodial account violation cases.

Accordingly, even if the cases under the Packers and Stockyards Act requiring proof of predatory intent or likelihood of injury were regarded as sound with respect to the types of violations involved in those cases, there are many other types of violations under the Packers and Stockyards Act where predatory intent or likelihood of injury has never been required.

Commercial bribery is, manifestly, unfair, unjustly discriminatory and deceptive, and is violative of § 202(a) of the Act irrespective of proof of injury or likelihood of injury. But if it were necessary to prove a likelihood of injury, this record would support such a finding.

III. A $50,000 Civil Penalty is Appropriate.

It is the policy of this Department to impose severe sanctions for serious or repeated violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings since the early 1970's.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g., In re Worsley,* 33 Agric. Dec. 1547, 1556-71 (1974),[21] which is set forth as Appendix A to this decision.[22] The Department's sanction policy is also discussed at length in *In re Esposito,* 38 Agric. Dec. 613, 624-65 (1979).

The Act authorizes a civil penalty of not more than $10,000 for each violation. The Act provides (7 U.S.C. § 193(b)):

> (b) . . . The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

In view of the size of the business involved here, the many violations, and the fact that commercial bribery is such a serious offense that it would, if not checked, undermine the entire meat marketing system in the United States, a civil penalty greatly in excess of $50,000 would be warranted here. The ALJ, in determining that

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[21] The Department's severe sanction policy did not originate with *Worsley,* but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner,* 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller,* 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam,* 498 F.2d 1088 (5th Cir. 1974).

[22] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.,* in *In re Collier,* 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam* (unpublished), 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.,* 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd,* No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.,* 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler,* 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.,* 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.,* 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland,* 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.,* 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.,* 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam,* 558 F.2d 748 (5th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978); *In re Catanzaro,* 35 Agric. Dec. 26, 31-32 (1976), *aff'd,* No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.,* 34 Agric. Dec. 773, 796, 801 (1975), *aff'd,* 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.,* 34 Agric. Dec. 700, 750, 762 (1975), *aff'd,* 549 F.2d 830 (D.C. Cir.), *cert. denied,* 434 U.S. 920 (1977); *In re Southwest Produce, Inc.,* 34 Agric. Dec. 160, 171, 178, *aff'd per curiam,* 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons,* 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam,* 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.,* 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd,* 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.,* 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Miller,* 33 Agric. Dec. 53, 64-80, *aff'd per curiam,* 498 F.2d 1088, 1089 (5th Cir. 1974).

a $25,000 civil penalty should be assessed, stated (Initial Decision at 28):

> Indeed, as Mr. MacDonald testified, the violations charged, and found, are serious because of their anti-competitive effect on the industry and the undermining of the trust placed in employees buying and selling meat products, as well as consumer trust in the marketing of meats. Mr. MacDonald, representing P&S views, believes that such a large monetary sanction [$50,000] is appropriate and necessary as an effective deterrent in precluding such activities in the industry in the future. However, sanctions, as well as being a deterrent, must also be realistic. The monetary sanction sought here is not realistic. Therefore, I find that a monetary civil penalty of $25,000, to be assessed jointly and severally, is a more realistic sanction and at the same time will also accomplish the purpose of a sanction, i.e., act as a deterrent to preclude such activities in the industry for the future.

Since respondents committed at least 29 violations, a civil penalty of at least $290,000 would be within the statutory limitations.

In view of the insidious and destructive nature of commercial bribery, it would not be unreasonable to impose a civil penalty to take away the entire gross profit from the transactions involving commercial bribery.[23] Respondents' gross profit on just a portion of the transactions involved here (those where the documents carry notations that Ingram shared in the "profits") totalled $113,141.27 (CX 5, p. 1).

Considering the large profits that can be made from commercial bribery and the difficulty in detecting such violations, I have serious reservations as to whether the $50,000 civil penalty imposed here is nearly enough to serve as an effective deterrent to future violations. But since complainant asks for no more, and the corporate respondent and respondent Prince did not appeal, the civil penalty in this case will be limited to the amount requested by complainant. If complainant requests larger civil penalties in

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[23] In some cases, taking away the entire gross profit would not result in a large enough civil penalty. For example, in *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ___ (May 8, 1986), the respondent corporation (which bribed the buyers of its meat products) purchased its meat from a corporation owned by the same person who was a co-owner of the respondent corporation, and the respondent corporation showed a continuous loss on its transactions, notwithstanding the advantage gained through commercial bribery.

future similar cases, this case will not be regarded as a precedent limiting the amount of future sanctions.

It should be noted that this case and *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ___ (May 8, 1986), also decided this day, are the first litigated cases involving commercial bribery committed after the Act was amended to authorize civil penalties. In *Holiday Food Services*, a $50,000 civil penalty is also being assessed against a defunct corporation and the individual who was its chief executive officer and 50% owner.

Respondent Wiggs suggests that the penalty is too severe since "[l]ittle people [like respondents] don't go around offering to corrupt big people [like IBP and Farmland]" (Appeal Response at 6). Respondent Wiggs suggests that the impetus for the bribes must have come from IBP and Farmland—not respondents. Although there is no evidence as to who initially suggested the unlawful payments, and the individual respondents did not testify, it would not be a mitigating circumstance if the IBP and Farmland officials suggested the profit-sharing scheme. Commercial bribery is destructive of the meat marketing system in the United States irrespective of who originates the fraudulent scheme.

With respect to "the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 193(b)), the Department has always construed the Act as requiring a respondent to introduce evidence that a civil penalty would affect his ability to remain in business, if the respondent wished such factors considered. See, *e.g.*, *In re Peterman*, 42 Agric. Dec. ___ (slip op. at 1c) (Dec. 12, 1983), *aff'd*, No. 84-1053 (10th Cir. Aug. 13, 1985) (respondent allegedly unable to pay $20,000 civil penalty should have introduced evidence to that effect at the hearing); *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1982 (1982); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 173 (1980). However, in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984), the court held that the Department has the burden of producing evidence as to the size of the business involved and the effect of the penalty on the person's ability to continue to do business.

We believe that the *Bosma* decision is erroneous, in this respect, for the reasons set forth in the Department's petition for rehearing in *Bosma*, which is set forth as Appendix B to this decision.[24] In any event, however, this case is distinguishable from *Bosma*.

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[24] *In re Upton*, 44 Agric. Dec. ___ (slip op. at 32) (Oct. 2, 1985); In re Saylor, 44 Agric. Dec. ___ (slip op. at 524-26) (Sept. 20, 1985) (final decision on remand) (respondent should have introduced evidence showing that he could not pay a $10,000 civil penalty).

Respondent Corn State Meat Company, Inc., has been out of business for several years, and there is no indication that it will ever be operative again. Hence the civil penalty imposed in this case cannot have any effect on respondents' ability to continue in business.

The Act requires the Secretary to consider the "size of the business involved," i.e., the business involved in the particular proceeding, and the effect of the penalty on the "person's ability to continue in business," i.e., to continue in the business involved in the proceeding. The Act does not require the Secretary to consider whether the penalty will have an effect on some unrelated business venture not involved in the proceeding.

Since respondents will not continue the Corn State Meat Company, Inc., meat business irrespective of any civil penalty in this case, which is the only relevant business to be considered under the Act, it is irrelevant whether a civil penalty will have any effect on respondents' ability to continue some other business. (The record shows that respondent Prince has been a bartender for the last 2 years (Tr. 188), and contains no evidence as to respondent Wiggs' present employment.) Hence the criterion relating to the effect of the penalty on the person's ability to continue in business is not applicable here.

Finally, it should be noted that commercial bribery is so inimical to the meat packing industry that it would be in the best interests of the meat packing industry for any person found to have engaged in commercial bribery to discontinue his meat packing business. Accordingly, a civil penalty imposed for commercial bribery that prevented a person from continuing his meat packing business would be in the public interest. As stated in *In re Saylor*, 44 Agric. Dec. ____ (slip op. at 526) (Sept. 20, 1985) (decision on remand) (8-month suspension order and $10,000 civil penalty):

> The statute only requires that the Secretary "consider . . . the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). It does not require that the Secretary refrain from imposing a civil penalty that would adversely affect the person's ability to continue in business where, as here, it is in the public interest that the respondent discontinue his livestock activities subject to the Act.

The civil penalty was properly issued jointly and severally against the respondent corporation and the individuals who own, direct and control the corporation. As stated in *In re Pastures, Inc.*, 39 Agric. Dec. 395, 397 (1980):

Respondents [i.e., the president of the corporation and his wife, who was the sole owner and secretary-treasurer of the corporation] are in error in believing that an order cannot be issued against them as individuals unless they personally caused the corporation's insolvency by embezzlement or [mis]appropriation of funds. *Sebastopol Meat Co.* v. *Sec. of Agr.*, 440 F.2d 983, 983-986 (9th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S.D.A.*, 438 F.2d 1332, 1342-1343 (8th Cir. 1971); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. [171, 173] (Jan. 30, 1980); *In re Norwich Veal & Beef, Inc., 37 Agric. Dec. 1202, 1205 (1978); In re Mid-States Livestock, Inc.*, 36 Agric. Dec. 172, 192-196 (1977), *aff'd*, 570 F.2d 701 (8th Cir. 1978); and *see Hedrick* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025, 1030-1031 (E.D. Pa. 1978); *Fillippo* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1015-1018 (E.D. Pa. 1978).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Corn State Meat Company, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondents Terrance P. (Terry) Prince, Jr., and James L. Wiggs, individually or as owners, officers or directors of any packer subject to the Act, shall cease and desist from:

1. Directly or indirectly giving or offering to give, or permitting or causing to be given, money or anything of more than nominal value to, or for the benefit of, an officer, director, agent, employee or representative of any customer or prospective customer as an inducement to influence any such customer or prospective customer to purchase or promote the purchase of meat, meat food products or livestock products from or through respondents; and

2. Soliciting or accepting favored treatment for respondents, or for any customer or prospective customer of respondents, through the offer or the gift of money or anything of more than nominal value to or for the benefit of any officer, director, agent or employee of a supplier of meat, meat food products or livestock products to respondents or to any customer or prospective customer of respondents.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Corn State Meat Company, Inc., respondent Terrance P. (Terry) Prince, Jr., and respondent James L. Wiggs are hereby assessed, jointly and severally, a civil penalty of fifty thousand dollars ($50,000).

The cease and desist provisions of this order shall become effective as to each respondent on the day after service of this order on such respondent.

The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250, not later than the 90th day after service of this order on respondents.

APPENDIX A

Excerpt from *In re Worsley,* 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. Sanction Policy

[Excerpt omitted.—Ed.]

APPENDIX B

Petition for Rehearing filed in *Bosma* v. *USDA,* 754 F.2d 804 (9th Cir. 1984) (Note: This Petition for Rehearing is printed as an appendix to *In re Saylor,* 44 Agric. Dec. 2238 (Sept. 20, 1985))

[Excerpt omitted.—Ed.]

In re: HOLIDAY FOOD SERVICES, INC. and NAT ROCKER. P&S Docket No. 6488. Decided May 8, 1986.

Packer—Commercial bribery—Civil penalty.

The Judicial Officer reversed Chief Judge Campbell's civil penalty determination, and increased the civil penalty assessed jointly and severally against respondents from $25,000 to $50,000. The Administrative Law Judge's cease and desist order was affirmed, as were the findings that respondents engaged in commercial bribery from 1977 to 1982 by making payments to buyers for four firms in connection with meat, meat food products, poultry and poultry products sold by respondents to the firms. Commercial bribery violates §§ 202 (a) and (b) of the Act. The civil penalty may be applied against the corporation and the person who was its chief executive officer, a director, and a 50% shareholder of the corporation. Severe sanction policy was explained. The *Bosma* decision, requiring the Department to produce evidence as to the effect of the penalty on the person's ability to continue to do business, is erroneous. But *Bosma* is irrelevant because respondent corporation is out of business. Commercial bribery is so inimical to the meat packing industry that it would be in the public interest to impose a civil penalty that would adversely affect the person's ability to continue in business. Consent orders are given no weight in determining the sanction to be imposed in a litigated case. Any damage resulting from an agency's press release is not considered in determining the sanction to be imposed.

Thomas C. Heinz, for complainant.
Harry G. Melkonian, Los Angeles, California, for respondents.
John A. Campbell, Chief Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on February 14, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) in which he found that respondents engaged in "commercial bribery" from 1977 to 1982 by making payments to buyers for four firms in connection with meat, meat food products, poultry and poultry products sold by respondents to the firms. The ALJ ordered respondents to cease and desist from such activities, and respondents were assessed, jointly and severally, a $25,000 civil penalty.

On March 1, 1986, complainant, seeking a $50,000 civil penalty, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On March 24, 1986, respondents filed a cross-appeal. On April 9, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondents, but is denied inasmuch as the issues are not difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the ALJ's findings and conclusions are adopted as the final decision in this case, with changes too minor to itemize, except that the figure $25,000 is changed to $50,000 in the discussion as to the sanction. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

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* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et. seq.*), hereafter called the "Act", instituted by a complaint filed on February 11, 1985, by the Packers and Stockyards Administration. The complaint alleged that the corporate respondent, under the management, direction and control of the individual respondent, made kickback payments to four employees of meat buyers in Hawaii, thereby violating sections 202(a) and 202(b) of the Act (7 U.S.C. §§ 192(a), 192(b)). Respondents filed an answer denying that the corporate respondent is a packer within the meaning of and subject to the provisions of the Act, and denied that the company made any kickbacks or that Mr. Rocker managed, directed or controlled the corporation. Respondents alleged that payments to the four employees were for lawful purposes. Respondents also alleged various affirmative defenses.

An oral hearing was held October 22 and 23, 1985, in Los Angeles, California. Respondents were represented by Harry G. Melkonian and Patricia M. Wilson of Buchalter, Nemer, Fields, Chrystie & Younger, Los Angeles, California. Complainant was represented by Thomas C. Heinz, Office of General Counsel, United States Department of Agriculture, Washington, D.C. At the close of the hearing, the time was set for the filing of briefs.

FINDINGS OF FACT

1. Holiday Food Services, Inc., hereafter "respondent Holiday", at all times material herein was a California corporation which was formed in 1976 and continued to operate until mid-1983. To date, the corporation has not been dissolved. Respondent Holiday has engaged in the business of marketing meats, meat food products and poultry products, acting as a wholesale broker, dealer or distributor in commerce, and is a packer within the meaning of and subject to the Act (7 U.S.C. § 191(c)). (Transcript of hearing [Tr.] 317-318, 320)

2. The principal executive and principal business offices of respondent Holiday are at 405 Centinela Avenue, Inglewood, California, where they have been located since the formation of the corporation in 1976. With the exception of petty cash records and other minor records, all books and records of respondent Holiday were maintained at the Inglewood, California, offices. All of respondent Holiday's customers were located in the State of Hawaii.

3. Respondent Holiday shares the same offices, directors, and officers with Holiday Meat and Provision Corporation, which is wholly owned by respondent Nat Rocker.

4. Nat Rocker, hereafter "respondent Rocker", is an individual residing at 4991 Amigo, Tarzana, California 91356. At all times material herein, respondent Rocker was the chief executive officer, a director, and a 50% shareholder of respondent Holiday. Ron Vogel is the other owner but has had no responsibilities in the operation of respondent Holiday since 1980 or 1981. Before that time his only responsibility was to serve as accountant for the company.

I

5. During the period from January 1977, through May of 1983, respondent Holiday sold meat, meat food products, poultry and poultry products to Flagship International, Inc., which purchased the products under the trade name "Sky Chefs" in Hawaii.

6. During the period from January 1977, through May 1983, Sky Chefs employed Nick Rodrigues, Sr., in a capacity which included responsibility for purchasing food products on behalf of his employer. During the same period Sky Chefs purchased meat, meat food products, poultry and poultry products from respondent Holiday, respondents also made monthly payments by check to Nick Rodrigues, Sr., from February 1977, through June 1980, as found in complainant's exhibit (Cx) 2. (See also Tr. 110–111). This exhibit correlates Sky Chefs' monthly purchase payments to respondents, with monthly payments by respondents to Mr. Rodrigues. Thirty-four checks in payment to Rodrigues are listed on the exhibit totalling $11,413.49.

From February 1977 through February 1980, in the vast majority of cases, those monthly payments equalled one percent of the cost of products purchased by Sky Chefs from respondent Holiday during the preceding month. (Cx 2, pp. 1–20; Cx 39, pp. 1–32). The check payments to Rodrigues covering the months of February, March, April, May and June of 1980 were equal to or about equal to two percent of the cost of Sky Chefs' purchases from respondent Holiday. (Cx 2, pp. 21–24; Cx 39, pp. 33–37)

7. The record contains copies of 39 checks [1] issued to Rodrigues (Cx 39, pp. 1–38; Cx 3, p. 14) which total $13,475.57. All but two of these checks were signed by respondent Rocker.

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[1] Checks which duplicate those contained in Cx 39 (and Cx 40, 41, and 42 *infra*,) were not counted; e.g. Cx 4, p.8; Cx 5, p.22, etc.

8. For the years 1978 and 1979, respondent Holiday issued two Internal Revenue Service forms numbered 1096 and 1099 to Rodrigues which total $6,711.87.

9. In addition to the check payments as shown in complainant's exhibits 3 and 39, respondents also made payments in cash to Rodrigues during the period Larry Luxenberg served as Honolulu manager for respondent Holiday. Mr. Luxenberg made these payments upon instructions from respondent Rocker and was reimbursed by respondent Holiday. (Tr. 47-51; Cx 37)

10. Mr. Rodrigues' receipt of payments from respondents violated his employer's conflict of interest policy. (Tr. 79-82; Cx 15)

II

11. During the period from January 1977, through May 1982, respondent Holiday sold meat, meat food products, poultry and poultry products to Kauai Resort Hotel in Hawaii. During this period, Kauai Resort Hotel employed Chris Chang as general manager with purchasing responsibilities for food. Mr. Chang was responsible for the purchases from respondent Holiday.

12. In 1977, Mr. Chang began receiving monthly payments by check from respondents. Beginning in 1980 until May of 1982, the payments were made in cash by Larry Luxenberg. (Tr. 16, 51; Cx 37) Monthly sales summations made by complainant's investigator (Cx 16) show in most cases that check payments to Mr. Chang equalled two percent of the sales by respondent Holiday to Kauai Resort Hotel. Thirty-five checks in payment to Mr. Chang are listed on the exhibit totaling $9,302.41.

13. The record contains copies of 27 checks issued to Chang totaling $8,009.42. (Cx 40, pp. 1-26; Cx 17, p.5) All 27 checks were signed by respondent Rocker.

14. For the years 1978 and 1979, respondent Holiday issued two Internal Revenue Service forms (1096 and 1099) to Chang which total $7,566.42 (Cx 26).

III

15. During the period from April 1979, through January 1980, respondent Holiday sold meat, meat food products, poultry and poultry products to Hawaiian Regent Hotel in Hawaii. During this period, the Hawaiian Regent Hotel employed Richard Albanese as executive chef, with responsibilities which included the purchase of food for the hotel. (Tr. 32-33). During the same period respondents made payments to Richard Albanese approximating one to three percent of the hotel's purchases from respondent Holiday. Monthly

sales summations made by complainant's investigator (Cx 27) list five checks in payment to Mr. Albanese totaling $3,392.60.

16. The record contains copies of five checks issued to Albanese also totaling $3,392.60. (Cx 42, pp. 1-5). Four of these checks were signed by Nat Rocker.

17. For the year 1979, respondent Holiday issued an Internal Revenue Service form 1099 to Albanese in the amount of $2,608.60.

18. The receipt by Richard Albanese of these payments from respondents violated his employer's employment policies.

IV

19. During the period from April 1977, through March 1979, respondent Holiday sold meat, meat food products, poultry and poultry products to Plantation Gardens, a resort hotel in Hawaii. The hotel employed Mel Wabinga as a chef with responsibilities for purchasing food for the hotel during this period. Monthly sales summations made by complainant's investigator (Cx 33) list 22 checks in payment to Mr. Wabinga totaling $1,771.08.

20. The record contains copies of 29 checks issued to Wabinga totaling $2,314.08 (Cx 41, pp. 1-26; Cx 34, pp. 1,2,3). Twenty-eight of the 29 checks were signed by Nat Rocker.

21. For the years 1978 and 1979, respondent Holiday issued two Internal Revenue Service forms (1096 and 1099) to Wabinga which total $1,831.21. (Cx 35)

22. If Mr. Wabinga's employers had known about these payments at the time they were made, he would have been fired. (Tr. 92)

CONCLUSIONS

All contentions of the parties (including respondents' objections regarding complainant's reply brief) have been considered in the light of the record evidence. By reason of the above findings of fact, I conclude that respondents violated sections 202(a) and 202(b) of the Act (7 U.S.C. 192(a), (b)). The respondents are ordered to cease and desist and pay a civil penalty of $50,000.00.

VIOLATIONS

Four buyers, Rodrigues, Chang, Albanese, and Wabinga, were identified as having responsibility for the purchase of meat and meat food products for their employers. All four buyers purchased such products from respondent Holiday and received payments from respondents in the form of checks totaling $27,191.67 (Findings 7,13,16,20). In addition, the record identifies two of the buyers (Rodrigues and Chang) as receiving cash payments from respondents. (Tr. 15-16, 47-51, Cx 37)

Two of the four buyers (Wabinga and Chang) testified at the hearing.

Mr. Wabinga described his business relationship with respondent Holiday at Tr. 266–268, as follows:

> Q. All right. Are you familiar with a company called Holiday Food Services?
>
> A. Yes, I do.
>
> Q. How did you become familiar with that company?
>
> A. Well, someone approached me from the Mainland saying that they're new in Hawaii, that they would like to promote Holiday Food in Hawaii.
>
> Q. And when did that occur?
>
> A. Pardon?
>
> Q. When did that occur?
>
> A. Year, or ——
>
> Q. In the year, approximately.
>
> A. Year. I think it's in '78 or '79.
>
> Q. Okay.
>
> A. And they asked me that they was going to promote the meat, Holiday foods, in Hawaii, that if I was interested to buy some meat. And I said, "It all depends how much it costs, and, you know, freight-wise, and everything."
>
> Q. For whom were you working at that time?
>
> A. At the Plantation Gardens.
>
> Q. And what was your position?
>
> A. Executive Chef.
>
> Q. Did your responsibilities include the purchase of meat and meat food products?
>
> A. Yes.
>
> Q. Did you decide to purchase meat from Holiday Food Services?
>
> A. Well, I said, "Yeah, I would like to try." You know, as long as the price is within range I would give them a chance to buy the—buy their meat from them.

Q. And how long did you purchase meat from Holiday Foods?

A. About a year or a year and a half.

Q. Did you receive any payments personally from Holiday Food Services during that period?

A. Yes, I did.

Q. In what form? Did you receive cash payments?

A. No, it's a check, a weekly (ph.) check.

Q. How often?

A. All depends if you order your meat from them they'll give you a check. If you don't order from them—let's say if I have enough and I didn't order from them then I wouldn't receive any.

Q. All right. Why did you receive those payments during that period?

A. Well, they told me they'd give me a little something if I did buy it from them.

Q. I'm sorry, sir, I did not hear your answer.

A. Oh. They told me if I buy meat from them it will be a little cheap and I would have payment for them—from them—for buying meat from them.

Q. And who told you that?

A. Larry Luxenberg. Is that his last name?

Q. I believe there was a man named that associated with Holiday Food.

A. What was his name again?

Q. Larry Luxenberg.

A. Yeah, that's the guy; that's the guy that I talked to, Larry Luxenberg.

Respondents challenge the accuracy of Wabinga's testimony as "confused, ambiguous and unclear." (Brief, p. 11) Respondents base this challenge upon Wabinga's identification of Mr. Larry Luxenberg as the individual he spoke to in 1978 about receiving payments from respondent Holiday. (See also Tr. 270-271)

Mr. Luxenberg owned Lux Foods, which operated in Honolulu until the operation was sold to respondents in 1974. Thereafter, in 1980, he became the general manager of respondent Holiday's operation in Honolulu (Tr. 44-47, 280-281).

While the record discloses no formal relationship between Luxenberg and respondents during the period 1974-1980, and while Wabinga might have been confused about his conversation with Luxenberg in 1978, his testimony about his receipt of check payments from respondents is clear and unambiguous, and is corroborated by his receipt of 29 checks from respondents (Finding 20).

Another buyer, Chris Chang testified. (Tr. 12-29). He testified that he received checks in the period 1976-1979, and cash thereafter through 1982 from Larry Luxenberg. Luxenberg's affidavit (Cx 37) and his testimony (Tr. 51) confirm the payment of cash.

Chang also testified that he understood the payments were for his referrals of respondents to other buyers. Chang made no introduction. He just told respondent's salesmen to "mention my name." (Tr. 26).

Mr. Chang's explanation of the reason for payments is not persuasive. The payments were not sporadic as one might expect from a casual reference here and there, but were monthly payments based in large measure on the volume of sales to his employer. (Findings of Fact 6 and 7).

Buyer Albanese and Rodrigues did not testify and could not be reached by complainant's investigator or refused to be interviewed (Tr. 98, 187-188). However, record evidence shows the receipt of payments, cash and checks to Rodrigues, and checks to Albanese, from respondents. (Findings of Fact 5-9, 15-17). Speculation about possible services rendered by these two buyers is not persuasive.

The totality of the facts contained in the record lead to the conclusion that respondents committed unfair trade practices, commonly called "commercial bribery", and thereby violated Sections 202(a) and 202(b) of the Act [2], by the payments to the four buyers named above.

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[2] Sec. 202. It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or . . . (7 U.S.C. 192(a), (b)).

As complainant correctly urges (main brief pp. 8–9):

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

Past decisions have established commercial bribery to be a violation of the Act. *In re National Beef Packing Co.*, 36 A.D. 1722 (1977), *aff'd*, 605 F.2d 1167 (CA 10, 1979)); *In re Gol-Pak Corporation*, 27 A.D. 228 (1968); *In re Hygrade Food Products Corporation*, 26 A.D. 825 (1967).

NAT ROCKER

It is respondents' position that the testimony of Nat Rocker clearly establishes his innocence from any wrongdoing. (Brief pp. 18–28).

Of great weight in this proceeding is the fact that of the 100 payment checks to the four buyers, 96 were signed by respondent Rocker. (Findings of Fact 7,13,16,20).

Larry Luxenberg testified about the payments to the buyers, and indicated that such payments were ongoing, existing even before his arrival in Hawaii in 1980. His testimony further indicates that he was reimbursed for cash payments, and that his disbursements were on instructions from Los Angeles. (Tr. 47–51). Luxenberg's affidavit (Cx 37) states that he paid cash to various food buyers "per the instructions of Nat Rocker."

In these circumstances, Nat Rocker cannot assert that the actions of Luxenberg or of the other managers in Hawaii were outside the scope of their employment.

Further, Nat Rocker's testimony of his disinterest, lack of control, and neglect of respondent Holiday Foods is hard to believe when contrasted with his success with and attention to Holiday Meat and Provision Corporation, hereinafter called "Holiday Meat." Respondent owns 100% of the stock of the Holiday Meat

Corporation, whose current annual volume of business is about 18 million dollars. (Tr. 277-294, 310-335).

Contrary to respondents' position, the record shows a deep involvement by respondent Rocker in the management of respondent Holiday. Aside from respondent Rocker's issuance of checks and instructions to Luxenberg, previously discussed, the record discloses that Rocker, and/or his California office: maintained all the books and records for respondent Holiday (Tr. 48, 68, 327-329); did most of the purchasing (Tr. 322-324); gave detailed and daily instructions to the Honolulu office of respondent Holiday (Tr. 48; Cx 37); and regularly discussed profits and losses with the Hawaii managers. (Tr. 328-33)

Respondent Rocker cannot avoid personal responsibility here. The record demonstrates that he was responsible for the operation of the respondent corporation. *In re Pastures, Inc.*, 39 A.D. 395, and cases cited at 397 (1980).

SANCTION

The respondents' violations are serious and repeated. Section 203(b) of the Act (7 U.S.C. § 193(b)) authorizes a civil penalty of $10,000 for each violation of the Act.

In consideration of the gravity of the violations, the size of the business involved, and the effect upon the ability to remain in business, a civil penalty in the amount of $50,000.00 is imposed, in addition to an order to cease and desist.

Respondents' competitors, and the customers involved herein, were injured by respondents' violations. As noted above, the violations were serious and repeated, thus requiring the imposition of a severe sanction.

While complainant was not successful in gathering financial information fromrespondents (Tr. 337-339), the record does reveal the following:

a. Respondent Holiday is defunct, and its dissolution is anticipated. Thus the sanction imposed may possibly be levied solely against respondent Rocker.

b. Respondent Holiday suffered a loss of about $800,000 which is owing to Holiday Meats (Tr. 322).

c. Holiday Meats, wholly owned by respondent Rocker, is a successful enterprise, with a current annual volume of business of 18 million dollars. (Tr. 316, 320)

Accordingly, it would appear that the imposition of a $50,000.00 civil penalty is clearly warranted in light of the nature and seriousness of the violations committed.

Likewise, the amount of the civil penalty, though large enough to deter future violations by respondents and other potential violators, will not adversely affect respondent Rocker's ability to remain in business.

For the foregoing reasons the following order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

For the reasons set forth by the ALJ, respondents' violations are serious and repeated, occurring continuously over a 5-year period.

It is the policy of this Department to impose severe sanctions for serious or repeated violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings since the early 1970's.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),[3] which is set forth as Appendix A to this decision.[4] The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

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[3] The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[4] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.* 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir.1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

Respondents argue that "[t]here is nothing left to deter" since "Holiday Food no longer exists" (Cross-Appeal at 7). But that argument overlooks the fact that the Department's sanction policy is meant to deter other potential violators, as well as the particular respondents involved in a pending proceeding.

Respondents contend that the $25,000 civil penalty assessed by the ALJ is too severe in view of respondents' financial condition (Cross-Appeal at 9-12). The Act authorizes a civil penalty of not more than $10,000 for each violation. The Act provides (7 U.S.C. § 193(b)):

> (b) . . . The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

The Department has always construed the Act as requiring a respondent to introduce evidence that a civil penalty would affect his ability to remain in business, if the respondent wished such factors considered. See, *e.g.*, *In re Peterman*, 42 Agric. Dec. ____ (slip op. at 1c) (Dec. 12, 1983), *aff'd*, No. 84-1053 (10th Cir. Aug. 13, 1985) (respondent allegedly unable to pay $20,000 civil penalty should have introduced evidence to that effect at the hearing); *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1982 (1982); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 173 (1980). However, in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984), the court held that the Department has the burden of producing evidence as to the size of the business involved and the effect of the penalty on the person's ability to continue to do business.

We believe that the *Bosma* decision is erroneous, in this respect, for the reasons set forth in the Department's petition for rehearing in *Bosma*, which is set forth as Appendix B to this decision.[5] In any event, however, this case is distinguishable from *Bosma*.

Respondent Holiday Food Services, Inc., has been out of business for several years, and respondent Rocker contends that he is planning to dissolve that corporate business. Hence the civil penalty imposed in this case cannot have any effect on respondent Rocker's ability to continue the Holiday Food Services business.

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[5] *In re Upton*, 44 Agric. Dec. 2238 (slip op. at 32) (Oct. 2, 1985); *In re Saylor*, 44 Agric. Dec. 2238 (slip op. at 524-26) (Sept. 20, 1985) (final decision on remand) (respondent should have introduced evidence showing that he could not pay a $10,000 civil penalty).

The Act requires the Secretary to consider the "size of the business involved," i.e., the business involved in the particular proceeding, and the effect of the penalty on the "person's ability to continue in business," i.e., to continue in the business involved in the proceeding. The Act does not require the Secretary to consider whether the penalty will have an effect on some unrelated business venture not involved in the proceeding.

Since respondent Rocker will not continue the Holiday Food Services, Inc., meat business irrespective of any civil penalty in this case, which is the only relevant business to be considered under the Act, it is irrelevant whether a civil penalty will have any effect on respondent Rocker's ability to continue his Holiday Meat & Provision Corporation business.

Furthermore, it should be noted that complainant's investigator repeatedly requested financial information relating to Holiday Food Services, Inc., and Holiday Meat & Provision Corporation, but respondents failed to supply the requested information (with the exception of one tax return) (Tr. 186–87, 337–40). This, again, is a circumstance that distinguishes this case from *Bosma*.

In addition, even if it were relevant to determine whether a $50,000 civil penalty will affect respondent Rocker's ability to continue his separate business as Holiday Meat & Provision Corporation, he has failed to demonstrate on the record that such a civil penalty would prevent him from continuing to operate that business.[6]

Finally, it should be noted that commercial bribery is so inimical to the meat packing industry that it would be in the best interests

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[6] The "Declaration of Nat Rocker" attached to respondents' cross-appeal, relating to the financial condition of his businesses, was not introduced as evidence and, therefore, cannot be considered on appeal. Also, there is no basis for reopening the hearing to receive evidence in this respect since the Department's uniform rules of practice applicable to disciplinary proceedings (7 CFR § 1.146(a)(2)) requires the same type of showing, in this respect, as court rules relating to newly discovered evidence. *In re DeJong Packing Co.*, 36 Agric. Dec. 1319, 1320 (1977) (order denying rehearing), *aff'd*, 618 F.2d 1329 (9th Cir.) (2–1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 795 (1978) (remand order), *final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80–3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1417 (1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 428–29 (1982), *aff'd*, No. 82–1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1910, 1910–11 (1981) (order denying reopening), *aff'd*, No. CV 81–6485 (C.D. Cal. Aug. 11, 1983) (reinstating *nunc pro tunc* original order of Oct. 20, 1982, *aff'd* 40 Agric. Dec. 1468), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Winger*, 38 Agric. Dec. 182, 188 (1979, *appeal dismissed*, No. 79–C–126 (W.D. Wis. June 1979). Respondents have made no showing why this information could not have been presented at the hearing.

of the meat packing industry if any person found to have engaged in commercial bribery discontinued his meat packing business. Accordingly, a civil penalty imposed for commercial bribery that prevented a person from continuing his meat packing business would be in the public interest. As stated in *In re Saylor,* 44 Agric. Dec. ___ (slip op. at 526) (Sept. 20, 1985) (decision on remand):

> The statute only requires that the Secretary "consider . . . the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). It does not require that the Secretary refrain from imposing a civil penalty that would adversely affect the person's ability to continue in business where, as here, it is in the public interest that the respondent discontinue his livestock activities subject to the Act.

Respondents contend that the evidence is weak as to respondent Rocker's personal involvement in the violations, but the ALJ, who saw and heard the witnesses testify, found it "hard to believe" Nat Rocker's "testimony of his disinterest, lack of control, and neglect of respondent Holiday Foods" (Initial Decision at 17). There is no basis in the record for setting aside his determination in this respect.

In addition, the ALJ correctly held that an order may be issued against an individual, in the circumstances shown here (Initial Decision at 18), citing *In re Pastures, Inc.,* 39 Agric. Dec. 395, 397 (1980). In *Pastures,* it is stated (*id.*):

> Respondents [i.e., the president of the corporation and his wife, who was the sole owner and secretary-treasurer of the corporation] are in error in believing that an order cannot be issued against them as individuals unless they personally caused the corporation's insolvency by embezzlement or [mis]appropriation of funds. *Sebastopol Meat Co.* v. *Sec. of Agr.,* 440 F.2d 983, 983-986 (9th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S.D.A.,* 438 F.2d 1332, 1342-1343 (8th Cir. 1971); *In re Thomaston Beef & Veal, Inc.,* 39 Agric. Dec. [171, 173] (Jan. 30, 1980); *In re Norwich Veal & Beef, Inc.,* 37 Agric. Dec. 1202, 1205 (1978); *In re Mid-States Livestock, Inc.,* 36 Agric. Dec. 172, 192-196 (1977), *aff'd,* 570 F.2d 701 (8th Cir. 1978); and *see Hedrick* v. *S. Bonaccurso & Sons, Inc.,* 466 F. Supp. 1025, 1030-1031 (E.D. Pa. 1978); *Fillippo* v. *S. Bonaccurso & Sons, Inc.,* 466 F. Supp. 1008, 1015-1018 (E.D. Pa. 1978).

Respondents contend that in a recent case brought against Dubuque Packing Company, in which Dubuque was charged with paying over $80,000 in commercial bribes, a $30,000 civil penalty was assessed (*In re Dubuque Packing Co.*, 44 Agric. Dec. ____ (Dec. 13, 1985)), which is about one-third the amount of the bribes paid, whereas a $50,000 civil penalty in this case would be almost twice as much as the proven bribes paid. However, it is well settled that consent orders "should be given no weight whatsoever in determining the sanction to be imposed in a litigated case" (*In re Worsley*, 33 Agric. Dec. 1547, 1569 (1974)), Appendix A at 23a. Furthermore, there is no policy of imposing a civil penalty in commercial bribery cases equal to a certain percentage of the amount of the bribes paid. (That is not one of the criteria set forth in the statute). In fact, since this is the first litigated case involving commercial bribery that has been decided by this Department after the Act was amended to authorize civil penalties, there is no prior precedent.[7]

In another case involving commercial bribery, in which the Decision and Order is being filed this day, a $50,000 civil penalty is also being imposed jointly and severally against a defunct corporation and two individuals. *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986). In *Corn State*, concern is expressed as to whether a $50,000 civil penalty is adequate to serve as an effective deterrent to commercial bribery (in view of the large profits that can be made from commercial bribery and the difficulty of detection). I have the same concern here. If complainant requests greatly increased sanctions in future similar cases, much larger civil penalties will be imposed.

Respondents contend that they have already suffered damage because of the Department's press release issued in this case, but it is well settled that any damage resulting from an agency press release is not considered in determining the sanction to be imposed in a proceeding.[8]

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[7] Prior litigated cases involving commercial bribery related to offenses committed before the 1976 amendment authorizing the imposition of civil penalties. *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-36 (1977), *aff'd*, 605 F.2d 1167, 1168-69 (10th Cir. 1979); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 552-53 (1981); *In re Gol-Pak Corp.*, 27 Agric. Dec. 228, 232-35 (1968); *In re Hygrade Foods Prods. Corp.*, 26 Agric. Dec. 825, 829-32 (1967).

[8] *In re Speight*, 33 Agric. Dec. 280, 304-05 (1974); *In re Miller*, 33 Agric. Dec. 53, 81-82, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974). In *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 188 (1973), the Court upheld a suspension order under the act notwithstanding the "damaging publicity" issued by the agency. *Accord, Miller* v. *Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *Bowman* v. *USDA*, 363 F.2d 81, 86 (5th Cir. 1966).

Although there is no basis on this record for reducing the amount of the civil penalty to be imposed because of respondents' financial condition, complainant does not object to the payment of the civil penalty over a period of years. Accordingly, the order will provide for payment of the $50,000 civil penalty over a period of 4 years.

No contention is made by respondents that complainant was required to prove actual injury or likelihood of injury in order to prove a violation of § 202(a) of the Act (7 U.S.C. § 192(a)), and the issue cannot be raised at this late date in this case. But since that issue is raised in *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986), also decided this day, the discussion of that issue in *Corn State* is set forth as Appendix C to this decision.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Holiday Food Services, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondent Nat Rocker, individually or as owner, officer or director of any packer subject to the Act, shall cease and desist from directly or indirectly giving or offering to give, or permitting or causing to be given money or anything of more than nominal value to, or for the benefit of, an officer, director, agent, employee or representative of any customer or prospective customer as an inducement to influence any such person to purchase or promote the purchase of meat, meat food products, poultry or poultry products from or through respondents.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are hereby assessed, jointly and severally, a civil penalty of fifty thousand dollars ($50,000).

The cease and desist provisions of this order shall become effective as to each respondent on the day after service of this order on such respondent.

The civil penalty shall be paid at the rate of $12,500 per year by certified checks made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250, with the first check due not later than the 90th day after service of this order on respondents, and the remaining checks due on the same date of the next 3 years thereafter.

APPENDIX A

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974).

U.S.D.A. SANCTION POLICY

APPENDIX B

Petition for Rehearing filed in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984) (Note: This Petition for Rehearing is printed as an appendix to *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985))

APPENDIX C

Excerpt from *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (slip op. at 37-50) (May 8, 1986)

II. Proof of Injury or Likelihood of Injury Is Not Required in Commercial Bribery Cases.

[The excerpts in the appendixes above are omitted.—Ed.]

In re: OLE SALEM PACKING CO., INC., a corporation, and GREGORY H. MITCHELL, an individual, P&S Docket No. 6668. Decided May 9, 1986.

Packer—failure to pay full purchase price—Civil Penalty—Consent.

Roberta Swartzendruber, P&S Div., OGC, for complainant.
E. Bragg Williams, Poplarville, MS, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ole Salem Packing Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Mississippi. Corporate respondent's mailing address is P. O. Box 1018, Picayune, Mississippi 39466.

2. The corporate respondent, at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter and preparing meats for sale and shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Gregory H. Mitchell, hereinafter referred to as the individual respondent, is an individual whose business mailing address is P. O. Box 1018, Picayune, Mississippi 39466.

4. The individual respondent, at all times material herein, was:

(a) An owner, in combination with his wife, of all the corporate respondent's stock;

(b) President of the corporate respondent; and

(c) Responsible for the direction, management and control of the business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Ole Salem Packing Co., Inc., its officers, directors, agents, successors and assigns, and Gregory H. Mitchell, directly or through any corporate or other device, in connection with their business subject to the Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are hereby severally and jointly assessed a civil penalty of One Thousand Eight Hundred Dollars ($1,800.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: HARRY BRODY & SONS, INC., and HERBERT S. SMALL, P&S Docket No. 6575. Decided May 14, 1986.

Packer—inaccurate or incorrect weights—commercial bribery—Civil Penalty—Consent.

Ben Bruner, P&S Div., OGC, for complainant.
Ramsey Clark, New York, NY, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harry Brody & Sons, Inc., hereinafter referred to as corporate respondent, is a corporation which had its principal place of business at 3451 Frankford Avenue, Philadelphia, Pennsylvania. It is no longer in operation.

2. Corporate respondent at all times material herein was:

(a) Engaged in the business of manufacturing and preparing meat and meat food products for sale and shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. Herbert S. Small, hereinafter referred to as individual respondent, is an individual whose mailing address is 1209 Stratford Avenue, Melrose Park, Pennsylvania 19126.

4. Individual respondent at all times material herein was:

(a) President of the corporate respondent;

(b) Owner of 100% of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent; and

(d) A packer within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Harry Brody & Sons, Inc., its officers, directors, agents and employees, and Herbert S. Small, directly or through any corporate or any device, in connection with the purchase, sale, or distribution of meat or meat food products, shall cease and desist from directly or indirectly;

1. Invoicing and collecting from the purchasers of livestock carcasses or parts thereof on the basis of inaccurate or incorrect weights;

2. Invoicing and collecting from the purchasers of livestock carcasses or parts thereof on the basis of a weight which includes trim weight without obtaining the purchasers' consent to the inclusion of trim weight in the invoice weight;

3. Attempting to enter into, continuing, cooperating in or carrying out any conspiracy, agreement, arrangement or understanding with any officer, agent, director, or employee of any customer or prospective customer which involves the offering or giving by respondent of any money or gift of more than nominal value to or for the benefit of any such officer, agent, director, or employee of the customer or prospective customer based upon or related to the purchase of livestock, meats or meat food products by such customer or prospective customer from respondent; and

4. Attempting to induce or cause, inducing or causing, accepting or receiving favored treatment or undue preference or advantage related to the purchase, sale, or marketing of meat or meat food products, in commerce, from any customer or prospective customer based on the offering or giving by respondent, its officers, agents, directors, employees, or brokers who represent it, of money or any gift or service of more than nominal value to or for the benefit of any customer, prospective customer, or their officers, agents, directors, or employees.

In accordance with section 203(b) of the Act (7 U.S.C § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of $20,000.00, which shall be held in abeyance, provided, however, that if respondents violate this order within five (5) years from its effective date, the full amount shall immediately become due and payable.

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: LINDEN PACKING CO., INC., P&S Docket No. 6536. Decided April 7, 1986.

Hooks & rollers not uniform—misrepresentation—mismanagement of monorail scale—inaccurate weights—Civil Penalty.

Peter Train, for complainant.
Raquel Romero, Elizabeth, NJ, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, hereinafter "the Act,"), that was instituted by a complaint and notice of hearing filed on May 8, 1985, which alleges that respondent engaged in unfair and deceptive trade practices in connection with its purchases of livestock.

The complaint alleges that during the period January 31, 1983 through December 29, 1983, respondent violated the Act (7 U.S.C. §§ 192(a) and 221) and regulations thereunder (9 C.F.R. §§ 201.73-1 and 201.99) when (1) it accounted and paid for livestock purchased on a carcass weight basis that included a tare which exceeded by five pounds the actual weight of the equipment (hooks and rollers) attached to the carcasses when weighed; (2) used hooks and rollers which were not uniform in weight; and (3) did not record the weight of the carcasses to the nearest minimum graduation on its scale.

Respondent filed an answer dated May 24, 1985, admitting the jurisdictional allegations of the complaint, but denying its commission of any violation. Subsequent to the holding of prehearing conferences and prehearing exchanges of proposed exhibits and wit-

ness lists, an oral hearing was held before me on December 3-4, 1985. Complainant was represented by Peter V. Train, Office of the General Counsel, United States Department of Agriculture, and respondent was represented by Raquel Romero, Weltchek, Prupis & Ritz, Elizabeth, New Jersey.

At the close of the oral hearing, a schedule for the filing of proposed findings of fact, conclusions, and supporting briefs was set. Briefing was completed on March 24, 1986.

Upon consideration of the entire record, briefs, and arguments, I have found that respondent did improperly account and pay for cattle on the basis of improper weighing practices. An order is being entered which directs respondent to cease and desist from such practices, specifies the manner in which respondent shall keep accounts and records in the future, and assesses a civil penalty against respondent of $20,000.00.

FINDINGS OF FACT

1. Respondent, Linden Packing Co., Inc., is a corporation which has a principal place of business at 324 Astor Street, Newark, New Jersey 07114.

2. Respondent is, and at all times material herein, was:

(a) engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) a packer within the meaning of and subject to the provisions of the Act.

3. Respondent has been in the meat packing business for over 30 years and its current Vice-President, Jack Rosenberg, is responsible for its day-to-day operations.

4. Respondent, at all times material herein, purchased a portion of its livestock on a carcass weight basis.

5. Respondent, at all times material herein, weighed its livestock purchases after their conversion into carcasses, on a Toledo monorail dial scale which depicted weights in one pound graduations, with odd numbers indicated by lines without numbers and even number indicated by both lines and numbers.

6. Respondent's plant, at all times material herein, employed a gravity dressing system in which carcasses travel on a gravity rail until they reach a washing station where they are cleansed by a pressure hose. They are then weighed on the Toledo monorail dial scale, after which they are moved into a cooler. Respondent considered installing automatic washing equipment which would have washed the carcasses after weighing, but was advised that this was not feasible due to the low water table of the land upon which the plant was built.

7. On February 9, 1968, after giving notice and considering comments by industry members and all interested persons, the Department of Agriculture, promulgated the following regulation (33 F.R. 2760-2763, 9 C.F.R. § 201.99(d)):

> "Settlement and final payment for livestock purchased by a packer on a carcass weight or carcass grade and weight basis shall be on the actual hot weights. The hooks, rollers and gambrels or other similar equipment used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare shall include only the weight of the equipment."

8. Departmental personnel, based upon the advice of the manufacturers of the Toledo monorail dial scale, have determined that it is reasonable to maintain the equipment in such condition that a variance of two ounces either above or below the average weight of a plant's hooks and rollers is the acceptable tolerance for its hooks and rollers to still be considered uniform in weight.

9. On May 19, 1982, Elizabeth Hughes, a marketing specialist for the Packers and Stockyards Administration, went upon respondent's premises and conducted a test of a sample of respondent's hooks and rollers which revealed that forty-two percent of those in the sample varied by more than two ounces from the average weight. She also observed that the tare setting on the scale was 20 pounds; whereas, the average weight of the hooks and rollers attached to carcasses when weighed, on the basis of those she sampled, should have been 14 pounds 12 ounces. She was advised that 5 pounds were added to the tare as a compensating deduction for the water added during the washing operation.

10. On May 20, 1982, a regional supervisor for the Packers and Stockyards Administration, sent respondent a letter by certified mail, return receipt requested, (Complainant's Exhibit 3) advising respondent:

> "Recently a survey was conducted at your plant to determine your firm's compliance with the Packers and Stockyards Act and regulations when buying livestock on a dressed weight basis.
>
> "During the survey, certain discrepancies were found and discussed with you.
>
> "You agreed to discontinue deducting five pounds for water when purchasing livestock on a dressed weight basis and to identify and keep captive enough hooks and rollers

for your weekly hot dressed weight purchases. These captive hooks must be standardized to plus or minus two ounces from their average weight and the tare on your scale set accordingly.

"It will also be necessary to record the number of livestock bought on a dressed weight basis in Section 5, Item 6, of your annual report.

"Please notify this office of the steps you are taking to implement the above requirements.

"If you have any questions, feel free to call this office at 201-246-0060."

11. Approximately one week subsequent to the May 20, 1982 letter, Ms. Hughes telephoned Mr. Rosenberg and inquired as to his actions to achieve compliance and he then advised that respondent would discountinue purchasing livestock on a dressed weight basis. A month later, Ms. Hughes spoke to Mr. Rosenberg by telephone again and he told her he had changed his mind and would continue to purchase livestock on a dressed weight basis; he was advised by Ms. Hughes that respondent would have to come into compliance.

12. Respondent's annual report for October 1, 1982 through September 30, 1983, reveals a blank space where the form requires a packer to identify its total livestock purchases during the period that were paid for on a dressed carcass basis.

13. On December 21, 1983, Vincent DiBernardo, an industrial specialist for the Packers and Stockyards Administration, went upon respondent's premises and conducted a test of a sample of respondent's hooks and rollers which revealed that sixty-five percent of those in the sample varied by more than two ounces from the average weight. He also observed that the tare setting on the scale was 20 pounds; whereas the average weight of the hooks and rollers attached to carcasses when weighed, on the basis of those he sampled, should have been 14 pounds 8 ounces.

14. In January of 1984, Ms. Hughes again went upon respondent's premises and again observed the tare setting to be 20 pounds and, believing it to be at least 5 pounds in excess of the weight of the hooks and rollers, she discussed the setting with Jack Rosenberg who told her he took 5 pounds additional tare to compensate for the water added to the carcasses when washed immediately prior to being weighed.

15. In the course of its purchase of livestock on a carcass weight basis, during the period January 31, 1983 through December 29,

1983, respondent customarily weighed carcasses with a tare setting that exceeded, by five pounds, the weight of the rollers and hooks attached to the carcasses; paid sellers and issued accountings to them based on such weights without informing them of this practice; and used hooks and rollers that were not uniform in weight. In respect to one seller alone, Fern Baker, from September 27, 1983 through December 29, 1983, respondent paid the seller $6,751.37 less than required by taking the five pound deduction for water in respect to its weighing of 1701 cattle carcasses.

16. During 1983, respondent's weighmaster always reported the individual carcass weights of livestock purchased on a carcass weight basis in terms of even numbers and never in terms of odd numbers.

17. As part of its annual report for the fiscal year that ended on September 30, 1983, respondent filed financial statements showing its sales for the year were just under 74 million dollars, its gross profits were over 3 million dollars, and its income before income tax was 1.5 million dollars.

CONCLUSIONS

1. (a) Respondent engaged in an unfair and deceptive practice and device in violation of 7 U.S.C. § 192(a) and 9 C.F.R. § 201.99, each time during the period January 31, 1983 through December 29, 1983, when it settled and made final payment for livestock purchased on a carcass weight basis that was not limited to the actual hot weights, but included as part of the tare, an additional five pounds for water and exceeded by that amount, the weight of the hooks, rollers and other equipment used in connection with respondent's weighing of the carcasses.

(b) Pursuant to 7 U.S.C. § 193(b), an order requiring respondent to cease and desist from continuing such violations is warranted and is being entered. Inasmuch as sellers were unaware of this practice, the fact that respondent had been given a prior warning but persisted in the practice, committed in excess of 1700 violations (see finding number 15, *supra*), and the fact that respondent's annual sales for the fiscal year which ended on September 30, 1983 was nearly 74 million dollars with a gross profit of over 3 million dollars, a civil penalty of $20,000.00 is also being assessed which will not affect respondent's ability to continue in business, and is well below the maximum amount that may be assessed under the Act's authorization of $10,000.00 per violation, but is sufficient to impress respondent with the gravity of the offense and the need for future compliance.

2. (a) Respondent further violated 7 U.S.C. § 192(a) and 9 CFR § 201.99, each time during the period January 31, 1983 through December 29, 1983, when it used hooks and rollers which were not uniform in weight.

(b) Pursuant to 7 U.S.C. § 193(b), an order requiring respondent to cease and desist from continuing such violations is warranted and is being entered, but inasmuch as the violations were technical in nature, the assessment of a civil penalty for these violations is not appropriate.

3. The practice of respondent's weighmaster of reporting all carcass weights on the basis of even numbers only, was not shown to have disadvantaged sellers any more than it did respondent and cannot be said to be in violation of the Act. The Departmental regulation cited by complainant (9 CFR § 201.73-1) applies to the weighing of drafts of livestock and not to dressed carcasses.

DISCUSSION

The gist of the violations committed by respondent was its unauthorized deduction of five pounds for the water that may have been added to the weight of carcasses when it cleaned them just before weighing. The Departmental regulation, promulgated only after considerable industry discussion to make intelligible the prices per pound packers quote to sellers, clearly prohibits any deduction from the actual weight of a carcass other than the actual weight of attached equipment; i.e., the hooks and rollers. Respondent would justify its practice on the basis of the low water table of the land where its plant is situated. It was advised by an engineer that, because of this fact, automatic washing equipment could not be installed because the sewers that service the plant would be caused to back up. However, respondent has not presented any evidence that, after it received a warning that its practices were in violation of the Act and the regulation, it was unable to use the existing pressure hose so as to cleanse the carcasses after, instead of before, weighing them. Moreover, other packers with similar problems have elected to buy livestock on the basis of live weights instead of carcass weights and respondent, at first, advised the investigator that it would switch to such purchasing practice. But, it later changed its decision and persisted in its practices despite actual knowledge that it was violating a Departmental regulation in implementation of the section of the Act that proscribes unfair and deceptive practices.

A civil penalty of $20,000.00 is warranted by respondent's wilful violations of the express language of the regulation when it persisted in adding five pounds to the tare on the carcass weights upon

which it paid sellers after it received express warnings and had promised to comply. This penalty is $5,000.00 less than the penalty recommended by complainant and reflects the fact that the charges respecting the weighmaster's practice of recording weights at the nearest even pound have been dismissed and that no civil penalty is being assessed for respondent's failure to use hooks and rollers of uniform weights which was a technical violation not shown to be of benefit to respondent at the expense of sellers.

Accordingly, the following Order is being entered.

ORDER

Respondent Linden Packing Co., Inc., its officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Failing to settle and make final payment for livestock purchased on a carcass weight basis on the actual hot carcass weight of such livestock;

2. Using hooks and rollers in the weighing of livestock purchased on a carcass weight basis that are not uniform in weight;

3. Using a tare when weighing livestock carcasses greater than the actual weight of the hooks, rollers, gambrels or other equipment being used during such weighing;

4. Operating any monorail scale owned or controlled by it unless the tare on such scale has been checked and the scale's tare has been correctly and properly adjusted prior to the start of each day's operations, and as often as necessary during each day's operations to ensure that the tare is proper;

5. Failing to maintain and operate any livestock or monorail scale owned or controlled by it in such a manner as to ensure accurate and correct weights;

6. Weighing livestock, livestock carcasses or parts thereof, or causing them to be weighed, at other than the true and correct weights; and

7. Accounting to and paying the sellers on the basis of inaccurate or incorrect weights.

Respondent Linden Packing Co., Inc., shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its operations subject to the Packers and Stockyards Act, including hot scale sheets, accounts of sale and purchase invoices showing the true and accurate hot weight of livestock purchased on a carcass weight basis.

Respondent Linden Packing Co., Inc., is assessed a civil penalty in the amount of $20,000.00, which shall be payable by certified check or money order to the Treasurer of the United States.

Respondent Linden Packing Co., Inc., shall deliver a copy of this Decision and Order to all of its personnel whose duties or responsibilities include, in whole or in part, the operation of its livestock and monorail scales, the weighing of livestock or livestock carcasses, and the accounting to and payment of the sellers of livestock.

This Decision and Order shall become final 35 days after service hereof, unless appealed within 30 days of service (9 CFR §§ 1.145(a), 1.142(c)).

A copy of this Order shall be served upon the parties.

[Decision and Order became final May 15, 1986—Ed.]

In re: SELECTED MEATS, INC., JOSEPH A. MEINDL and ROBERT D. HINDSLEY, P&S Docket No. 6430. Decided May 16, 1986.

Packer—issuing insufficent funds checks—failure to pay when due—custodial accounts—Civil Penalty—Consent.

Eric Paul, for complainant.
Virgil L. Beeler, Indianapolis, IN, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrative, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint as modified below and specifically admit the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Selected Meats, Inc., hereinafter referred to as the corporate respondent, is an Indiana corporation whose principal place of business is located in Kingsford Heights, Indiana, and whose mailing address is P.O. Box 471, Kingsford Heights, Indiana 46346.

2. The corporate respondent at all times material herein prior to the suspension of livestock purchase operations on May 3, 1984, was:

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter and of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. The corporate respondent's average annual purchases of livestock prior to May 3, 1984, exceed $500,000.00.

4. Joseph A. Meindl, hereinafter referred to as respondent Meindl, is and at all times material herein was:

(a) An individual whose address is 906 East 20th Street, La Porte, Indiana;

(b) President of the corporate respondent;

(c) Owner of at least a 55 percent interest in the corporate respondent's outstanding stock; and

(d) In combination with respondent Hindsley, responsible for the direction, management and control of the operation of the corporate respondent.

5. Robert D. Hindsley, hereinafter referred to as respondent Hindsley, is and at all times material herein was:

(a) An individual whose address is 6256 South Range, R.R. #3, La Porte, Indiana 46350;

(b) Vice President of the corporate respondent until at least April 30, 1984;

(c) Owner of a 45 percent interest in the corporate respondent's outstanding stock until at least April 30, 1984;

(d) In combination with respondent Meindl, responsible for the direction, management and control of the operation of the corporate respondent;

(e) Engaged in the business of buying and selling livestock in commerce for his own account; and

(f) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Selected Meats, Inc., its officers, directors, agents and employees, successors and assigns, and respondents Joseph A. Meindl and Robert D. Hindsley, individually or as officers, directors, agents or employees of respondent Selected Meats, Inc., or of any other packer, directly or through any corporate or other device, in connection with their operations as a packer shall cease and desist from:

(1) Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to permit their payment upon presentation;

(2) Failing to pay, when due, for livestock purchases;

(3) Failing to promptly collect, hold in trust, and make a timely distribution of trust assets required to be held in trust for the benefit of all unpaid cash sellers of livestock until such cash sellers are paid, when and to the extent required by sections 206 and 409 of the Act (7 U.S.C. §§ 196, 228b); and

(4) Mailing checks issued in payment for livestock purchases without first obtaining and maintaining in their records written agreements authorizing the mailing of checks, when and to the extent required by section 409 of the Act (7 U.S.C. § 228b).

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Joseph A. Meindl and Robert D. Hindsley are jointly and severally assessed a civil penalty of $3,500.00.

This order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: HARRY P. REDMAN, P&S Docket No. 6613. Decided May 20, 1986.

Dealer—failure to meet bonding requirements—Suspension—Consent.

Eric Paul, for complainant.
Donald G. Beattie, Altoona, PA, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harry P. Redman, doing business as Redman & Son, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 435, Mitchellville, Iowa 50169.

2. The respondent is, and at all times material herein was;

(a) Engaged in the business of buying livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Harry P. Redman, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act for a period of five (5) years and thereafter until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the five (5) year period.

The provisions of this order shall become effective on the sixth day after service of this decision of the respondent.

Copies of this decision shall be served on the parties.

In re: RICHARD TODD, P&S Docket No. 6664. Decided May 21, 1986.

Dealer—failure to meet bonding requirements—Suspension—Civil Penalty—Consent.

Eric Paul, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Richard Todd, doing business as Circle T Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is Box 147, Afton, Oklahoma 74331.

2. The respondent is and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Richard Todd, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand One Hundred Dollars ($2,100.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: ROYAL CREST MEATS, INC., P&S Docket No. 6643. Decided April 15, 1986.

Packer—failure to comply with bonding requirements—cease and desist—Civil Penalty—Default.

Eric Paul, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Royal Crest Meats, Inc., hereinafter referred to as the respondent, is a corporation with its principal place of business located at Trenton, New Jersey. Respondent's business mailing address is 610 Roebling Avenue, Trenton, New Jersey 08611.

(b) Respondent is, and at all times material herein was:

(1) A packer, within the meaning of and subject to the provisions of the Act; and

(2) Engaged in the business of buying livestock in commerce for purposes of slaughter.

(c) Respondent's average annual purchases of livestock exceed $500,000.00.

2. The Packers and Stockyards Administration notified respondent by certified mail on August 20, 1985, that the $10,000.00 surety bond it maintained to secure the performance of its livestock obligations under the Act would terminate on October 29, 1985. Respondent was further informed that if it continued to buy livestock in commerce for purposes of slaughter without bond coverage or its equivalent, it would be in violation of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent has continued to buy livestock in commerce for purposes of slaughter without filing and maintaining a reasonable bond or its equivalent.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has violated section 202(a) of the Act (7 U.S.C. § 192(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Royal Crest Meats, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations as a packer, shall cease and desist from engaging in the business of a packer, in commerce, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00)

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof sha!l be served on the parties.

[The Decision and Order became final on May 26, 1986.—Ed.]

In re: CHARLES RAY STAFFORD and ROBERT E. STAFFORD, P&S Docket No. 6445. Decided May 29, 1986.

Dealer—market agency—failure to meet bonding requirements—Civil Penalty—Consent.

Peter Train, P&S Div., OGC, for complainant.
Kent O. Hyde, Springfield, MO, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C., Section 181 *et seq.*) by a Complaint filed by the Administrator,Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR, Section 201.1 *et seq.*). This Decision is entered pursuant to the consent Decision provisions of the Rules of Practice applicable to this proceeding (7 CFR, section 1.138).

The respondents admit the jurisdictional allegations in Paragraph I of the Complaint, and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Charles Ray Stafford and Robert E. Stafford, hereinafter referred to as "Respondents," are partners doing business as Stafford Brothers. Their business mailing address is 1323 West Locust, Springfield, Missouri 65803.

2. Respondents are, and at all times material herein were:

(a) Engaged in business as a dealer, buying and selling livestock in commerce for their own account and as a market agency to buy livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account and as a market agency to buy livestock on a commission basis.

CONCLUSIONS

The Respondents, having admitted the jurisdictional facts, and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondents, Charles Ray Stafford and Robert E. Stafford, their agents and employees, directly and through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents have filed and presently maintain the reasonable bond or its equivalent as required by the Act and regulations and therefore no suspension of their registration is warranted. That Respondents are hereby assessed a civil penalty in the amount of One Thousand and No/100 ($1,000.00) Dollars, which has been paid and receipt acknowledged in open court.

The provisions of this Order shall become effective on the sixth day after service of this Order on the Respondents.

Copies of this Decision shall be served upon the parties.

In re: WESTERN STOCKYARDS CORPORATION, P&S Docket No. 6680. Decided May 30, 1986.

Market agency—custodial account—misuse of funds—Suspension—Civil Penalty—Consent.

John J. Casey, P&S Div., OGC, for complainant.
Daniel Olsen, Kansas City, MO, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Western Stockyards Corporation admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of

settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Western Stockyards Corporation, hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Texas. It is doing business as Amarillo Livestock Auction Company, and as Amarillo Cattle Company, with a principal place of business located at Amarillo, Texas, and a mailing address of 100 S. Manhattan, P.O. Box 30668, Amarillo, Texas.

2. Respondent among other things is, and at all times material herein was:

a. Engaged in the business of conducting and operating the Amarillo Livestock Auction Company stockyard, a posted stockyard under the Act;

b. Engaged in the business of selling livestock on a commission basis; and

c. Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Western Stockyards Corporation, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds of Amarillo Livestock Auction Company, within the time and in the amounts prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), amounts equal to proceeds receivable from sales of consigned livestock;

2. Transferring funds, from the same custodial account to their general account, in excess of lawful charges and sums due to respondent as authorized by section 201.42(d) of the regulations (9 CFR § 201.42(d)); and

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of net proceeds to the owners, con-

signors or shippers of such livestock, or for payment of amounts due the respondent for lawful marketing charges.

Respondent Western Stockyards Corporation is suspended as a registrant under the Act for a period of two (2) weeks, beginning July 6 and ending July 19, 1986, and thereafter until such time as it demonstrates that the shortage in the Custodial Account for Shippers' Proceeds of Amarillo Livestock Auction Company has been eliminated. When respondent Western Stockyards Corporation demonstrates that the shortage in the custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the two-week period.

Respondent Western Stockyards Corporation is hereby assessed a civil penalty in the amount of twenty-five thousand dollars ($25,000.00), to be paid by check delivered to the attorney for complainant, payable to the United States Treasury, on or before July 7, 1986.

The provisions of this order shall become effective upon service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: CIRCLE B. MEAT CO., INC., d/b/a FLORIDA BONELESS BEEF and-CIRCLE B. PORTION MEAT CO., GEORGE E. MUELLER, SR., and JAY A. MUELLER, P&S Docket No. 6614. Decided April 25, 1986.

Packer—issuing insufficient funds checks—inventories—dissipation of trust assets—failure to pay when due—Civil Penalty—Default.

Allan Kahan, for complainant.
Robert L. Williams, Venica, FL, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO CIRCLE B. MEAT CO., INC., AND GEORGE A. MUELLER, SR., UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the

Act were served on the respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents Circle B. Meat Co., Inc., and George A. Mueller, Sr., have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing pertaining to respondents Circle B Meat Co., Inc., and George A. Mueller, Sr., which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Circle B Meat Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of Florida, doing business as Florida Boneless Beef and Circle B Portion Meat Co. Its business mailing address is P. O. Drawer 1412, Dade City, Florida 34297.

(b) The corporate respondent was, at all times material herein:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter;

(2) Engaged in the business of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(3) A packer within the meaning of the Act and subject to the provisions of the Act.

(c) George E. Mueller, Sr., hereinafter referred to as respondent George Mueller, is an individual whose mailing address is Box 1044, Bushnell, Florida 33513.

(d) Respondent George Mueller is, and at all times material herein was:

(1) Vice-President and a director of the corporate respondent; and

(2) Responsible for the management, direction and control of the practices and activities of the corporate respondent.

(e) Respondent George Mueller was, at all times material herein, a packer within the meaning of the Act and subject to the provisions of the Act.

2. As of January 3, 1984, the corporate respondent's financial condition failed to meet the requirements of the Act. On said date, the corporate respondent filed a Chapter XI Petition in the United States Bankruptcy Court for the Middle District of Florida.

3. (a) The corporate respondent, under the management, direction and control of respondent George Mueller, in connection with their operations as a packer, on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, and at divers other times, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of August 1, 1985, there remained unpaid by respondents approximately $130,399.30 for such livestock purchases.

4. The corporate respondent, under the management, direction and control of respondent George Mueller, in connection with their operations as a packer, on or about the dates and in the transactions set forth in paragraph IV of the Complaint and Notice of Hearing, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

5. The corporate respondent, under the management, direction and control of respondent George Mueller, failed to hold in trust and wilfully dissipated inventories of meat and meat food products which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that:

(a) On January 6, 1984, respondents sold 4860 pounds of 50/50 beef trim to Swift & Co., Orlando, Florida for $1,980.00. The proceeds from said sale were distributed by respondents to Sam Cohen, United Telephone and M&M Cattle. The payments constitute dissipations of trust assets.

(b) On January 20, 1984, respondents sold 9000 pounds of 50/50 beef trim to Swift & Co., Orlando, Florida for $3,960.00. Respondents used the proceeds from said sale to make payments to U.S. Leasing, United Telephone, Sumter Electric, and Grafton & Sons, Inc., made two loan payments totaling $417.75, and obtained $1,290.66 in currency, the disposition of which is unaccounted for. The payments constitute dissipations of trust assets.

6. The corporate respondent, under the management, direction and control of respondent George Mueller, failed to hold in trust inventories of livestock which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that, during the period October 24, 1983, through December 12, 1983, respondents purchased 67 head of livestock from Jacksonville Livestock Auction Company, Inc., Whitehouse, Florida, and North Florida Farmers Livestock Market, Inc., Lake City, Florida for $7,847.56. Respondents' records contain no indication of the slaughter or other disposal or disposition of this livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the corporate respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Findings of Fact 3 and 4 herein, respondents Circle B Meat Co., Inc., and George Mueller wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Findings of Fact 5 and 6 herein, respondents Circle B Meat Co., Inc., and George Mueller wilfully violated sections 202(a) and 206(b) of the Act (7 U.S.C. §§ 192(a), 196(b)).

ORDER

Respondent Circle B Meat Co., Inc., its officers, directors, agents and employees, and respondent George E. Mueller, Sr., directly or through any corporate or other device, in connection with their operations as a packer, shall cease and desist from:

1. Purchasing livestock while insolvent, i.e., while current liabilities exceed current assets, unless the respondents pay the full purchase price of the livestock at the time of purchase in U.S. currency, by cashier's check or wire transfer;

2. Failing to pay or failing to pay, when due, for livestock;

3. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit in the bank account upon which they are drawn to pay such checks when presented;

4. Engaging in any act or practice for the purpose of converting to their own personal use or gain assets required to be held in trust for the benefit of unpaid cash sellers of livestock; and

5. Failing to hold in trust livestock purchased in cash sales and all inventories of or receivables or proceeds from meat, meat food products or livestock products derived therefrom required to be held in trust for the benefit of unpaid cash sellers of livestock, pursuant to section 206(b) of the Packers and Stockyards Act (7 U.S.C. § 196(b)), until full payment of the amounts due under the trust have been received by such unpaid cash sellers.

Respondent George E. Mueller is hereby assessed a civil penalty in the amount of Twenty Five Thousand Dollars ($25,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[Decision and Order became final June 2, 1986.—Ed.]

In re: COUNTRY CUTS OF IOWA, INC., DAVID F. OLSON, LUTHER GESME, JACK L. WARD and RICHARD HOBSON, P&S Docket No. 6515. Decided June, 6, 1986.

Packer—failure to pay full purchase price—commercial bribery—Civil Penalty—Consent.

Ben Bruner, P&S Div., OGC, for complainant.
William Kevin Stoos, Sioux City, IA, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Country Cuts of Iowa, Inc., hereinafter referred to as respondent Country Cuts, is a corporation under the laws of the State of Iowa with its principal place of business in Sioux City, Iowa. The business mailing address of the corporation is 525 Chambers Street, Sioux City, Iowa 51101.

2. Respondent Country Cuts, at all times material herein was:

(a) Engaged in the business of manufacturing and preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. David F. Olson, hereinafter referred to as respondent Olson, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

4. Respondent Olson, at all times material herein, was:

(a) Secretary and a member of the Board of Directors of respondent Country Cuts;

(b) Owner of 20% of the outstanding stock of respondent Country Cuts.

(c) President and a member of the Board of Directors of Mid-America Lamb Processing, Inc., hereinafter referred to as Mid-America; and

(d) Owner of 12.1% of the outstanding stock of Mid-America.

5. Luther Gesme, hereinafter referred to as respondent Gesme, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

6. Respondent Gesme, at all times material herein, was:

(a) Treasurer and a member of the Board of Directors of respondent Country Cuts;

(b) Owner of 20% of the outstanding stock of respondent Country Cuts.

(c) Vice President and a member of the Board of Directors of Mid-America; and

(d) Owner of 12.1% of the outstanding stock of Mid-America.

7. Jack L. Ward, hereinafter referred to as respondent Ward, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

8. Respondent Ward, at all times material herein, was:

(a) Vice President and a member of the Board of Directors of respondent Country Cuts;

(b) Owner of 20% of the outstanding stock of respondent Country Cuts;

(c) Secretary-Treasurer and a member of the Board of Directors of Mid-America; and

(d) Owner of 14.0% of the outstanding stock of Mid-America;

9. Richard M. Hobson, hereinafter referred to as respondent Hobson, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

10. Respondent Hobson, at all times material herein, was:

(a) President and a member of the Board of Directors of respondent Country Cuts; and

(b) Owner of 20% of the outstanding stock of respondent Country Cuts.

11. Respondents Olson, Gesme, Ward and Hobson, acting in concert, at all times material herein were responsible for the direction, management and control of respondent Country Cuts.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Country Cuts of Iowa, Inc., David F. Olson, Luther Gesme, Jack L. Ward and Richard Hobson, their officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay the full purchase price of meat;

2. Engaging in the practice of making unduly or unreasonably preferential payments to any person or subjecting any person to any undue or unreasonable prejudice or disadvantage in connection with meat or meat food products purchased in commerce.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Olson, Gesme, Ward and Hobson are jointly and severally assessed a civil penalty in the amount of Four Thousand Dollars ($4,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties. Country Cuts of Iowa, Inc.

In re: DOUGLAS B. GRANT, an individual, and GRANT LIVESTOCK, INC., a corporation, P&S Docket No. 6570. Decided April 25, 1986.

Dealer—failure to meet bonding requirements—insolvency—issuing insufficient funds checks—failure to pay full purchase price—prohibited from engaging in business while insolvent—Default.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the re-

spondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Douglas B. Grant, hereinafter referred to as the respondent, is an individual whose business mailing address is 1115 West Green Street, Cheraw, South Carolina 29520.

(b) The individual respondent at all times material herein was:

(1) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account;

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account;

(3) Doing business under the name of the corporate respondent, Grant Livestock, Inc.;

(4) President of and 100% stockholder of the corporate respondent; and

(5) Responsible for the direction, management and control of the corporate respondent.

(c) Grant Livestock, Inc., hereinafter referred to as the corporate respondent, is engaged in the business of a dealer, buying and selling livestock in commerce for its own account.

(d) The corporate respondent is not registered with the Secretary of Agriculture in any capacity subject to the Act.

2. During the period January through August 1984, respondents engaged in business as a dealer buying and selling livestock in commerce for their own account without having and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

3. (a) As of January 31, 1985, the individual respondent had current liabilities totalling $75,579.73 and no current assets. As of January 31, 1985, the corporate respondent had current liabilities of $57,099.03 and no current assets.

(b) The individual respondent's and corporate respondent's current liabilities presently exceed their current assets.

4. Respondents, in connection with their business as a dealer, on or about the dates and in the transactions set forth in paragraph

IV of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

5. (a) Respondents, on or about the dates and in the transactions specified in paragraph IV and in the transactions specified in paragraph V of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of July 1, 1985, there remained unpaid by the respondents a total of $60,959.73 for such livestock purchases.

6. Respondents, in connection with their business subject to the Act, failed to keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their business, in that respondents failed to keep and maintain a record of accounts payable and accounts receivable, buyer's bills, seller's invoices, all bank statements and cancelled checks and all records of their assets and liabilities.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondents have wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondents' financial condition does not meet the requirements of the Act (7 U.S.C. 204).

By reason of the facts found in Findings of Fact 4 and 5 herein, the respondents have wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. 213(a), 228b).

By reason of the facts found in Finding of Fact 6 herein, respondents have violated section 401 of the Act (7 U.S.C. 221).

ORDER

The individual respondent, directly or through any corporate or other device, and the corporate respondent, its officers, directors, agents, employees successors and assigns, in connection with their business subject to the Act shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the ac-

count upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

The respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including a record of accounts payable and accounts receivable, buyer's bills, seller's invoices, all bank statements and cancelled checks and all records of their assets and liabilities.

Individual respondent Grant is suspended as a registrant under the Act for a period of six months and thereafter until he demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements of the Act and regulations. When the individual respondent demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the six month period.

Corporate respondent Grant Livestock, Inc., is prohibited from operating subject to the Act for a period of six months and thereafter until it demonstrates that it is no longer insolvent and that it is in full compliance with the bonding requirements of the Act and regulations. When the corporate respondent demonstrates that it is no longer insolvent and that it is in full compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating the prohibition after the expiration of the six month period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[Decision and Order became final on June 7, 1986.—Ed.]

In re: CELIVO NICK FARINELLI, JR. P&S Docket No. 6642. Decided April 24, 1986.

Market agency—insolvency—issuing insufficient funds checks—failure to pay when due—Suspension—Default.

Andrew Stanton, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent's financial condition does not meet the requirements of the Act and that the respondent wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Celivo Nick Farinelli, Jr., hereinafter referred to as respondent, is an individual whose business mailing address is 10018 No. Alves Road, Ballico, California 95303.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce for his own account.

2. (a) On July 22, 1985, respondent filed with the United States Bankruptcy Court, Eastern District of California, a voluntary petition pursuant to Chapter 7 of the Bankruptcy Act, which indicates

that respondent had current assets of $4,000.00 and current liabilities of $97,669.00, resulting in an excess of current liabilities over current assets in the amount of $93,669.00.

(b) Respondent's current liabilities presently exceed his current assets.

3. (a) Respondent, on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, in connection with the purchase of livestock, issued checks which, when presented for payment, were not paid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the accounts upon which such checks were drawn.

(b) Respondent, on or about the dates and in the transactions set forth in paragraphs III(a) and (b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) In connection with the livestock transactions set forth in paragraphs III(a) and (b) above, there remains unpaid a total of $31,295.80.

4. In connection with the transactions set forth in paragraph III of the complaint, and on or about the transactions set forth in paragraph IV of the complaint, respondent purchased livestock and failed to pay, when due, the full purchase price of such livestock.

5. Respondent, in connection with his operations as a dealer, during the period April 1, 1985, through August 15, 1985, failed to create, keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions subject to the Act and regulations, in that respondent failed to create, keep and maintain fully completed purchase and sales invoices.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 3 herein, respondent has violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

By reason of the facts found in Finding of Fact 4 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

By reason of the facts found in Finding of Fact 5 herein, respondent has violated section 401 of the Act (7 U.S.C. § 221).

ORDER

Respondent Farinelli, individually or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent shall create, keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Act, including fully completed purchase and sales invoices.

Respondent Celivo Nick Farinelli, Jr., is suspended as a registrant under the Act for a period of five (5) years, provided, however, that a supplemental order will be issued terminating this suspension at any time after the expiration of 45 days upon demonstration by respondent that all livestock sellers have been paid in full, provided further that this suspension may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant or packer after the expiration of the 45 day period of suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[Decision and Order became final on June 11, 1986.—Ed.]

In re: JOHN A. SCHOLL, P&S Docket No. 6684. Decided June 13, 1986.

Bonding required—suspended—Civil Penalty—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administra-

tor, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. John A. Scholl, hereinafter referred to as the respondent, is an individual whose business mailing address is 218 H West Route 313, Perkasie, Pennsylvania 18944.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent John A. Scholl, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: OWEN A. BOARDMAN, P&S Docket No. 6694. Decided June 13, 1986.

Maintain adequate bond—suspended—Civil Penalty—Consent.

Ben E. Bruner, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Owen A. Boardman, doing business as 81 Hog Company, hereinafter referred to as the respondent, is an individual whose business mailing address is 1601 So. 1st Avenue, Norfolk, Nebraska 68701.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Owen A. Boardman, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Five Hundred Dollars ($1,500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: JAY RIPPY, INC., d/b/a CATTLEMAN'S LIVESTOCK COMMISSION CO., P&S Docket No. 6568. Decided June 16, 1986.

Adequate bond needed—Consent.

Ben E. Bruner, for complainant.
John Huffaker, Amarillo, TX, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Depart-

ment of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jay Rippy, Inc., doing business as Cattleman's Livestock Commission Co., hereinafter referred to as the respondent, is a corporation incorporated under the laws of Texas, whose business mailing address is Highway 54, Dalhart, Texas 79022.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Cattleman's Livestock Commission Co. stockyard, a stockyard posted under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a dealer buying and selling livestock in commerce for its own account, and a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jay Rippy, Inc., its agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: RICHARD N. GARVER. P&S Docket No. 6449. Decided June 19, 1986.

Insufficient funds checks—Failure to pay when due—Suspension of registration.

The Judicial Officer affirmed that part of Chief Judge Campbell's order requiring respondent to cease and desist from failing to pay for livestock and issuing insufficient funds checks, and suspending respondent's registration for 2 years and thereafter until he is no longer insolvent, but reversed that part of the order holding all but 30 days of the suspension period in abeyance. The fact that insufficient funds checks were issued when the bank lawfully and unilaterally terminated respondent's over-draft protection without notice is not a defense. A violation is willful if respondent intentionally does an act which is prohibited, or acts with careless disregard of statutory requirements. The test of insolvency is whether current liabilities exceed current assets. Once insolvency has been established, it is considered as continuing until a respondent demonstrates that he is no longer insolvent. The failure to pay promptly and in full for livestock and the issuance of insufficient funds checks violate sections 312(a) and 409 of the Act. Severe sanction policy explained. To permit respondent to continue in the livestock industry after a 30-day active suspension period would seriously undercut the deterrent value of the 2-year suspension order. The fact that respondent's creditors would receive a token repayment of the indebtedness if he remains in business is outweighed by the national interest in having fair and competitive conditions in the livestock industry.

Peter V. Train, for complainant.
Thomas R. Smith, for respondent.
John A. Campbell, Chief Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on January 29, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) ordering respondent to cease and desist from failing to pay for livestock and issuing insufficient funds checks. The order also suspends respondent's registration for 2 years and thereafter until he is no longer insolvent, except that all but 30 days of the suspension period is held in abeyance.

On March 4, 1986, complainant, seeking to eliminate that portion of the order holding the suspension order in abeyance, appealed to

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* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On April 21, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, I agree with complainant's position on appeal. The ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with changes too minor to itemize, except that the provisions of the order holding the suspension order in abeyance are eliminated, together with the ALJ's reasons therefor. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereafter referred to as the "Act", instituted by a complaint filed on November 8, 1984, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The complaint charges that the respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204) and that he willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by issuing nonsufficient funds checks and failing to pay, when due, for livestock.

Respondent filed an answer on January 2, 1985, in which he admitted all but one of the material allegations of the complaint. An oral hearing was held in Cincinnati, Ohio on September 18, 1985. Respondent was represented by Thomas R. Smith, Esq., and complainant was represented by Barbara S. Harris of the Office of the General Counsel. At the close of the hearing the time was set for the filing of briefs.

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 405c–405g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

FINDINGS OF FACT [1]

1. Richard N. Garver, hereafter referred to as the respondent, is an individual whose business mailing address is 9226 Hiner Road, Wooster, Ohio 44691.

2. The respondent, at all times material herein, was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. As of September 30, 1984, the respondent's current liabilities exceeded his current assets.

4. Respondent's current liabilities presently exceed his current assets.

5. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn.

DATE OF CHECK (1984)	CHECK ISSUED TO	NO. OF HEAD	AMOUNT OF CHECK
9/22	Paul Stewart	75	27,454.61
9/22	Marietta Livestock Sales	28	9,907.15
9/17	Scio Livestock Auction	11	3,407.96
9/23	Scio Livestock Auction		1,319.27
9/15	Bill Martin		36,084.40
9/18	Producer's Lvsk. Assoc.	132	67,369.99
9/24	Producer's Lvsk. Assoc.	215	130,063.83
9/18	Producer's Lvsk. Assoc.	44	32,932.47
9/19	Producer's Lvsk. Assoc.	45	32,277.67
9/19	Producer's Lvsk. Assoc.	128	64,061.78
9/24	Producer's Lvsk. Assoc.	211	141,303.32
9/15	Athens Livestock	40	12,213.97
9/15	Jerry Caldwell	163	45,231.54
9/20	Jerry Caldwell	274	73,271.71

6. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below and in Finding of Fact No. 5, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

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[1] Findings 1 through 7, accepted as accurate by respondent, are restated herein. Findings 8, 9, and 10 were proposed by respondent and are included herein, along with my additional findings 11 through 16.

1984 DATE OF PURCHASE	PURCHASED FROM	AMOUNT	NO. OF HEAD
9/24	Carrollton Livestock Auction	5,086.65	14
9/17,19	Muskingum Livestock Sales	19,408.10	58
9/22	Paul Stewart	32,451.65	97
9/8,15,22	Barnesville Livestock	15,794.76	92
9/20	Chickasaw Stock Yard	4,082.04	10
	Scio Livestock Auction	2,177.38	
9/21	Livestock Market of Spencer	7,299.35	20
9/3,10,11	Bill Martin	202,460.18	432
9/11,18	Roger Taylor	31,609.50	82
8/10	Athens Livestock	1,239.00	1
9/15	Athens Livestock	9,199.50	26
9/22	Athens Livestock	8,717.11	26
9/22	United Livestock Sales Co.	23,306.87	64
9/24	Jerry Caldwell	13,705.88	55

7. As of September 18, 1985, there remained unpaid a total of at least $700,000.00 for such livestock purchases set forth in Findings of Fact Nos. 5 and 6.

8. For ten (10) years prior to September, 1984, respondent had a business arrangement with his bank under the terms of which the bank honored all overdrafts on his account and charged respondent a fee established by the bank for doing so.

9. At the time that respondent issued the checks identified in Finding No. 5, the arrangement with the bank was in full force and effect and respondent had no reason to believe that the checks would not be honored by his bank.

10. Respondent did not provide checks to persons from whom he had purchased cattle knowing that those checks would be returned because of insufficient funds.

11. Respondent's bank arrangement, noted in Findings 8 and 9, whereby the bank would pay for respondent's overdrafts, was secured by property. When the property was sold there was no longer any collateral to secure respondent's line of credit, and the bank terminated the agreement.

12. Respondent's bookkeeping methods were archaic if not primitive. He maintained no records of accounts receivable and, consequently, had no way of knowing how much he was owed or by whom. For example, respondent testified that it was his custom to visit his bookkeeper once a month, taking all of his bills, sales slips, and bank statements to her in a grocery bag.

13. Since early 1985, respondent has been working as a commissioned buyer of livestock for Elden Ginn who operates a stockyard

and sells cattle on a commission basis only. In order to have respondent work for him, it was necessary for Mr. Ginn to increase his own bond from $55,000.00 to $100,000.00.

14. Under respondent's arrangement with Ginn, respondent is paid $275.00 per week for salary and expenses. All commissions earned by him are segregated and (except for taxes, a $100.00 per month payment to Ginn's bookkeeper, and respondent's $275.00 salary) are distributed to respondent's creditors quarterly. The arrangement is contained in respondent's Exhibit No. 1. Respondent acts purely as an agent for Ginn and has no access to funds.

15. At the time of the hearing (September 18, 1985), approximately $4,800.00 had been distributed to creditors under the arrangement with Ginn and it was expected that approximately $6,000.00 more would be paid within several weeks of the hearing.

16. Respondent had not been suspended under the Act prior to this proceeding.

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. By reason of the above findings of fact, it is concluded that respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204), and that respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by failing to pay, when due, and by issuing nonsufficient funds checks, for livestock. The order proposed by complainant is issued. . . .

WILLFUL VIOLATIONS OF THE ACT

Complainant correctly contends that respondent's failure to pay for livestock and respondent's issuance of nonsufficient funds checks were willful violations of Sections 312(a) and 409 of the Act.

Respondent admits such practices but argues that his relationship with his bank and the over-draft protection the bank extended to him demonstrate that he did not willfully engage in the practices in violation of the Act. However, the unilateral termination by the bank of the respondent's overdraft protection demonstrates precisely why such arrangement cannot insulate a livestock buyer from accountability under the Act. It gives no protection to the sellers of livestock. Respondent's awareness or state of mind at the time the bad checks were issued is of no consequence.

A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. Despite Mr. Garver's longstanding and friendly relationship with his bank, his bank lawfully and unilaterally terminated

his over-draft protection without notice. Similarly, over-draft protection would be of no value if respondent's bank were to fail. As stated in *In re Thumb Auction Markets, Inc.*, 37 A.D. 164, 167-168 (1977). "Such protection fails to fulfill respondent's obligation under statutory and regulatory requirements. . . ."

Decisions under the Act and regulations have established that a line of credit or over-draft protection extended by a bank is no defense to a charge of insolvency or custodial account violations. *In re Thumb Auction Markets, Inc., supra; In re Hugh B. Powell,* 41 A.D. 1354, 1360 (1982); *In re Sechrist Sales Co.,* 36 A.D. 665, 668, 670-75 (1977); *In re Harry Hardy,* 33 A.D. 1383, 1401 (1974). Similarly, over-draft protection cannot be a defense to a charge of issuing insufficient funds checks.

A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or if the respondent acts with careless disregard of the statutory requirements. *Butz* v. *Glover Livestock Commission Co.,* 411 U.S. 182, 185, 187 (1973); *Goodman* v. *Benson,* 286 F.2d 896, 900 (CA 7 1961); *In re Miller,* 33 A.D. 53, 83-87, *aff'd sub nom., Miller* v. *Butz,* 498 F.2d 1088 (CA 5 1974); *In re Lufkin Livestock Exchange, Inc.,* 27 A.D. 596, 609 (1968).

Here, the practices engaged in by respondent must be characterized as willful.

Respondent operated completely in the dark regarding the financial condition of his business. He maintained no record of his sales and hence did not know who owed him or how much he was owed. He relied solely on a credit arrangement with a bank to pay his over drafts, and then sold the property which was the collateral for the credit arrangement. This state of affairs led to the respondent's failure to pay for livestock and his issuance of nonsufficient funds checks. At the very least respondent's actions and course of conduct were in careless disregard of the requirements of the Act.

On fourteen separate occasions, respondent issued checks in purported payment for livestock which were returned for nonsufficient funds in his account. In another fourteen transactions, respondent admits that he failed to give his sellers payment for the livestock he purchased. The failure to pay promptly and in full for livestock and the issuance of "nonsufficient funds" checks have been held to violate Sections 312(a) and 409 of the Act. *Lewis* v. *Butz,* 512 F.2d 681, 682-83 (CA 8 1975); *In re Bryan,* 36 A.D. 37, 42 (1977); *In re Mid-States Livestock, Inc.,* 37 A.D. 547, 561-562 (1977), *aff'd sub nom Van Wyk* v. *Bergland,* 570 F.2d 701, 704-705 (CA 8 1978); *In re Trenton Livestock, Inc.,* 41 A.D. 1965 (1982); *In re Edzards,* 37 A.D. 1880, 1887 (1978).

In addition, respondent admitted that as of September 30, 1984, his current liabilities exceeded his current assets and that as of the date of the filing of the complaint, his current liabilities also exceeded his current assets. Under the Act, the principal test of insolvency is whether current liabilities exceed current assets. This test has been reviewed and affirmed by the Fifth Circuit in *Bowman* v. *United States*, 363 F.2d 81 (CA 5 1966).

Once insolvency has been established, it is considered as continuing until a respondent demonstrates that he is no longer insolvent. *In re Hugh B. Powell, supra*, at 1359–1360; *In re Donald Hageman*, 42 A.D. 531, 539–540 (1983).

Because repondent was insolvent on September 30, 1984 and November 8, 1984, it is clear that he failed to meet the financial requirements of the Act. (7 U.S.C. § 204).

SANCTION

Respondent does not contest the factual allegations of the complaint. His sole argument is directed to the proposed sanction sought by the complainant. The complainant requests that respondent be ordered to cease and desist from the practices alleged and that he be suspended for a period of two years and thereafter until he demonstrates his insolvency.

Complainant urges at page 6 of its brief:

> In 1976, Congress recognized the importance of assuring livestock producers prompt payment for the livestock they sell by amending the Packers and Stockyards Act to include section 409 (7 U.S.C. § 228b). This section, which embodies the prompt payment provisions, was enacted to insure financial integrity in the livestock industry and to prevent economic disaster to livestock sellers (Tr. 10). So crucial is the requirement of prompt payment to the financial stability of the livestock industry, a cash basis industry, that Congress uniformly imposed it on all persons subject to the Act's jurisdiction.
>
> The testimony at the oral hearing was unequivocal and extensive that due to the congressional mandate set forth above, the Packers and Stockyards Administration considers violation of the prompt payment provisions of section 409 to be very serious (Tr. 12, 13). Mr. Brinckmeyer testified that these practices are damaging to the individual market agency, dealer or producer who does not receive timely payment, and damaging to the industry as a whole. (Tr. 11).

Further, the Judicial Officer has held repeatedly that it is the policy of the Department to impose severe sanctions upon respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department. This policy has been adopted in order to serve as an effective deterrent to the respondent as well as to other potential violators. *In re Braxton M. Worsley,* 33 A.D. 1547, 1556-1561 (1974). The Judicial Officer has also stated that the recommendation of the administrative officials with respect to the sanction is to be given great weight since they administer the program on a daily basis and are in the best position for observing whether the sanctions imposed serve as an effective deterrent to future violations by respondents and others. *In re Worsley, supra,* at 1568.

In light of the nature and seriousness of the violations committed, the sanction requested is appropriate and clearly warranted in the circumstances.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The ALJ recognized the "enormity of the violations" (Initial Decision at 12), which "clearly warranted" the 2-year suspension order requested by complainant (Initial Decision at 11). Nonetheless, he held all but 30 days of the suspension period in abeyance for the following reasons (Initial Decision at 11-13):

> In light of the nature and seriousness of the violations committed, the sanction requested is appropriate and clearly warranted in the circumstances. At the same time, some consideration should be given to respondent's plea that an order be formulated permitting respondent to continue in the livestock industry with the safeguards that are presently in place. This I believe is possible within the framework of the sanction proposed by complainant.
>
> A modification appears appropriate for several reasons. Respondent was not subject to prior suspensions nor was there any indication of an intent to defraud his creditors. His faults lay in his failure to establish good accounting practices and blind reliance on a credit arrangement with his bank. These failings appear to be remedied through his present arrangement with his employer, Elden Ginn (Findings 13 and 14, and respondent's Exhibit 1). Further, under such arrangement, respondent's creditors receive a token repayment of the indebtedness. (Findings 14, 15). While such payment is no defense to the violations of the Act

(complainant's main brief, page 5), it represents a good faith attempt to repay his indebtedness.

Under the order as contained herein, respondent is suspended as a registrant for two years and thereafter until he demonstrates that he is no longer insolvent, as complainant recommends. However, after a 30-day period of suspension (the enormity of the violations requires at least an initial 30-day suspension) the remainder of the two-year suspension is suspended for so long as respondent remains in the employ of Elden Ginn in accordance with the present arrangement contained in the record. Should such arrangement terminate after a three-month period, for example, the remaining 20 months of the 2-year suspension of registration would become effective. If after expiration of the two-year period, respondent can demonstrate he is no longer insolvent, a supplemental order will be issued terminating the suspension.

The order herein will serve as an effective deterrent to future violations by respondent and others, and at the same time permit respondent's employment in an endeavor in which he has worked all of his life.

I could not disagree more with the ALJ's views! The ALJ's sanction is a "slap on the wrist" which would encourage, rather than discourage, respondent and others to engage in similar reckless conduct costing livestock sellers hundreds of thousands of dollars.

The admitted facts show that as of the date of hearing (September 18, 1985), respondent still had not paid for at least $700,000 worth of livestock purchased during a 3-week period in September 1984 (Findings 5–7). Respondent's exhibits show that during August and September 1984, his checking account was in an overdrawn (or negative) position on only one day, *viz.*, on August 17, 1984 his checking account was overdrawn in the amount of $10,720.20 (RX 3, 4). Since respondent was actually broke in September 1984 (i.e., he was in the red by nearly a million dollars), I infer that he was "robbing Peter to pay Paul." That is, respondent was delaying making payment for livestock purchased from A until he had bought livestock from B, received payment for B's livestock, and then used the money from B's livestock to pay A.

Futhermore, the undisputed evidence gives rise to the inference that respondent had been engaging in that practice for a considerable period of time. Respondent admittedly began selling livestock on a grade and yield basis in 1982 or 1983, and he continued operating until September 1984, when the bank withdrew his line of

credit.[2] He explained that he bought animals on a live weight basis, e.g., paying $500 for an animal, and sold it on a dressed weight basis. He would call the packer on a given day and the packer would tell him what price would be paid for choice cattle delivered at the plant the following day. Respondent would then purchase the livestock himself (or through the 15 buyers purchasing livestock for him on a commission basis) on a live weight basis, and sell it on a grade and yield basis. If he or the other buyers estimated incorrectly the grade that would be determined after slaughter or the number of dressed weight pounds that would be produced from the livestock, respondent would likely lose money on the transaction. Since respondent lost about $700,000 from his grade and yield transactions, either he and his buyers were very inept at buying livestock that would be profitable at the price being paid by the packer, or he was taking too much profit from the business. (For our purposes, it makes no difference which explanation is correct.)

Although respondent was admittedly a very poor bookkeeper, and kept no accounts receivable records, he took all of his records to his bookkeeper once a month. No matter how poor respondent's bookkeeping system was, it would not be possible for him to be short $700,000 without knowing that he was operating in the red. Accordingly, I infer that respondent knew for a considerable period of time that he was operating in a manner that exposed the persons selling livestock to him to great risk.[3] *Cf. Zwick* v. *Freeman*, 373 F.2nd 110, 115 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967), in which the court said with respect to a failure to pay case under the Perishable Agricultural Commodities Act:

> As there was a series of 295 transactions which occurred over a period of several months and which involved a deficit in excess of a quarter of a million dollars, it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clear-

[2] The bank's action in withdrawing respondent's line of credit did not cause his loss of at least $700,000, but merely exposed his insolvent condition.

[3] Respondent was not asked whether he knew that he had been operating in the red for a considerable period of time. He testified that he assumed that the bank would continue to honor overdrafts, but, as stated above, he was depositing enough money into his checking account from his livestock sales so that his account was overdrawn on only one day during August and September 1984, even though he was at least $700,000 in the red at the time.

er examples of "flagrant" violations of the statute than were exemplified by petitioner's conduct.

If, on the other hand, respondent were to contend that he was totally oblivious to the fact that he was operating heavily in the red, when, in fact, he was short approximately $700,000 in his livestock business, that would be such reckless conduct that it would demonstrate a total lack of regard for the legislative requirements that he pay promptly and in full for his livestock purchases.

Hence under any view of the situation, respondent's failures to pay for over $700,000 worth of livestock constitute flagrant violations of the Act warranting a most severe sanction.

It is the policy of this Department to impose severe sanctions for serious or repeated violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings since the early 1970's.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974),[4] which is set forth as an Appendix to this decision.[5] The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624–65 (1979).

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[4] The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263–64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64–80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[5] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971–72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362–63 (1978), *aff'd*, No. 78–3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330–32, 337–52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549–51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133–34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31–32 (1976), *aff'd*, No. 76–1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145–60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913–14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric.

Continued

Respondent's failure to pay for about $700,000 worth of livestock fully justifies the 2-year suspension order requested by complainant. It should be noted that there has been a drastic change in complainant's sanction policy with respect to failure to pay violations in recent years. For many years, a person who deprived a livestock seller of 1% of the value of his livestock by false weighing would be given a more severe sanction than a person who deprived the livestock seller of 100% of the value of his livestock by failing to pay for the livestock. In the latter case, a 30-day suspension order was typical. (I inherited that policy and did not change it during the period I was administrator of the Packers and Stockyards Act regulatory program.)

I suggested a drastic change in that policy in *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978). In that case, livestock sellers lost over half a million dollars because respondents took money from their livestock business, which was needed to pay sellers, and lost it gambling on the commodity futures market (37 Agric. Dec. at 550). Complainant recommended the usual 30-day "slap on the wrist" suspension order, which was imposed by the ALJ. When *respondent* appealed, I *sua sponte* raised the issue as to whether the sanction should be increased on appeal, and suggested in an order requesting additional briefs that a 5-year suspension order seemed appropriate. In imposing a 60-day suspension order in that case, it is stated (37 Agric. Dec. at 550–51):

> Just last year Congress indicated its concern that livestock producers be paid for their livestock by the enactment of amendments to the Packers and Stockyards Act which impose payment requirements even more stringent than those previously imposed by the regulations issued under the Act (Public Law 94–110, 94th Cong., 2nd Sess.; 90 Stat. 1249). In the House Report on the bill relating to these amendments, it is stated (H. Rep. No. 94–1043, 94th Cong., 2nd Sess., p. 5; see, also, Sen. Rep. No. 94–932, 94th Cong., 2nd Sess., pp. 5–6):
>
> > USDA figures show that in 1973 some $31 billion worth of livestock and $4 billion worth of poultry were marketed in the United States, representing approximately one-third of all farm

Dec. 499, 515, 539–50 (1974) *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64–80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

> income. Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or one more vital to the national interest than the producer. And no entrepreneur is so completely at the mercy of the marketplace. The livestock producer, if he successfully combats the vicissitudes of weather, financing, skyrocketing costs, etc., must sell when his cattle are ready irrespective of the market. His livestock may represent his entire year's output. And, if he is not paid, he faces ruin. While some may argue that business is business and that farmers must take their chances along with everyone else, this Committee must view the situation from a larger perspective. We would be derelict in our responsibilities to the American people if we failed to address the evils which have inflicted heavy losses upon the very producers upon whom the Nation depends for such an important part of its basic food supply.

In two recent cases involving failure to pay for about $766,000.00 and $3.2 million dollars worth of livestock, respectively (*In re Robert L. Benefiel*, 32 Agr Dec 1684 (1973); *In re James L. Heller*, 34 Agr Dec 1563 (1975)), respondents were suspended for five years. Although these cases are not weighty precedents because one is a consent case and the other a default case, they show, nonetheless, that a 5-year suspension order is at least regarded as appropriate in some failure to pay cases. I believe that the respondent's failure to pay over half a million dollars in the present case warrants a similar 5-year suspension order, particularly since the respondents took the money from their successful livestock business to finance their gambling ventures.

Under a similar regulatory program administered by the Department involving perishable agricultural commodities, a violator's license is routinely revoked for failing to pay a significant amount of money for produce, even where such failure is because of legitimate business losses. See, *e.g.*, *In re Reese Sales Company*, 28 Agr Dec 1150 (1969), affirmed *sub nom. Reese Sales Company* v. *Hardin*, 458 F.2d 183

(C.A. 9); *In re Sam Leo Catanzaro*, 35 Agr Dec 26 (1976), [*aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977)].[6] A revoked licensee may not apply for a new license for two years. 7 U.S.C. 499d(b).

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[6] *Accord In re B.G. Sales Co.*, 44 Agric. Dec. ___ (Oct. 9, 1985) (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ___ (Oct. 6, 1983) (nonpayment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (nonpayment because another firm failed to pay respondent $248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtor's to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (nonpayment because of bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171, (1982) (nonpayment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (nonpayment because of bankruptcy of another firm owing respondent $776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (nonpayment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (nonpayment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (nonpayment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (nonpayment because of strike and failure of others to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (nonpayment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (nonpayment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (nonpayment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (nonpayment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (nonpayment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (nonpayment because of bankruptcy of another firm owing respondent over $130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (nonpayment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (nonpayment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties).

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> Although I believe the violations in this case warrant a 5-year suspension order to serve as an effective deterrent to future similar violations, the complainant, in the oral argument before the Judicial Officer, recommended only a 60-day suspension order. Since it is the policy of the Judicial Officer "never to increase the sanction recommended by the administrative officials" (see Appendix, p. 21a), a 60-day suspension order will be issued rather than a 5-year suspension order.

Subsequent to the decision in *Mid-States*, just quoted, the Judicial Officer overruled that portion of the Department's sanction policy which precluded him from imposing a sanction greater than that recommended by the administrative officials (*In re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983)). Accordingly, if *Mid-States* were to be decided today, a 5-year suspension order would be issued.

The ALJ felt that it would be desirable to permit respondent to continue in the livestock industry with the safeguards that are presently in place. I disagree! It is not desirable to permit respondent to continue in the livestock industry since that would seriously undercut the deterrent value of the administrative sanction imposed in this case. It would encourage respondent and others to act in a similar irresponsible manner in the future, greatly endangering livestock sellers.

The ALJ also indicated that under the proposed arrangement to permit respondent to remain in the livestock business during all but 30 days of the 2-year suspension period, respondent's creditors could receive a "token" repayment of the indebtedness. However, that argument has routinely been rejected in determining sanctions imposed by this Department. It has consistently been held that any hardship to the respondent's creditors, customers, community, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interests that might be damaged as a result of a suspension order.[7]

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[7] *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. ___ (Mar. 7, 1986), *appeal docketed*, No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. ___ (Jan. 27, 1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1172 (1983); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 606 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z.*

Continued

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Richard N. Garver, his agents and employees, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for 2 years and thereafter until such time as he demonstrates that he is no longer insolvent. When the respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after expiration of the 2-year period.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent. The suspension provisions shall become effective on the 30th day after service on respondent.

APPENDIX

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

Lancaster Stock Yards, Inc., 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737–38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128–29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989–90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34–35 (1976), *aff'd*, No. 76–1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851–52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120–21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

In re: LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH, P&S Docket No. 6174. Decided June 20, 1986.

Failure to pay—inaccurate records—Civil Penalty—Consent.

Jory Hochberg, for complainant.
Harrison W. Hertzberg, Los Angeles, CA, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO CHAIM TREIBATCH

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, and a subsequent Amended Complaint and Notice of Hearing alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Chaim Treibatch admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, neither admits nor denies liability for the actions and practices of Landmark Beef Processors, Inc., waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Chaim Treibatch, hereinafter referred to as respondent Treibatch, is an individual whose mailing address is 17211 Rancho Street, Encino, California 91316.

2. Respondent Treibatch is, and at all times material herein was:

(a) Chief Financial Officer of Landmark Beef Processors and a principle owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of the corporate respondent;

(b) With John M. Burbank, Ronald Hillman and Alan Silverberg, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and

3. Respondent Treibatch consents to the jurisdiction of the Secretary to enter this decision.

CONCLUSIONS

Respondent Chaim Treibatch having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Chaim Treibatch, his agents and employees, individually or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, for meat and meat food products purchased;

2. Preparing and using any false, misleading, incorrect or incomplete financial statements or inventory reports for the purpose of inducing suppliers and vendors of meat and meat food products to sell or otherwise transfer such products to respondents.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Packers and Stockyards Act and the regulations, including, but not limited to: (1) invoices and other accountings which disclose all purchases and sales of meat or meat food products; (2) records of all receipts and disbursements; (3) a general ledger of accounts disclosing respondent's assets, liabilities, income, expenses and net worth; and (4) an accurate and current inventory record.

Respondent shall keep and maintain, and shall not destroy or otherwise dispose of, any purchase invoices, sales invoices, inventory records, or similar accounts and records documenting the purchase and sale of meat or meat food products for a minimum period of two years. In addition, respondent shall strictly comply with the provisions of section 203.4 of the statements of general policy (9 CFR § 203.4).

Respondent Chaim Treibatch is hereby assessed a civil penalty in the amount of Twenty Thousand Dollars ($20,000.00), payable pursuant to the terms of that certain Understanding With Respect to Civil Penalty and Payment Terms, concurrently executed herewith.

The provisions of this order shall become effective on the first day after service of this decision on respondent Chaim Treibatch.

Copies hereof shall be served upon the parties.

In re: KLEMME CATTLE CO., INC., P&S Docket No. 6455. Decided February 24, 1986.

Maintain bond—Civil Penalty.

Roberta Swartzendruber, for complainant.
Kent O. Hyde, Springfield, MO, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary action brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C., section 181, et seq.), wherein the Respondent is charged with violation thereof by reason of operating as a dealer, buying and selling livestock in commerce, without having and maintaining an adequate bond, or its equivalent, as required by the Act and the regulations promulgated thereunder, by the Secretary of Agriculture (9 CFR section 201.1 et seq.).

The Complaint was filed on November 29, 1984, to which the Respondent filed an Answer on December 26, 1984.

An oral hearing was held herein on July 17, 1985, in Springfield, Missouri, before Administrative Law Judge Dorothea A. Baker. Appearing as counsel for the Complainant was Roberta Swartzendruber, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent was represented by Kent O. Hyde, Esquire, Harrison, Tucker & Geisler, 1121 S. Glenstone, Missouri 65804. Pursuant to pleadings for the reopening of the briefing period, the last brief herein was filed February 3, 1986, and the case was referred to the Administrative Law Judge on February 10, 1986.

The parties do not materially differ as to the Findings of Fact, but, rather, to the legal implications flowing therefrom.

FINDINGS OF FACT

1. Klemme Cattle Company, Inc., hereinafter referred to as Respondent, or, as Respondent Klemme Cattle, is a corporation with its principal place of business located at Walnut Grove, Missouri. Its business mailing address is Route 2, Walnut Grove, Missouri 65770.

2. Respondent Klemme Cattle, at all times material herein, was engaged in the business of a dealer, buying and selling livestock in commerce for its own account.

3. Respondent Klemme Cattle, at all times material herein, was registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce, and as a market agency buying livestock in commerce on a commission basis. (Complaint, Paragraph I(b)(2); CX 1)

4. Respondent Klemme Cattle is solely owned by Lem and Yvonne Klemme and their four children. It is directed, controlled and managed by Lem and Yvonne Klemme. (TR 57, 58, 61)

5. Respondent Klemme Cattle was sent, on September 24, 1984, and received, on September 26, 1984, formal notice from the Packers and Stockyards Administration that its bond to secure the performance of its livestock operations under the Act would expire on October 24, 1984. The notice further stated that if a new bond or its equivalent was not secured, all livestock operations for which bonding was required would have to be discontinued as of October 24, 1984, or respondent Klemme Cattle would be in violation of the Act and regulations. (CX 2, 3, 4; TR 10, 11, 14, 15)

6. Despite this notification, respondent Klemme Cattle continued in business as a dealer, engaging in livestock operations for which bonding was required under the Act without maintaining either a bond or its equivalent. (CX 6, 7, 8, 9, 10, 11; TR 11, 12, 59, 65, 70)

7. Respondent Klemme Cattle continued in violation of the Act, engaging in livestock operations for which bonding was required without having in effect a bond or its equivalent from October 24, 1984, through March 27, 1985. (CX 2, 3, 4, 5; TR 10, 11, 27, 31, 59, 65)

8. In the five month period from October 24, 1984, through March 27, 1985, during which no bond or its equivalent was in effect, Respondent Klemme Cattle purchased and sold hundreds of thousands of dollars worth of livestock in transactions for which bonding was required under the Act.

9. Except for the period alleged in the Complaint, Respondent has always maintained a Bond and abided by the Packers and Stockyards Rules and Regulations.

10. Respondent's Livestock Bond was terminated on or about October 24, 1984, because the company which provided Respondent with a Bond discontinued writing Livestock Bonds. Respondent immediately sought a new company to write a Bond, and although Respondent was diligent in its efforts to obtain a new Bond, five months expired in the interim.

11. The record is abundant with evidence that Respondent, by and through its agent, employee, and part owner, made timely attempts to obtain a new Bond.

CONCLUSIONS

The Respondent herein, during the period from October 24, 1984, through March 27, 1985, operated without a Bond or Bond equivalent in disregard of Complainant's Notice that such operations would be in violation of the Act and the regulations.

On September 24, 1984, the Complainant notified Respondent that its Bond would terminate on October 24, 1984. The Notice further instructed Respondent that if a new Bond or its equivalent was not obtained by the close of business on October 24, 1984, all livestock operations for which bonding is required under the Act had to be discontinued. Said Notice was received by the Respondent corporation.

For a period of five months from October 24, 1984, through March 27, 1985, the Respondent operated without a Bond or its equivalent. The testimony adduced at the oral hearing constitutes admissions that during the cited time period, the Respondent was in continuous violation of the Act.

During this five-month period, Respondent purchased and sold hundreds of thousands of dollars worth of livestock in unbonded transactions. In the fourth quarter of 1984 alone, Respondent, although bonded for only twenty-four days of that three-month period, purchased livestock totaling $401,968.89 while leaving a total livestock inventory for 1984 of only $22,794.44.

The requirement that a Bond or its equivalent be maintained by every dealer is a requirement imposed by the Act and the regulations (7 U.S.C. section 204; 9 CFR section 201.29, 201.30). It has been held that operation without a Bond or its equivalent is a violation of section 312(a) of the Act (7 U.S.C. section 213(a)) as an "unfair, unjustly, discriminatory, or deceptive practice or device." See *In re: Martin*, 8 A.D. 1247 (1949); *In re: White*, 23 A.D. 1104 (1964); and *In re: Centreville Livestock Auction Inc.*, 31 A.D. 765 (1972).

The Respondent does not substantially dispute the Findings of Fact in this matter, but rather maintains that before there can be finding of wilfulness in an action brought under the Packers and Stockyards Act, there must be a finding that the Respondent committed an "intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." Citing *Capital Packing Company* v. *United States*, 350 F.2d 67 (10th Circuit, 1965).

With respect to this argument of the Respondent, it will be noted initially that the Respondent did, in this case, receive a "warning letter." Moreover, the contention of the Respondent that it should not be found to have "willfully" violated the Act cannot be main-

tained in view of the precedent followed by the Department of Agriculture.

As set forth by the Complainant in its Brief, the term "willful" has many meanings, in connection with regulatory statutes such as this one. The precedent followed by the Department of Agriculture is that a prohibited action is willful if done intentionally or with careless disregard of statutory requirements. *In re: Speight*, 33 A.D. 280 (1974); *In re: Miller*, 33 A.D. 53 (1974), appeal denied, 498 F.2d 1088 (5th Circuit 1974); *In re: Rayville Livestock Inc.*, 30 A.D. 886 (1971); and *Goodman* v. *Benson*, 286 F.2d 896 (7th Circuit 1961).

Intentionally or negligently doing a prohibited act is willful under a regulatory statute such as the one here involved. This broad definition of willfulness has been adopted in precedent cases. A most recent statement of the Department's Judicial Officer is set forth in the excerpt, *infra*, from *Gerald F. Upton, d/b/a Degraff Livestock Sales, Respondent*, Docket No. P. & S. 6196, December 4, 1985:

"As stated in *In re Farrow*, 42 Agric. Dec.—(September 21, 1983) (slip op. at 54-55):

> Respondents would have to be incredibly naive not to know that their agreement violated the comprehensive Packers and Stockyards Act regulatory program. I do not believe that they are incredibly naive. But in any event, a violation is wilful, so that a suspension order can be issued (5 U.S.C. § 558(c)), if a person (i) intentionally does an act which is prohibited, irrespective of evil motive, or reliance on erroneous advice, or (ii) acts with careless disregard of statutory requirements. *In re Shatkin*, 34 Agric. Dec. 296, 298-314 (1975), and cases cited therein. And *see Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-87 (1973). (Footnote omitted)

The Court stated in *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973):

> The Secretary may suspend "for a reasonable specified period" and registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to

impose it to deter repeated violations of the Act, whether intentional or negligent."

In addition, the *Upton* case went on to state:

"Suspension orders have routinely been upheld where a finding of willfulness was made by the Department without a finding that the respondent knew that his conduct was unlawful. For example, in *Goodman* v. *Benson,* 286 F.2d 896,900 (7th Cir. 1961), the court upheld a suspension order, stating:

We think it clear that if a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. Eastern Produce Co. *v.* Benson, 3 Cir., 278 F.2d 606, 609.

Similarly, in *Eastern Produce Co.* v. *Benson,* 278 F.2d 606, 609 (3d Cir. 1960), the court upheld a suspension order, stating:

Nor can we subscribe to the proposition that the test of willfulness in this context is to be evil purpose of criminal intent, for this is not a criminal statute."

The Respondent's owners and managers freely admitted during the oral hearing that the Respondent corporation had operated in violation of the Act for months after Notice, and it was further admitted that they had full knowledge and understanding of the Act's provisions and requirements, having been in the cattle business for more than 20 years. Such operation after Notice has consistently been held to be willful.

The Complainant has established on the record the reason for its requested sanction of a $1,500.00 civil penalty to be assessed against the Respondent for its willful violation of the Packers and Stockyards Act and regulations. Accordingly, such sanction is hereby imposed.

The Respondent seeks the imposition of a penalty of no more than $100.00. However, the facts and record of this case do not show valid reason for such a low penalty, and, is not consistent with the record evidence. The Complainant's sanction policy and guidelines were provided by Complainant's witness, Mr. Jack Brinckmeyer. This testimony is found at pages 84 and 85 of the transcript:

Q. Why is that you think an appropriate sanction is $1,500.00?

A. It is basically based on our present guidelines that we use in determining sanction for a failure to provide bond coverage. July, a year ago, when the bonding requirements were increased to $10,000.00 minimum, we changed our basic determination to 5 per cent of the amount of the bond that was required at the time it was terminated, plus the period of time that the person operated without bond coverage is determined in the civil penalty that is included.

Prior to that we have been using 10 per cent because of the increase in the minimum bond and requirements under 303, we tried to equate those to be in a fairly equal position.

* * * * * * *

Q. Do you feel, Mr. Brinckmeyer, in your opinion as an employee of the Packers and Stockyards Administration, do you feel that the penalty of $1,500.00 is what is necessary to basically assure the Department that Mr. Klemme won't again operate without a bond?

A. That's part of it. We feel that the penalty is also to indicate to other people that would be inclined to violate the Act, that they should stay in compliance. I will have to say that we have started and are continuing to increase our sanctions, not only on civil penalties but on suspensions as well, to a point to where we have more voluntary compliance, if you want to call it that. I feel this penalty is in an area that we need at the present time to insure compliance by respondent, as well as other people who would be inclined in engage in the same type of violations.

The Department's deciding official, the Judicial Officer, has stated many times what is set forth in the 1974 decision of: *In re: Worsley,* 33 A.D. 1547, that it is the policy of the Department to impose severe sanctions upon Respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department.

The record evidence herein firmly establishes the seriousness of Respondent's violations. For months, Respondent Klemme Cattle engaged in livestock transactions totalling hundreds of thousands of dollars while offering the industry no surety protection in event of its failure to pay those with whom it engaged in business.

Accordingly, the following Order is appropriate, and, it is so issued.

ORDER

Respondent Klemme Cattle Company, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations as a dealer or market agency subject to the Act, shall cease and desist from engaging in business subject to the Act without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. section 213(b)), Respondent is assessed a civil penalty of One Thousand Five Hundred Dollars ($1,500.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Roberta Swartzendruber, Esquire, Office of the General Counsel, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400.

The provisions of this Order shall become effective Thirty-five days after service thereof unless appealed by a party hereto within Thirty Days after service, all as more fully set forth in the Rules of Practice and Procedure, 7 CFR 1.131, *et seq,* 1.145(a) and 1.142(c).

Copies of this Decision shall be served upon the parties.

[Decision and Order became final on June 21, 1986.—Ed.]

In re: B. C. UMBERGER, P&S Docket No. 6691. Decided June 23, 1986.

Cease and desist failure to pay for purchases—Suspension—Consent.

Andrew Stanton, for complainant.
James A. Boyd, Wytheville, VA, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. B. C. Umberger, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 265, Wytheville, Virginia 24382.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent B. C. Umberger, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of four weeks.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: FRED COCHRAN and DALE COCHRAN, P&S Docket No. 6693. Decided June 23, 1986.

Insufficient funds—failure to pay—Suspension—Consent.

Roberta Swartzendruber, for complainant.
Edward F. Rate, Iowa City, IA, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Fred Cochran and Dale Cochran, hereinafter referred to as the respondents, are individuals whose principal places of business are located in North Liberty, Iowa, and Coralville, Iowa, and whose business mailing address is R.R. 2, North Liberty, Iowa 52317.

2. Respondents, at all times material herein, were:

(a) Engaged in the business of buying livestock in commerce for their own accounts; and

(b) Registered with the Secretary of Agriculture as dealers to buy and sell livestock in commerce for their own accounts.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Fred Cochran and Dale Cochran, their agents and employees, directly or through any corporate or other device, in

connection with their business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondents Fred Cochran and Dale Cochran are suspended as registrants under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of six months for respondent Fred Cochran and after two years for respondent Dale Cochran upon demonstration by respondents that all unpaid livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondents' salaried employment by another registrant after the expiration of a six month suspension for Fred Cochran and a two year suspension for Dale Cochran.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: RAYMOND HENSLEY, P&S Docket No. 6534. Decided June 26, 1986.

Bonding required—Civil Penalty—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Raymond Hensley, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 199, Collins, Missouri 64738.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account, and a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Raymond Hensley, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

The respondent is assessed a civil penalty, the dollar amount of which shall be five percent (5%) of the respondent's required amount of bond coverage, not to exceed Two Thousand Seven Hundred and Fifty Dollars ($2,750.00). The amount of required bond coverage is dependent on the amount of livestock purchased during the respondent's business year as set forth in Packers and Stock-

yards Administration regulations at 9 CFR § 201.30. The respondent agrees to furnish the dollar amount of all his livestock purchases from January 1, 1985, through March 31, 1986, to the Packers and Stockyards Administration's Kansas City, Missouri, Regional Office at 828 Livestock Exchange Building, Kansas City, Missouri 64102.

When the livestock purchase figures are received and the amount of the respondent's required bond is determined, the dollar amount of the civil penalty shall be assessed as set forth herein and the respondent shall be immediately notified by the Regional Office of the required dollar amount for his bond and the amount of his assessed penalty.

Should this dollar amount of livestock purchases *NOT* be received by the Regional Office within the 30 day period following the date this decision is signed by the administrative law judge, the maximum civil penalty of Two Thousand Seven Hundred and Fifty Dollars ($2,750.00) is hereby assessed against the respondent.

Upon the effective date of this order, respondent Raymond Hensley shall make a payment of Two Hundred and Fifty Dollars ($250.00) toward the total civil penalty to be assessed, such payment to be made by certified check payable to the Treasurer of the United States clearly marked with the case docket number and sent to Roberta Swartzendruber, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2446, South Building, Washington, D.C. 20250-1400. Payments in the sum of Two Hundred Fifty Dollars ($250.00) per month shall be made in like manner by respondent on the remaining balance of the civil penalty until paid in full. These payments are to commence on the first day of the month following respondent Hensley's notification of the amount of civil penalty assessed.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: GILES AND STRATTON AUCTION, INC., a corporation, d/b/a LIVESTOCK PRODUCERS, FLOYD GILES, an individual, and RONNIE STRATTON , an individual, P&S Docket No. 6660. Decided June 26, 1986.

Insolvent—Civil Penalty—Suspended—Consent.

Roberta Swartzendruber, for complainant.
Michael Epley, Magnolia, AR, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Giles and Stratton Auction, Inc., doing business as Livestock Producers, hereinafter referred to as the corporate respondent, is a Louisiana corporation whose mailing address is R.R. 1, Box 666, Bossier City, Louisiana 71112.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating Livestock Producers stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis and as a dealer buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis and as a dealer to buy and sell livestock in commerce for its own account.

3. Floyd Giles and Ronnie Stratton, hereinafter referred to as individual respondents Giles and Stratton, are sole owners of the corporate respondent. Individual respondent Giles is president and individual respondent Stratton is vice president of the corporate respondent.

4. Individual respondents Giles and Stratton direct, manage and control the business activities of corporate respondent.

5. The individual respondents Giles and Stratton are market agencies and dealers within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent Giles and Stratton Auction, Inc., its officers, directors, agents, employees, successors and assigns, and individual respondents Floyd Giles and Ronnie Stratton, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42 of the regulations, amounts equal to the proceeds due consignors for livestock purchased by respondents for market support, and amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

3. Failing to otherwise maintain and use properly their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;

5. Consigning livestock to any stockyard for sale under false or fictitious names;

6. Preparing buyer's bills which fail to disclose the full, true and correct names of the buyers of consigned livestock;

7. Permitting its auctioneer or other key employees to purchase livestock from consignments for speculative resale or to fill orders; and

8. Selling consigned livestock to any owner, officer, agent, employee, or any such person having an ownership or financial interest in the market without disclosing the name of the buyer and the nature of the relationship existing between the market agency and the buyer on the account of sale issued to the consignor. Further, such disclosure shall be publicly announced at the time of sale.

Respondents Giles and Stratton Auction, Inc., and Floyd Giles are suspended as registrants under the Act for a period of seven (7) days and thereafter until they demonstrate that they are no longer insovlent and that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated. When respondents demonstrate that they are no longer insolvent and that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the seven (7) day period.

Respondent Stratton is prohibited for a period of seven (7) days from engaging in business or operating subject to the Act as a dealer and/or market agency.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are hereby assessed a civil penalty in the amount of seventeen thousand dollars ($17,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: TERRY KREWSON, BOBBIE KREWSON, D. E. KREWSON, and LICKING LIVESTOCK AUCTION COMPANY, INC., P&S Docket No. 6702. Decided June 26, 1986.

Failure to maintain accounts—failure to pay promptly—failure to pay full purchase price—suspended—must eliminate deficits—meet bonding requirements—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administra-

tor, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in Part I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Terry Krewson and Bobbie Krewson were, at all times material herein, partners doing business as Licking Livestock Auction Co., and having their principal place of business at Licking, Missouri. Respondents' business address is P. O. Box 299, Licking, Missouri 65542.

2. Respondents Terry Krewson and Bobbie Krewson were, at all times material herein:

(a) Engaged in the business of conducting and operating the Licking Livestock Auction Co. stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

3. In addition to his partnership activities set forth above, respondent Terry Krewson, was, at all times material herein:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account;

4. On April 5, 1985, Licking Livestock Auction Co. was incorporated under the laws of the State of Missouri as Licking Livestock Auction Company, Inc.;

5. Licking Livestock Auction Company, Inc., hereinafter referred to as corporate respondent, succeeded respondents Terry and Bobbie Krewson doing business as Licking Livestock Auction Co. in the conduct and operation of Licking Livestock Auction Company stockyard and is engaged in business as a market agency selling

livestock on a commission basis, but is not so registered with the Secretary.

6. Respondent Terry Krewson is responsible for the day-to-day management of the corporate respondent.

7. D. E. Krewson, father of respondent Terry Krewson, at all times material herein was:

(a) Owner, in combination with his wife, of all corporate respondent's stock;

(b) President of the corporate respondent; and

(c) Responsible, in combination with respondent Terry Krewson, for the direction, management and control of all business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent Licking Livestock Auction Company, Inc., its officers, directors, agents, employees, successors and assigns, and individual respondents Terry Krewson, Bobbie Krewson, and D.E. Krewson, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regulations, amounts equal to the proceeds due consignors for livestock purchased by respondents for market support, and amounts equal to the outstanding proceeds receivable from the sale of consigned livestock;

3. Failing to otherwise maintain and use properly their Custodial account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;

5. Consigning livestock to any stockyard for sale under false or fictitious names;

6. Selling consigned livestock under false or fictitious names;

7. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the bank account(s) upon which such checks are drawn to pay such checks when presented;

8. Failing to pay, when due, the full purchase price of livestock;

9. Failing to pay the full purchase price of livestock; and

10. Engaging in business in any capacity for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents Terry and Bobbie Krewson are suspended as registrants under the Act for a period of twenty one (21) days and thereafter until they demonstrate that they are no longer insolvent and that the deficit in their custodial account has been eliminated. When respondents demonstrate that they are no longer insolvent and that the shortage in their custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the twenty one (21) day period.

Licking Livestock Auction Company, Inc., and respondent D. E. Krewson are prohibited for a period of twenty one (21) days from engaging in business or operating subject to the Act as a dealer and/or market agency selling livestock on a commission basis and thereafter until they demonstrate that Licking Livestock Auction Company, Inc., is no longer insolvent, that the deficit in its custodial account has been eliminated, and that it is in compliance with the bonding requirements under the Act and the regulations. When respondents demonstrate that Licking Livestock Auction Company, Inc., is no longer insolvent, that the shortage in its custodial account has been eliminated, and that it is in full compliance with the bonding requirements under the Act and the regulations, a supplemental order will be issued in this proceeding terminating this prohibition after the expiration of the twenty one (21) day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK and GEORGE BITZ, P&S Docket No. 6678. Decided June 30, 1986.

Custodial account misuse—misuse of funds—Suspended—Consent.

Jory Hochburg, for complainant.
Joseph A. Vogel, Jr., Mandan, ND, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO DONALD A. HAUCK

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Donald Hauck admits the jurisdictional allegations in paragraph I of the Complaint as those allegations pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Donald A. Hauck, hereinafter referred to as respondent Hauck, is an individual whose business address is P. O. Box 1914, Minot, North Dakota.

2. Respondent Hauck, at all times material herein was:

(a) President of respondent Napoleon;

(b) Owner of 51 per cent of the outstanding stock issued by respondent Napoleon;

(c) Responsible for the direction, management and control of respondent Napoleon;

(d) Engaged in the business of conducting and operating the Napoleon Livestock Auction, Inc. stockyard, a posted stockyard subject to the Act;

(e) Engaged in the business of selling livestock on a commission basis at the Napoleon stockyard, buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account; and

(f) A dealer and a market agency, within the meaning and subject to the provisions of the Act.

3. Since September 6, 1985, respondent Hauck has been registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce at the Northern Livestock Exchange, a posted stockyard subject to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Hauck, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to maintain his Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

2. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), amounts due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of his own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock, or for the payment of amounts due the respondents for lawful marketing charges;

4. Reducing or eliminating the selling commission required by the stockyard's approved tariff for consignments of livestock to the stockyard;

5. Providing free or reduced transportation to consignors for livestock consigned to the stockyard for sale; and

6. Paying all or a portion of the lodging costs or other expenses incurred by buyers attending sales held by the stockyard.

Respondent Hauck is suspended from operating as a dealer or a market agency subject to the Act and is prohibited from acting as the agent or employee of a dealer or a market agency subject to the Act for a period of 21 days.

The provisions of this Order shall become effective upon filing.

Copies of this decision shall be served upon the parties.

In re: NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK and GEORGE BITZ, P&S Docket No. 6678. Decided June 30, 1986.

Custodial accounts—deposit proceeds—misuse of funds—suspension—prohibition as dealer—Consent.

Jory Hochberg, for complainant.
Joseph A. Vogel, Jr., Mandan, ND, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO RESPONDENTS NAPOLEON LIVESTOCK AUCTION, INC., AND GEORGE BITZ

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Napoleon Livestock Auction, Inc., and George Bitz admit the jurisdictional allegations in paragraph I of the complaint as those allegations pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Napoleon Livestock Auction, Inc., hereinafter referred to as respondent Napoleon, is a corporation organized and existing under the laws of the State of North Dakota. Its business mailing address is P. O. Box 3, Napoleon, North Dakota 58561.

2. Respondent Napoleon is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Napoleon Livestock Auction, Inc. stockyard, a posted stockyard subject to the Act, hereinafter referred to as the stockyard; and

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, buying livestock on a commission basis in commerce, and buying and selling livestock in commerce for its own account.

3. Respondent Napoleon is, and at all times material herein was, registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

4. George Bitz, hereinafter referred to as respondent Bitz, is an individual whose business mailing address is P. O. Box 3, Napoleon, North Dakota 58561.

5. Respondent Bitz is, and at all times material herein was:

(a) A corporate officer of respondent Napoleon;

(b) Owner of at least 49 percent of the outstanding stock issued by respondent Napoleon;

(c) Responsible for the direction, management and control of respondent Napoleon;

(d) Engaged in the business of conducting and operating the stockyard;

(e) Engaged in the business of selling livestock on a commission basis at the stockyard, buying livestock on a commission basis in commerce, and buying and selling livestock in a commerce for his own account; and

(f) A dealer and a market agency, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

Respondents Napoleon and Bitz having admitted the jurisdictional facts as they pertain to them and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Napoleon, its officers, directors, employees, agents, successors and assigns, and respondent Bitz, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)) amounts due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock, or for the payment of amounts due the respondents for lawful marketing charges;

4. Reducing or eliminating the selling commission required by the stockyard's approved tariff for consignments of livestock to the stockyard;

5. Providing free or reduced cost transportation to consignors of livestock to the stockyard for sale; and

6. Paying all or a portion of the lodging costs or other expenses incurred by buyers attending sales held by the stockyard.

Respondent Napoleon is suspended as a registrant subject to the Act and respondent Bitz is prohibited from operating as a dealer or market agency subject tothe Act or acting as an employee or agent of a dealer or a market agency subject to the Act for a period of 21 days and thereafter until such time as they demonstrate that the deficit in their custodial account has been eliminated. When respondents demonstrate that the deficit in their custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 21-day period.

The provisions of this order shall become effective upon filing of this decision.

Copies of this decision shall be served upon the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: FARMERS LIVESTOCK AUCTION, INC., P&S Docket No. 6266. Decided May 14, 1986.

Suspension modified to terminate—deficit in accounts eliminated.

Jory Hochberg, for complainant.
Gerald Eftink, Kansas City, MO, for respondent.

Decision for John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On November 14, 1985, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of 28 days and thereafter until the deficit in respondent's custodial account was eliminated. The effective date of this suspension was later modified by orders issued on December 11, 1985, and April 15, 1986.

Respondent has now demonstrated that the deficit in its custodial account has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued April 15, 1986, is modified to terminate after the expi-

ration of the 28 day period of suspension. The order shall remain in full force and effect in all other respects.

In re: BUSHELLE CATTLE COMPANY, INC., P&S Docket No. 6639. Decided May 14, 1986.

Late Appeal denied.

Roberta Swartzendruber, for comp'ainant.
John P. Smith, Park Rapids, MN, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING LATE APPEAL

Respondent's appeal was filed with the Hearing Clerk on April 28, 1986, after it had become final and effective on April 26, 1986. Accordingly, respondent's appeal must be dismissed because it was not timely filed. See *In re Powell*, 44 Agric. Dec. ___ (May 28, 1985), attached as Appendix A.

Even if respondent's appeal had been timely filed, it would have been dismissed because respondent failed to file a timely answer. See *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986), attached as Appendix B.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's appeal is denied since it was filed after the Administrative Law Judge's decision had become final.

APPENDIX A

In re Powell, 44 Agric. Dec. ___ (May 28, 1985)

APPENDIX B

In re Daul, 45 Agric. Dec. ___ (Mar. 6, 1986)
[Both excerpts omitted.—Ed.]

In re: GARY WESSELS, P&S Docket No. 6423. Decided June 13, 1986.

Suspension terminated—compliance.

Roberta Swartzendruber, for complainant.
Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 29, 1984, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act for a period of 180 days and thereafter until such time as he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 29, 1984, is terminated. The order shall remain in full force and effect in all other respects.

In re: RANCHERS AND FARMERS LIVESTOCK AUCTION, INC., and L. KIRBY POWELL, P&S Docket No. 6692. Decided June 23, 1986.

Suspension terminated.

Jory Hochberg, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On May 5, 1986, an order was issued in the above-captioned matter which, *inter alia,* suspended the corporate respondent as a registrant under the Act for a period of 21 days and thereafter until its current liabilities do not exceed its current assets.

Corporate respondent has now demonstrated that its current liabilities do not exceed its current assets. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued May 5, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: ALLEN H. RIFFEE, P&S Docket No. 6477. Decided June 30, 1986.

Suspension period expired—bonding requirements met.

Stephen Luparello, for complainant.
Arthur Lambiotte, Woodstock, VA, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On December 13, 1985, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of four months and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations.

The four month period of suspension has expired and respondent is now in compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued December 13, 1985, is terminated. The order shall remain in full force and effect in all other respects.

In re: CARTER-KIRCHOFF FEED YARD, INC., and BOB CARTER, P&S Docket No. 6611. Decided June 30, 1986.

Full restitution date established.

Dennis Becker, for complainant.
R. Byron Bass, Jr., Lubbock, TX, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

AMENDMENT OF ORDER

For good cause show, and on agreement of counsel for both parties, that portion of the Order of April 2, 1986, which provides that:

> In accordance with section 312(b) of the Act, the corporate respondent and individual respondent are assessed jointly and severally a civil penalty of one hundred thousand dollars ($100,000.00), with the proviso that the civil penalties will be waived if full restitution is made to the parties named in paragraph II(a) of the complaint within 90 days of the entry of this order.

is amended to provide that full restitution must be made by August 18, 1986.

REPARATION DECISIONS

STANLEY V. GLOVER, *v.* LIMON LIVESTOCK EXCHANGE and MIKE JORGENSEN, P&S Docket No. 6562. Decided June 10, 1986.

Full payment—Complaint dismissed.

Peter V. Train, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

ORDER OF DISMISSAL

Complainant having informed the presiding officer that he has received full payment of his claim, the above-captioned complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

In re: LEO ZEMLISKA, d/b/a PROFESSIONAL FEEDER CONSULTANTS, *v.* GLASGOW LIVESTOCK SALES CO., and ROBERT D. FJELDHEIM, P&S Docket No. 6064. Decided June 20, 1986.

Failure to pay—agency—indemnity for expenses and losses—instructions violated—portion dismissed—reparations.

Thomas Heinz, Presiding Officer.
John L. Davidson, Billings, MT, for complainant.
Robert M. Cook, Norfolk NE, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*), hereinafter "the Act," begun by a complaint timely filed on February 11, 1982, alleging in substance that respondents failed to reimburse complainant for livestock purchased on order by complainant for respondents. The amount claimed as reparation was $57,016.32. That amount was changed on brief to $41,501.25 plus interest thereon at the rate of 16.5% per annum from November 15, 1983, until paid. A copy of the formal complaint and the investigation report prepared by the Packers and Stockyards Administration of this Department was served on respondents.

Respondents filed a timely answer generally denying the allegations of the complaint. Further, in allegations later abandoned on brief, respondents alleged that the Secretary of Agriculture lacks

jurisdiction over the parties and the subject matter, that the complaint was untimely filed and that complainant has been paid. Respondents requested an oral hearing. Accordingly, oral hearings were held on November 22 and 23, 1983, in Billings, Montana, before Joanne I. Schwartz of the Office of General Counsel of this Department. Complainant was represented by John R. Davidson, Esquire, of Davidson, Veeder, Baugh, Broeder, Poppler & Michelotti, Billings, Montana. Respondents were represented by Robert M. Cook, Esquire, Norfolk, Nebraska. Complainant testified on his own behalf and introduced six exhibits. Three witnesses testified for respondents who introduced two exhibits. After the oral hearing was held, complainant requested leave to introduce rebuttal evidence by deposing two individuals who did not appear at the hearing. Although orders were issued to depose both of these two individuals using written interrogatories and cross-interrogatories, complainant encountered difficulties in his attempts to depose one of them, and eventually agreed to proceed without that individual's deposition. Briefing by the parties was completed on November 18, 1985.

FINDINGS OF FACT

1. Complainant Leo Zemliska (hereinafter "Zemliska") is an individual doing business as "Professional Feeder Consultants," with his principal place of business located at Newcastle, Wyoming. At all times material herein, Zemliska was registered with the Secretary as a dealer to buy and sell livestock for his own account and as a market agency to buy livestock on commission for the account of others. Zemliska has been engaged in the livestock business for many years.

2. Respondent Glasgow Livestock Sales Company, at all times material herein, was a corporation registered with the Secretary as a dealer to buy and sell livestock for its own account and as a market agency to sell livestock on a commission basis for the account of others. The corporate respondent had its principal place of business located in Glasgow, Montana. Fjeldheim Livestock, Incorporated, is the successor corporation to Glasgow Livestock Sales Company.

3. Respondent Robert D. Fjeldheim is an individual who at all times material herein was the president and sole stockholder of the corporate respondent. The respondents hereinafter will be referred to collectively as "Fjeldheim." Fjeldheim has been engaged in the livestock business for many years.

4. During August of 1981, Fjeldheim received an order from one Marlyn Dahlquist (hereinafter "Dahlquist") of Laurel, Nebraska, to

purchase approximately 1,000 heifers and heiferettes suitable for his feeding operations. Dahlquist operated feed lots in Laurel, Nebraska, and Avon, South Dakota, and wanted animals which were relatively young, with healthy mouths, not pregnant and, if properly fed, capable of gaining weight to the point where their meat would grade higher upon slaughter than it would have if the animals were slaughtered immediately after purchase. The livestock were to be furnished to Dahlquist subject to his approval. The agreement required Fjeldheim to use his own funds to purchase the livestock and to bill Dahlquist for the actual cost of the cattle plus a buying commission of $1.00 per hundredweight for his services.

5. In early December, 1981, as part of his continuing efforts to fill the order from Dahlquist, Fjeldheim requested Zemliska purchase some of the same type of animals at livestock auction markets in Sturgis and Belle Fourche, South Dakota. Fjeldheim told Zemliska that the cattle were to be purchased for a third party who had the right to reject them upon receipt, but Fjeldheim did not reveal Dahlquist's identity at this time. Like the Dahlquist-Fjeldheim agreement, the agreement between Fjeldheim and Zemliska required Zemliska to use his own funds to purchase the livestock and to bill Fjeldheim for the actual cost of the cattle plus a buying commission of $.50 per hundredweight to compensate Zemliska for his buying services. Zemliska was also responsible for arranging truck transportation of the animals to a destination which was to be communicated to the trucker after departure from the purchase location.

6. Pursuant to his order, in early December, 1981, Zemliska purchased two loads of cattle at Sturgis and Belle Fourche, South Dakota, arranged their transportation, and issued accountings to Fjeldheim, who accordingly reimbursed Zemliska, paid the agreed $.50 per hundredweight buying commission, and billed Dahlquist for the cost of the cattle plus a commission of $1.00 per hundredweight. There is no controversy between the parties regarding these two loads of cattle which were accepted by Dahlquist upon receipt.

7. Based on Dahlquist's acceptance of the cattle purchased by Zemliska at Sturgis and Belle Fourche, South Dakota, Fjeldheim instructed Zemliska to purchase additional livestock of the same type and quality at Torrington, Wyoming and St. Onge, South Dakota. Thereafter, on December 4, 1981, using his own funds, Zemliska purchased 345 head of livestock at Torrington Livestock Commission Company, Torrington, Wyoming. Zemliska billed Fjeldheim for $125,835.94 which included the buying commission of $1,481.55 of these 345 head. Fjeldheim accordingly issued a check to

Zemliska to reimburse him for the cost of the cattle and to pay the buying commission. Pursuant to instructions from Fjeldheim, these cattle were shipped to Dahlquist's feedlots in Avon, South Dakota, where they arrived on December 5, 1981.

8. On December 5, 1981, using his own funds, Zemliska purchased 112 head of livestock at Madden's Livestock Market, Inc., St. Onge, South Dakota, for $41,072.03 and billed Fjeldheim for $41,574.38 which included a buying commission of $502.35. Fjeldheim thereafter issued a check to Zemliska to reimburse him for the cost of the cattle and to pay the buying commission. These cattle were shipped, pursuant to instructions from Fjeldheim, to Dahlquist in Avon, South Dakota, on December 6, 1981, and arrived on December 7, 1981.

9. On or about December 7, 1981, Russell Hamilton, manager of Dahlquist's feedlots in Avon, South Dakota, telephoned Dahlquist in Laurel, Nebraska, to tell him the livestock received from Torrington, Wyoming, and St. Onge, South Dakota on December 5 and 7 were not heiferettes, did not conform, were not suitable for feeding and were not of the same type and quality as the livestock previously received from Sturgis and Belle Fourche.

10. Dahlquist personally inspected the cattle on December 9, 1981, and concluded only 91 out of the 457 head shipped from Torrington and St. Onge conformed to his order. On the same day, he telephoned Fjeldheim to reject the non-conforming cattle.

11. On December 9, 1981, pursuant to his order from Fjeldheim and using his own funds, Zemliska purchased 36 head of livestock at Torrington Livestock Commission Company, Torrington, Wyoming, for $13,711.47.

12. During the morning of December 10, 1981, before the cattle purchased the proceeding day could be shipped, Fjeldheim telephoned Zemliska to inform him that on December 9, 1981, Dahlquist had rejected the cattle which had arrived at his feedlots on December 5 and December 7 because there were "too many lumps and bumps and [the livestock] did not conform to the order." Transcript, p. 159. Fjeldheim instructed Zemliska to resell in Torrington the 36 head purchased on December 9 and promised to indemnify him for any loss upon resale. When resold, these 36 cattle incurred a loss of $2,813.48.

13. On December 10, 1981, Zemliska purchased 113 head of livestock from Fjeldheim for $26,658.30, which amount has not been paid.

14. On December 10, 1981, Fjeldheim agreed to pay one half the air fare for Zemliska to fly to Avon, South Dakota in order that he,

Zemliska, could inspect the cattle which Dahlquist had rejected. The total air fare for the trip was $425.00.

15. Zemliska inspected the cattle on December 11, 1981. Thereafter, on several occasions between December 11 and December 30, 1981, Zemliska, Fjeldheim, Dahlquist and his agents, and South Dakota brand inspectors examined the cattle which had been rejected by Dahlquist. These examinations were prompted by Zemliska's contention that the cattle Dahlquist had rejected were not all the same cattle he had purchased at Torrington, Wyoming, and St. Onge, South Dakota, on December 4 and 5 respectively.

16. On or about December 11 or 12, 1981, Zemliska entered into an agreement with Russell Hamilton, subsequently ratified by Dahlquist, wherein Dahlquist agreed to feed the rejected livestock for Zemliska until Zemliska could ascertain whether the livestock were in fact those which he had purchased at Torrington and St. Onge.

17. On December 14, 1981, Fjeldheim stopped payment on the checks which had been issued to pay for the cattle purchased by Zemliska pursuant to order on December 4 and 5, 1981.

18. On December 30, 1981, Zemliska arranged for the resale of 363 head of the 457 head of disputed livestock at auction markets in Yankton and Mitchell, South Dakota. Zemliska received proceeds from those resales totalling $113,070.99.

19. Out of the disputed 457 head, three died before they could be resold, one in transit to Dahlquist's feedlots and the other two while in the feedlots. Zemliska has received insurance compensation of $296.12 for the animal that died in transit.

20. The remaining 91 head out of the disputed 457 head were resold to one Gary Erwin and generated net proceeds of $38,663.82, which amount Fjeldheim has retained and not remitted to Zemliska.

SUBSIDIARY FINDINGS AND CONCLUSIONS

Zemliska contends, in effect, that he properly purchased 457 head of livestock pursuant to an order received from Fjeldheim, and that by the time they were inspected by Fjeldheim's prospective purchaser, Dahlquist, some unknown party or parties had mixed in or substituted different cattle for some of those he had purchased. Further, Zemliska contends that even if the livestock did not conform to the order, Dahlquist and hence Fjeldheim did not reject them in a timely manner. Zemliska argues that he purchased the livestock as an agent for Fjeldheim who, as the owner of the livestock, must bear the loss incurred when Dahlquist improperly rejected the cattle and they had to be resold. Fjeldheim, on the

other hand, claims that Zemliska was not an agent, rather he was the seller to Fjeldheim who as the buyer rightfully rejected the livestock which did not conform to the contract of sale. Therefore, Fjeldheim argues, Zemliska as seller must suffer the losses incurred in the salvage sale of the nonconforming cattle. Neither party's argument can be entirely endorsed. Although Zemliska correctly argues that he acted as Fjeldheim's agent, that fact does not permit him to recover all the expenses and losses claimed in this case. On the contrary, by unjustifiably tendering livestock which concededly did not conform to the order, Zemliska failed to fulfill his duty as an agent to follow instructions and cannot be indemnified for the losses and expenses occasioned by the transactions.

Nature of Relationship Between the Parties

Section 1 of the Second Restatement of Agency provides as follows:

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> (2) The one for whom action is to be taken is the principal.
>
> (3) The one who is to act is the agent.

The agreement between Zemliska and Fjeldheim clearly manifests a contract of agency. Fjeldheim gave instructions as to the type of cattle to buy, where to buy them, at what price and weight, and where to send them after purchase. Zemliska acted subject to Fjeldheim's control and primarily for Fjeldheim's benefit, not his own, which distinguishes their relationship from that of a buyer and seller.

> One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself.

Section 14K, Restatement of Agency, 2d.

Zemliska was to be paid a flat commission of $.50 per hundredweight for his buying services. He was required to bill Fjeldheim for the exact costs of the cattle. This is a crucial fact in the determination of the nature of the relationship between the parties. If Zemliska had been a seller here, that is, a dealer rather than an agent, he would have been free to make a speculative profit in the venture. He was not. His only personal benefit was the flat per

hundredweight commission. Moreover, if the parties had been operating as buyer and seller rather than as principal and agent, it is very unlikely Fjeldheim would have felt obligated to promise indemnification, as he did, for any loss suffered on the 36 head of cattle Zemliska bought on December 9, 1981 at Torrington, Wyoming.

A considerable portion of the record in this case concerns brand certificates issued and reissued at various points by various persons. Under the best of circumstances, the brand certificates are merely *prima facie*, not conclusive, evidence of ownership. (Section 11-20-108 of Wyoming statutes of 1977.) The evidence in this case shows that at the time the cattle were purchased, Zemliska knew he was not purchasing them for his own account but rather for a third party whose identity was known to Fjeldheim but not to Zemliska at that time. Dahlquist's identity was revealed to Zemliska later. Under these circumstances, it was understandable and reasonable for Zemliska to identify Fjeldheim as the "owner." Since there is no evidence the brand inspectors who filled out the original brand certificates had any source of information about the relationship between the parties independent of Zemliska, those brand certificates cannot be taken conclusively to determine the true ownership of the cattle. They merely reflect what Zemliska told the brand inspectors. The reissued brand certificates in the record are likewise unreliable indicators of ownership because the person who filled them out was not shown to be aware of the true nature of the relationship between the parties.

Invoices, health certificates and bills of lading in the record variously designate both Zemliska and Fjeldheim as the person who was "owner," "shipper," "consignor," "consigned to," "consignee," and "purchaser." Like the brand certificates, these documents do not reveal or determine the true nature of the relationship between the parties.

The ultimate purchaser of the disputed livestock was to be Dahlquist. The agreement between Dahlquist and Fjeldheim was identical to the Fjeldheim-Zemliska agreement except that Dahlquist agreed to pay a buying commission of $1.00 per hundredweight over the exact cost of the cattle rather than the $.50 per hundredweight Fjeldheim agreed to pay Zemliska for Zemliska's services. Fjeldheim's sole personal benefit from the transactions derived from the flat-rate buying commission. Like Zemliska, he was not free to make a speculative profit from the deal. In other words, like Zemliska, Fjeldheim also was acting as an agent. Zemliska was the subagent for Fjeldheim, the agent for Dahlquist, the principal.

Duties and Liabilities of the Parties

The Second Restatement of Agency and Corpus Juris Secundum set out the following rules defining the duties and liabilities of the parties in this case:

> (1) Unless otherwise agreed a subagent who knows of the existence of the ultimate principal owes him the duties owed by an agent to a principal, except the duties dependent upon the existence of a contract.
>
> (2) Unless otherwise agreed, a subagent owes the agent the duties of an agent to his principal.

Restatement of Agency, 2d, § 428.

Comment(c) to section 428 describes the situation where Zemliska knew that he was purchasing cattle for an unknown third party.

> (c) Principal partially disclosed. A subagent who knows of the existence but does not know of the identity of the principal has in general the same liabilities as one who knows of the identity of the principal.

Zemliska was obliged to obey instructions from Fjeldheim.

> It is an agent's duty to adhere faithfully to all instructions given him by his principal, and his violation of the instructions will serve to make the agent liable for any loss or damage which may result therefrom.

3 C.J.S. Agency § 288

If Zemliska followed instructions, Fjeldheim is required to indemnify him for expenses and losses.

> The general rule is that where one is employed or directed by another to do an act in his behalf, not manifestly wrong, the law implies a promise of indemnity by the principal for damages resulting from or expenditures incurred as a proximate consequence of the good faith execution of the agency . . .

3 C.J.S. Agency § 321.

However, if Zemliska did not obey instructions and committed unauthorized acts, Fjeldheim is not required to indemnify the losses and expenses caused by the unauthorized acts.

> Unless otherwise agreed, the principal is not subject to a duty to indemnify an agent:

> (a) for pecuniary loss or other harm, not of benefit to the principal, arising from the performance of unauthorized acts or resulting solely from the agent's negligence or other fault . . .

Restatement of Agency, 2d, § 440

The Dahlquist-Fjeldheim cattle order called for heifers and heiferettes in healthy condition and suitable for feeding purposes. Invoices in the record show a majority of the cattle Zemliska purchased were cows, not heifers or heiferettes.[1] Gail Sohler, the owner and operator of the auction market where many of the rejected cattle were resold testified that the rejected cattle were "all butcher cows." (TR 360) Mike Madden, owner and operator of the auction market in St. Onge where Zemliska purchased 112 of the disputed livestock, testified that Zemliska bought 82 aged cows and 30 heiferettes. (TR 226, 228) In his deposition, Dallas Larson said he was present at the December 4, 1981, sale at Torrington when Zemliska was buying and saw the purchase of animals which would not qualify as heiferettes. Moreover, invoices made out at the time Zemliska purchased the animals in dispute show several which were "lame," "rough," or suffering from a cancerous eye, conditions which adversely affected their suitability for feeding purposes. It is therefore clear that many of the 457 head of cattle which are subject of this dispute did not conform to that order in that they were not heifers, were too old to be heiferettes or were not suitable for feeding purposes; they were cows suitable only for butcher purposes.

In fact, Zemliska does not dispute that a significant number of the livestock did not conform to the order, but he claims he did not buy them. Rather, he argues there had to have been a mix-up at some point along the line from his purchase to rejection by Dahlquist. In other words, Zemliska contends that he followed his principal's instructions, but that someone else was responsible for the delivery of non-conforming livestock. This argument is unpersuasive. There is *prima facie* proof Zemliska violated instructions, but he has failed to carry his burden to prove he was not responsible for the delivery of cattle which did not conform to the order.

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[1] Although there is some considerable debate in the record concerning the exact meaning of "heiferette," there can be no doubt that the term does not include butcher cows. (*See, Grischott* v. *Willard*, 28 Agric. Dec. 423 (1969) where it was found that the disputed animals were cows and too old to be "heiferettes," making them unfit as feeders.)

> The principal has the burden of proving that the agent has been guilty of negligence or misconduct or has violated instructions; these matters will not be presumed, but where there is prima facie proof thereof, the agent has the burden of showing facts relieving him from liability or reducing the amount of damages.

3 C.J.S. § 507; *See also, Robbins* v. *Roumel*, 138 A.2d 922 (D.C. 1958).

Zemliska submitted into evidence lists of back tag numbers reportediy attached to the cattle at the time they were purchased, along with lists of back tag numbers purportedly found on some of the cattle purchased at St. Onge when inspected at Dahlquist's feedlots. These lists show gaps in the numbers, unassigned numbers, missing tag numbers, and unexplained and undecipherable notations. Therefore, these lists do not support Zemliska's argument that the back tag numbers do not match, thereby proving a mix-up of the cattle.

Terry Gropper was the South Dakota brand inspector who prepared the brand inspection certificate for the 112 head of cattle Zemliska purchased at St. Onge, South Dakota, on December 5, 1981. Mr. Gropper twice went to Avon, South Dakota, at Zemliska's request to check the brands. Although Zemliska did not call Mr. Gropper to testify at the hearing, the investigation report, served on Zemliska before the hearing, contains a memorandum of a conversation Mr. Gropper had with an investigator from the Packers and Stockyards Administration. That memorandum indicates Mr. Gropper said the cattle he found in Avon were the same cattle he issued a market clearance for on December 5, 1981, after the auction at St. Onge.[2] The content of this conversation was corroborated by Mike Madden, owner and operator of the St. Onge auction market, who testified at the hearing that Mr. Gropper reported the same conclusion to him.[3] Further, Mr. Madden and his employees

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[2] Rule 4(c) of the Rules of Practice governing this proceeding provides, regarding the contents of the investigation report: "The Judicial Officer shall consider information in such a report or supplement as part of the evidence in the proceeding, to the extent that such information is relevant and material to the proceeding. Any party may submit evidence in rebuttal of such information as is provided generally in these rules for the submission of evidence." 9 CFR § 202.104(c).

[3] Zemliska's objections to the admission of hearsay are meritless. Responsible hearsay is admissable in all administrative proceedings. 5 U.S.C. § 556(d); *In re Thornton*, 38 Agric. Dec. 1425, 1435, (remand order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Bruhn's Freezer Meats*, 29 Agric. Dec. 223 and cases cited at 238 (1970), *aff'd sub nom., Bruhn's Freezer Meats* v. *United States Department of Agriculture*, 438 F.2d 1332 (8th Cir. 1971).

also conducted an independent investigation which reached the same conclusion.

Zemliska himself testified to the effect that he found the majority of the 345 cattle he purchased at Torrington, Wyoming arrived at the Dahlquist feedlots. He specifically remembered only three head out of the 345 as not purchased by him because "they were older cows." (TR 169) Finally, The affidavit in the record from Lester W. Maxfield, owner and operator of the auction market in Torrington, contains Maxfield's statement that "it is my opinion that Mr. Zemliska loaded out on trucks the exact 345 head of cattle that he purchased." In sum, the preponderance of the evidence does not support Zemliska's uncorroborated contention that a significant number of the cattle found at Dahlquist's feedlots were not the same cattle he had purchased at St. Onge, South Dakota, and Torrington, Wyoming on December 4 and 5, 1981.

Zemliska also argues, in effect, that even if all the cattle did not conform to the order, Dahlquist and his agents initially took action inconsistent with rejection and failed to reject the cattle within a reasonable time. Both parties improperly cite Article 2 of the Uniform Commercial Code on sales in their arguments regarding this issue. Since the parties are not buyer and seller but rather are principal and agent as to each other, agency law, not sales law, governs this dispute. *See* UCC § 1-103 and *Manger* v. *Davis*, 619 P.2d 687 (Utah, 1980); *Cairo Co-op Exchange* v. *First National Bank of Cunningham*, 608 P.2d 1370 (Kan. 1980). Cast in agency terms, Zemliska is arguing that Dahlquist must be taken to have impliedly ratified his unauthorized purchase of non-conforming cattle by treating the livestock in a manner consistent with acceptance and by failing to reject the cattle until two to five days after delivery. That argument has no merit.

> The principal must have full knowledge of the unauthorized act of his agent and an opportunity to repudiate the same before any delay in repudiating the act in question can constitute a ratification thereof.
>
> * * * * * * *
>
> The principal does not ratify an unauthorized act if he repudiates it with reasonable promptness after learning the facts, instant repudiation not being essential to avoid ratification . . . .

2A C.J.S. Agency § 87, 89.

The Torrington cattle arrived in Avon, South Dakota, on Saturday, December 5, and the St. Onge cattle arrived on Monday, December 7, 1981, the same day Dahlquist's employee, Russell Hamilton, called him in Laurel, Nebraska to report that the cattle did not conform to the order. Russell Hamilton obviously did not have authority on his own motion to reject the cattle, or he would have done so without contacting his employer. Dahlquist personally inspected the cattle on Wednesday. He then immediately communicated rejection to Fjeldheim who in turn passed the word to Zemliska on Thursday morning, December 10. Under these circumstances, we find that repudiation of Zemliska's unauthorized act, that is, the purchase of non-conforming livestock, occurred with reasonable promptness after Dahlquist learned the facts.

Although Dahlquist's feedlot employees apparently initially treated the livestock in a manner which would have been consistent with acceptance by their employer, this treatment cannot be deemed acceptance, particularly in the absence of any showing that these employees had authority from Dahlquist to reject livestock purchased on order, or in the absence of any evidence that Zemliska was prejudiced either by the short lapse of time between delivery and rejection or by the treatment the cattle received while in Dahlquist's custody before rejection.[4]

In summary, Zemliska, in violation of instructions, purchased livestock which did not conform to the Dahlquist-Fjeldheim order and which were rightfully rejected by Dahlquist in a timely manner. Because Zemliska violated his order-buying instructions without justification, we hold that he, not Fjeldheim, is liable for losses and expenses incurred in connection with his purchase of the non-conforming livestock. 3 C.J.S. Agency § 288. The complaint will be dismissed as to those losses and expenses, which include the losses generated upon resale of the livestock, plus telephone, travel, brand inspection and trucking expenses incurred with respect to the livestock rightfully rejected by Dahlquist. This conclusion, based on the facts of this case, comports with record evidence show-

[4] The investigation report contains a memorandum to file by Dennis Thalacker, Packers and Stockyards Administration, memoralizing his interview of Oliver Dicken, auctioneer at Torrington Livestock Commission Co., Torrington, Wyoming. Mr. Dicken is reported to have compared various average cattle prices on December 4 and December 11, 1981, and to have concluded that "it was evident that the going price paid for various types of cattle had declined about $2.00 per hundredweight." If Mr. Dicken's conclusion was well-founded, it suggests a possible bad faith motive for rejecting the livestock. However, since Dahlquist was not called to testify and there is no other evidence on this point, on the basis of this record we must conclude that Dahlquist acted in good faith when he rejected on December 9 the livestock purchased by Zemliska on December 4 and 5.

ing that as a general rule in the livestock industry, a livestock order buyer bears the risk of loss for delivery of non-conforming livestock.

Fjeldheim received the proceeds from the sale of the 91 head of livestock which in fact conformed to the Dahlquist-Fjeldheim order. Failure to reimburse an agent for the full amount of the purchase price plus costs of livestock properly purchased on order constitutes an unjust practice in violation of the Act for which reparation may be awarded. *Frank Novy* v. *Western Iowa Farms Co., d/b/a Martin Bros. & Co.*, 33 Agric. Dec. 23 (1974); *Southwest Cattle Co.* v. *Betts*, 28 Agric. Dec. 426 (1969).

Fjeldheim concedes he owes Zemliska the following amounts:

$38,663.82	proceeds from resale of 91 head to Gary Erwin which reimburses Zemliska for the cost thereof and includes Zemliska's buying commission thereon
1,216.06	shipping cost for the 91 head
2,813.48	loss incurred upon resale of 36 head purchased on December 9, 1981
212.50	one-half of air fare for Zemliska's trip to Avon
$42,905.86	

From this amount must be deducted $26,658.30 which both parties agree Zemliska owes Fjeldheim for 113 cattle purchased on December 10, 1981, leaving a total of $16,247.56.

Fjeldheim claims an additional setoff of $11,875.28 for feed he contends Zemliska owes Dahlquist. However, Fjeldheim was not a party to the contract wherein Dahlquist agreed to feed cattle for Zemliska, nor has Fjeldheim become subrogated to Dahlquist's rights under that contract. Therefore, Fjeldheim is without standing to assert the purported feed bill of $11,875.28 as a setoff claim against Zemliska. Accordingly, Fjeldheim will be ordered to pay Zemliska as reparation $16,247.56 plus interest.

Three out of the subject 457 cattle died, one in transit to South Dakota for which Zemliska has received insurance compensation and two others after arrival at Dahlquist's feedlots. The record does not reveal whether or not these two conformed to the Dahlquist order. Since Zemliska has the burden of proving his damages, no reparation can be awarded for the two cattle which died after delivery to Dahlquist.

All contentions of the parties presented for the record have been carefully considered whether or not specifically mentioned herein.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, 42. F.R. 4395, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. §§ 450c–450g. It constitutes an "order for the payment of money" within the meaning of section 309(f) of the Act (7 U.S.C. § 210(f)).

Under that section, if respondents do not comply with this order within the time limit in this order, comlainant may within one year of the date of this order file in the district court of the United States for the district in which they reside or in which is located the principal place of business of respondents, or in any state court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and order herein shall be *prima facie* evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon appeal. That section further provides that if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D.C. 20250, for inclusion in the file of this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice be given to the Office of the General Counsel, USDA, Washington, D.C. 20250.

On the Secretary's jurisdiction to issue this order, see discussion in *Neugebauer* v. *Ryken*, Civ. 74-4018, U.S.D.C., D. So. Dak., So. Div. 1975, 34 Agric. Dec. 1712; *Mid-South Order Buyers, Inc.* v. *Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W.2d 229, 41 Agric. Dec. 48 (1982).

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see rule 17 of the Rules of Practice, 9 CFR § 202.117.

On the respondents' right to judicial review hereof, see *Maly Livestock Commission* v. *Hardin, et al.*, 446 F.2d 4, 30 Agric. Dec. 1063 (8th Cir. 1971). On complainant's right to judicial review hereof, see *United States* v. *I.C.C.*, 337 U.S. 426.

ORDER

That part of the complaint filed herein is dismissed which seeks recovery from losses and expenses incurred by complainant Leo Zemliska in connection with the rejection by Marlyn Dahlquist of all but 91 head out of 457 head of livestock purchased on order by complainant Leo Zemliska for respondents Glasgow Livestock Sales Co. and Robert D. Fjeldheim.

Within thirty days from the date hereof, respondents Glasgow Livestock Sales Co., its successors and assigns, and Robert D. Fjeldheim shall pay complainant Leo Zemliska as reparation the sum of $16,247.56 with interest thereon at the rate of 13 per cent per annum from February 1, 1982, until paid.

Copies hereof shall be served upon the parties.

COURT DECISIONS

ROBERT L. REEVES, CHARLES W. REEVES, JAMES C. REEVES *v.* UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE. Civil Action Nos. 85-1517, 85-1518, 85-1519. Decided May 28, 1986.

United States Court of Appeals District of Columbia

PETITIONS FOR REVIEW OF ORDERS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE: WALD and GINSBURY, Circuit Judges and RE, Chief Judge of the United States Court of International Trade (sitting by designation).

JUDGMENT

These consolidated petitions for review of decisions of the Administrator of the Agricultural Marketing Service were briefed and argued by counsel for the parties. The court has considered the issues petitioners present and finds they occasion no need for a further opinion. *See* D.C. Cir. R. 13(c).

Our review of the record satisfies us that petitioners have failed to demonstrate that they are not "responsibly connected" with a dealer. Unlike *Quinn* v. *Butz*, 510 F.2d 743 (D.C. Cir. 1975), and *Minotto* v. *U.S. Dep't of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983), petitioners here are in no sense subordinate to or under the control of the principal actor in the company in question. The evidence amply shows that petitioners acted of their own volition, and became affiliated as directors and stockholders of Reeves Produce because they believed the business would yield them a profit. The evidence further shows that they failed to exercise due care to determine whether Reeves Produce was being managed in accord with legal requirements imposed by the Perishable Agricultural Commodities Act. It is therefore

ORDERD and ADJUDGED that the petitions for review are denied and the decisions of the Administrator are affirmed.

Per Curiam

REEVES PRODUCE, INC. *v.* UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, CIVIL ACTION NO. 85-1602. DECIDED MAY 28, 1986.

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.

Before: WALD and GINSBURY, Circuit Judges and RE, Chief Judge of the United States Court of International Trade (Sitting by designation).

JUDGMENT

This petition for review of a decision of the Secretary of Agriculture was briefed and argued by counsel for the parties. The court has considered the issues petitioner presented and finds they do not merit a further opinion. *See* D.C. Cir. R. 13(c).

Substantial evidence, summarized in the findings and conclusions of the Administrative Law Judge and Judicial Officer, fully supports the determination that Reeves Produce committed flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499b(4). Furthermore, the record evidence plainly warrants the sanction ordered. It is therefore

ORDERED and ADJUDGED that the petition for review is denied and the decision of the Secretary is affirmed.

Per Curiam

DISCIPLINARY DECISIONS

In re: TED SOBIECH. PACA Docket No. 2-6902. Decided May 8, 1986.

Failure to pay promptly—License suspended—Consent.

Edward M. Silverstein, for complainant.
Jeffrey D. Sherwin, Middletown, New York, for respondent.

Decision by John A. Campbell, Chief Administrative Law Judge, for Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 24, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period April 1984 through February 1985, respondent purchased, received and accepted, in interstate commerce, from nine sellers, 39 lots of onions, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $144,723.41.

A copy of the complaint was served upon respondent. On August 28, 1985, an answer was filed by respondent in which he denied violating the Act as alleged by complainant. Complainant moved for the setting of a definite date for hearing, and, on February 20, 1986, the matter was set down for hearing on April 1, 1986, in New York City, New York. A prehearing conference, by telephone, was held on March 13, 1986. Complainant's counsel appeared at the April 1, 1986, hearing and reported that, at 11:15 the previous evening, the parties had agreed to settle this matter without hearing. Therefore, with the consent of the parties, the following Decision and Order is issued.

FINDINGS OF FACT

1. Respondent, Thaddeus J. Sobiech t/a Ted Sobiech, is an individual, whose mailing address is Box 158, Pine Island, New York 10969.

2. Pursuant to the licensing provisions of the Act, license number 152721 was issued to respondent on June 29, 1954, was renewed annually, presently is in effect, and is subject to renewal on or before June 29, 1986.

3. As more fully set forth in paragraph 5 of the complaint, during the period April 1984 through February 1985 respondent purchased, received and accepted in interstate commerce, from nine sellers, 39 lots of onions a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $144,723.41.

4. The amounts due and owing the nine sellers referred to in paragraph 3 above has now been paid, and respondent appears to be current in his payments to his suppliers.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 39 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is suspended for 80 days.
This Order shall take effect on May 15, 1986.
This Decision will become final upon its issuance.
Copies hereof shall be served upon the parties.

In re: TED SOBIECH. PACA Docket No. 2-6902. Decided May 19, 1986.

Correction of decision—Consent.

Edward M. Silverstein, for complainant.
Jeffrey D. Sherwin, Middletown, New York, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CORRECTION TO CONSENT DECISION

The oral hearing was held herein on April 1, 1986, during which a settlement agreement was reached on the record. Same was to be reduced to writing and presented to the Administrative Law Judge. This was not done until May 7, 1986, at a time when the Judge was out of town on another hearing and the Consent Decision was signed in her absence.

Paragraph 4. thereof is hereby corrected to read:

> The amounts due and owing the nine sellers referred to in paragraph 3 above have now been paid, and respondent appears to be current in his payments to his suppliers.

Copies hereof shall be served upon the parties.

In re: H & J BROKERAGE, INC. PACA Docket No. 2-6437. Decided May 22, 1986.

Appeal of denial of application for license—Denial affirmed.

The Judicial Officer affirmed Judge Baker's decision denying respondent's application for a license on the ground that Mr. Scharf, respondent's president, treasurer, and 75% stockholder, played a major role in the failure of Fresh World, Inc., to pay 20 shippers for over $331,000 worth of produce. Although Mr. Scharf was not solely responsible for Fresh World's failures to pay, he was general manager of Fresh World and was primarily responsible for its sales to Central Produce, whose failure to pay $342,000 to Fresh World was a major factor in Fresh World's failure to pay its suppliers. It is immaterial that Mr. Scharf was not "responsibly connected" with Fresh World, as that term is defined in the Act. Explanation as to when a "responsibly connected" determination is relevant. It is only necessary for complainant to show that Mr. Scharf engaged in practices of the character prohibited by the Act. The inclusion of a term in one section of the Act, while omitting it in another, emphasizes that it should not be implied in the place where it was omitted. The Act has been interpreted in a tough and harsh manner, with the support of the industry. Excuses are routinely rejected in failure to pay and failure to pay promptly cases. Once complainant establishes that Mr. Scharf engaged in practices of the character prohibited by the Act, the burden of proof is on respondent to show that it is fit to receive a license. It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy. In a hearing conducted at intervals, there is little or no basis for respondent's complaint as to the adequacy of the administrative complaint. The ALJ should require the parties to number the pages of multi-page exhibits.

Dennis Becker, for complainant.
Burton I. Manis, Boca Raton, Florida, for respondent.
Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on July 24, 1985, denying respondent's application for a license on the ground that Donald Scharf, who is respondent's president, treasurer, only director, and 75% stockholder, played a major role in the failure of Fresh World, Inc.,

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* *See generally* Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

to pay 20 shippers for over $331,000 worth of produce from June 1983 through September 1983.

On December 9, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On March 25, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order, with material added by the Judicial Officer included in brackets. In addition, a few trivial changes not included in brackets have been made. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is an administrative action brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter sometimes referred to as the "PACA." It arises by reason of a Notice to Show Cause filed on December 12, 1983, wherein it is alleged that the Application of Respondent corporation, a New Jersey corporation, filed on November 14, 1983, reflects that Donald Scharf is the president, treasurer, director and holder of 75 percent of the outstanding stock of said H & J Brokerage, Inc. It is further alleged that said Donald Scharf was president and/or general manager and/or director of Fresh World, Inc., a California corporation, holding a PACA license certificate, and that said Fresh World, Inc. allegedly violated Section 2(4) of the PACA (7 U.S.C. 499b(4)) during the period June 1983 through September 1983 by failing to make full payment promptly to 20 sellers of the agreed purchase prices, or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultur-

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

al commodities purchased, moved, and accepted in interstate or foreign commerce.

The Notice to Show Cause further alleges that during the period June 1983 through September 1983, Donald Scharf, acting as general manager, made all decisions regarding from whom Fresh World, Inc. would purchase and to whom it would sell perishable agricultural commodities. It is further stated that during the above period, Donald Scharf sold to Central Produce Corp., San Juan, Puerto Rico, substantial quantities of produce purchased by Fresh World, Inc., permitting an indebtedness from Central Produce Corp. to Fresh World, Inc. of more than $300,000.00 to accrue. It is further alleged that Central Produce has failed and refused to pay this indebtedness. Until August 9, 1983, it is stated that Donald Scharf had authority to issue checks for Fresh World, Inc.

The reason stated that the issuance of a license to Respondent, H & J Brokerage, Inc., has been withheld is because Mr. Scharf is the Respondent corporation's president, treasurer, director, and holder of 75 percent of the outstanding stock and it is alleged that Mr. Scharf as president, director, and/or general manager of Fresh World, Inc. is responsible for the commission of violations of PACA in that:

Section 2(4) of the PACA (7 U.S.C. 499b(4)) provides as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> (4) For any commission merchant, dealer or broker, to make for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail, or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

And that, during the period June, 1983, through September, 1983, Fresh World, Inc. violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 20 sellers of

the agreed purchase prices or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultural commodities purchased, moved and accepted in interstate or foreign commerce.

Despite these clear assertions in the Complaint, the Complainant, on brief, and through the evidence which it either adduced, or sought to admit into evidence, seeks to enlarge upon the reasons why the Respondent should not be granted a license under the PACA. This is done through reference to Mr. Scharf's prior associations with other firms with which he has been associated. It should be remembered that this is not an action against Fresh World, Inc. nor the determination of responsibility of that entity, and its officers, and shareholders as to the requirement of payment to its suppliers. However, official notice is taken herein of a Default Decision against Fresh World, Inc., PACA 2-6526 (October 4, 1984).

As will be set forth more fully hereinafter, the Secretary of Agriculture has a wide area of discretion with respect to the granting of licenses, and if there is legally sufficient basis for his denying a license application, then, a substitution of judgment is not appropriate.

Further, it is alleged in the Notice to Show Cause, that:

> "Section 9 of the PACA (7 U.S.C. 499i) requires that records of business transaction by commission merchants, dealers and brokers be maintained so as fully and correctly to disclose all transactions involving perishable agricultural commodities. On information and belief, Mr. Scharf either caused records pertinent to the transactions set forth * * * above, not to be maintained, or took such action which has made them unavailable for inspection by the Department, in violation of the PACA and regulations issued thereunder."

Also the Notice to Show Cause relies upon the Statutory provision:

Section 4(d) of the PACA (7 U.S.C. 499d(d)), in pertinent part, provides as follows:

> (d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, . . . or in case the applicant is a corporation, any officer or holder of more than [1] 10 per centum of the

[1] There was an error of omission in the quote in Paragraph 9 of the Complaint.

> stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . the Secretary may refuse to issue a license to the applicant.

The Respondent maintains that it is entitled to the license for which application has been made and in support thereof alleges that although Donald Scharf was named as the president on the license of Fresh World, Inc., a California corporation, he never acted as such; that in a letter sent to the United States Department of Agriculture under date of March 23, 1983, Donald Scharf requested that his name be removed as president of Fresh World, Inc.; that on March 29, 1983, David Dixon took over the ownership of Fresh World, Inc. and received the majority of the stock of Fresh World, Inc., it being Respondent's information and belief that Karl Allen retained a minority ownership of the stock of Fresh World, Inc.; that although Donald Scharf acted as manager of Fresh World, Inc., from March 29, 1983, to the early part of August, 1983, said management was subject to the control and direction of David Dixon; and that in the early part of August, 1983, and without hisknowledge, Donald Scharf's authority to sign checks was withdrawn from the bank by David Dixon who handled the financial matters of Fresh World, Inc. It is further alleged that David Dixon made the managerial decisions of Fresh World, Inc. from June, 1983, to September, 1983.

The first session of the oral hearing commenced on February 8, 1984, and continued to February 9 and 10, 1984, in San Francisco, California. Pursuant to agreement of the parties, the hearing continued thereafter on April 4 and 5, 1984, in San Francisco, California.

The oral hearing was held before Administrative Law Judge, Dorothea A. Baker. The Complainant was represented by Dennis Becker, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250, and the Respond-

ent was represented by Eugene Epstein, Esquire, Shostak, Epstein and Boyd, 144 West Gabilan Street, P.O. Box 2164, Salinas, California, 93902.

The last brief was filed herein on September 17, 1984.

FINDINGS OF FACT

1. Respondent, H & J Brokerage, Inc., is a New Jersey corporation with a business address at 1287 North Main Street, Suite 109, Salinas, California, 93909, and on November 14, 1983, filed a license application which, if issued, would authorize H & J Brokerage, Inc. to engage in the business of handling fruits and vegetables or perishable agricultural commodities in interstate or foreign commerce as a dealer or broker.

2. That license application reflects that Donald Scharf is the President and Treasurer, a 75 percent stockholder, and the only director of Respondent. Said License application further reflects that the other 25 percent of the stock is held by Howard Chaplin, M.D. Donald Scharf also currently holds a license to do business as H & J Brokerage, which is a sole proprietorship.[2]

3. Pursuant to the licensing provisions of the PACA, license No. 820039 was issued to Fresh World, Inc., on October 14, 1981, and was renewed in 1982, but was allowed to lapse when it was due for renewal in October, 1983.

4. The Secretary of Agriculture has jurisdiction of the subject matter of this proceeding.

5. On December 12, 1983, the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, issued a "Notice to Show Cause" indicating that the issuance of a license to H & J Brokerage, Inc. was withheld at that time pursuant to Section 4(d) of the PACA inasmuch as Donald Scharf had allegedly engaged in practices in violation of the Perishable Agricultural Commodities Act.

6. The "Notice to Show Cause" reflects that the only allegation of wrongdoing on the part of Donald Scharf is that by reason of his association and position as general manager, during the period June, 1983, through September, 1983, the corporation known as Fresh World, Inc., a California corporation, whose mailing address is P.O. Box 4550, Salinas, California, 93912, failed to make full payment promptly to 20 sellers of the agreed-upon purchase prices, or balances thereof, in the total amount of $331,194.55 for 85 lots of

[2] In this proceeding the Secretary does not seem to object to the holding by Mr. Scharf of a license as a sole proprietor but asserts that the corporate "cloak" would allow, or be conducive to, unpaid creditors, without personal liability.

perishable agricultural commodities in interstate or foreign commerce and that Mr. Scharf "permitted" [3] an indebtedness of over $300,000.00 to accrue from Central Produce Corp., as well as an allegation pertaining to the failure to keep, maintain, and make available pertinent records.

7. The evidence establishes, and it is not disputed, that the amounts set forth in the Notice to Show Cause, or substantial portions thereof, remained unpaid by Fresh World, Inc., at the time of the oral hearing. Once the corporation, Fresh World, Inc., closed down its business in September, 1983, and the accounts receivable were taken by Mr. Dixon, and the accounts payable were either placed in storage or were unaccounted for, it cannot be ascertained if any of the amounts collected by either the Bank or Mr. Dixon were ever used to pay any of the accounts payable, although there may have been some small payments. However, several trades people testified as to the non-payments of their accounts.

8. Essentially, the Complainant frames the dispute herein as one concerning whether or not Mr. Donald Scharf was responsible for non-payment to the vendors of the amounts set forth in Paragraph 6 of the Notice to Show Cause. A principal witness, appearing on behalf of the Complainant, was Mr. Dixon, a majority owner of Fresh World, Inc., from at least March, 1983, who indicated that Mr. Scharf had the responsibility for the non-payment of the accounts. Mr. Scharf, the applicant/Respondent herein, maintains that the unpaid indebtednesses were attributable to persons other than him.

9. On or about October, 1981, several individuals decided to form a corporation known as Fresh World, Inc., for the purpose of dealing and/or brokering in perishable agricultural commodities. In order to do this, Mr. Karl Allen invested $10,000.00 in the corporation and advanced $10,000.00 each to Mr. Terry Allen (his brother), Mr. James Faulkner, and Mr. Smith. No promissory notes were ever executed and there are no documents evidencing the $30,000.00 indebtedness. The latter three individuals allegedly invested by paying into the treasury of the corporation the $10,000.00 advanced to them by Karl Allen and each of the four received 25 shares of stock representing a 25 percent ownership for each one. Karl Allen, an attorney, did not actively participate in the business. The business was run on a day-to-day basis by Mr. Faulkner together with clerical help.

10. Mr. Faulkner left Fresh World, Inc. in the summer of 1982 and was subsequently replaced by Donald Scharf. Through a

[3] On Brief, the Complainant changed its stance to "knowing".

mutual acquaintance, Mr. Scharf became aware of Fresh World, Inc. during the latter part of June, 1982. The mutual acquaintance indicated that Fresh World, Inc. needed someone to buy and sell produce. Mr. Scharf met with Terry Allen, who was the President of Fresh World, Inc., during June, 1982, and as a result of discussions and a consultant-employment arrangement, Mr. Scharf commenced employment with Fresh World, Inc. during the last week of June, 1982. The initial employment arrangement was that Mr. Scharf would be employed as a consultant for 12 weeks at a salary of $1,000.00 per week, plus car allowances and medical insurance. Mr. Scharf had never been a seller or broker of produce before this employment [, but he has been in the produce business for 29 years, including buying for supermarket chains (Tr. 106, 781–82, 806–16), and he bought and sold produce for Amigo Foods (Tr. 806)]; Mr. Scharf did not have any responsibilities for the financial records of Fresh World, Inc., nor did he even look at them during the period when Terry Allen ran the corporation.

11. Early in the existence of Fresh World, Inc., Karl Allen received $15,000.00 from Fresh World, Inc. which he stated he considered repayment of funds advanced by him for the incorporation of Fresh World, Inc. During the latter part of 1982, Mr. Karl Allen indicated that he became concerned about his investment, and in December, 1982, Karl Allen, through the corporation's Treasurer, and his brother, Terry Allen, caused corporate funds to be distributed to him in the amount of $25,000.00. He still retained his 25 shares in the corporation. Even if Karl Allen's premise is correct that all he was doing was withdrawing his investment in the corporation, it conflicts somewhat with his theory that what he did was to make loans to the other three investors. Also, inasmuch as Karl Allen still retained his 25% interest in the corporation, the difference between $40,000.00 withdrawn and the $30,000.00 invested would be attributable to earnings of the corporation in the absence of evidence to the contrary.[*]

12. Basically, the Complainant maintains that Respondent is unfit to receive a PACA license because Fresh World, Inc. did not pay its bills, and that Mr. Scharf was knowing, or permissive thereof. However, dilution of the earnings and/or capitalization of a company can also be a factor as to why it does not pay its creditors. Although neither party on brief addresses the situation, there is,

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[* Mr. Dixon considers the $40,000 withdrawal of funds by Karl Allen to be illegal (Tr. 357–63, 403–04), and he plans to institute an action against the Security Pacific Bank for $25,000 of that amount, because the $25,000 check was signed by Terry Allen, who was not authorized at that time to sign checks (Tr. 359, 488), and to recover the other $15,000 from Karl Allen (Tr. 488, 492–93).]

nevertheless, some evidence of record that there was a transaction involving a company referred to as Tamarack. The evidence in this regard is not sufficient to form any conclusions, but there is some testimony to the effect that Cameron Dale was a force in causing the Tamarack entity to provide collateralization for cash made available to Fresh World.

Undisclosed facts relating to the Tamarack corporation, of which Mr. Al Olson and Mr. Bob Paul were principals, preclude any determination as to the effect, if any, which the issuance of some 500 shares of stock of Fresh World, Inc., for the supplying of security for a $35,000.00 loan, and the subsequent surrender of such stock, as well as other matters associated with same, may have had on the financial aspects of Fresh World.

13. Mr. David Dixon became involved with Fresh World, Inc. in January, 1983. He became President of the corporation in March, 1983, by election of the Board of Directors, which consisted of himself and another individual. Mr. Dixon indicated that he first became aware of Fresh World through Cameron Dale whom he had known for approximately three years.

14. Mr. Dixon has been a principal stockholder of ten closely held corporations within the past fifteen years, including being the President and owner of Food Tech, Inc., and Food Source, Inc.

15. Mr. Dixon acquired 75 percent, or 75 shares of the stock of Fresh World, Inc. [in consideration for obtaining and guaranteeing a $500,000 line of credit for Fresh World]; and, Food Source, Inc., a corporation controlled by Mr. Dixon provided Fresh World, Inc., $70,000.00 [as a loan] in February, 1983.[*] No promissory note was received for these funds, and the $70,000.00 was subsequently withdrawn from Fresh World by Mr. Dixon, and paid to Mr. Dixon by the end of July, 1983.

16. Mr. Dixon sought to acquire the 100 shares outstanding in order to effectuate the total ownership of Fresh World, Inc.; however, Mr. Cameron Dale from whom Mr. Dixon acquired three signed certificates of stock, the signatures of which were not guaranteed,

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[* Respondent's Proposed Findings of Fact, Conclusions, and Order filed August 22, 1984, states (p. 5):

> 15. DAVID DIXON acquired 75 percent or 75 shares of the stock of FRESH WORLD, INC. in exchange for his agreement to furnish a line of credit of $500,000.00 through SECURITY PACIFIC BANK to FRESH WORLD, INC. (Tr. 356)
>
> 16. FOOD TECH, a corporation controlled by DAVID DIXON loaned FRESH WORLD, INC. $70,000.00 in February 1983. (Tr. 360) No promissory note was received for this loan. (Tr. 361) $70,000.00 was repaid to DIXON by the end of July 1983. (Tr. 401)]

was unable to persuade Karl Allen to relinquish his stock. The 75 share acquisition was apparently done through Mr. Cameron Dale; Food Source, Inc. [and Mr. Dixon guaranteed payment of the $500,000 line of credit from Security Pacific National Bank, which was the consideration for the acquisition of the 75 shares. Under the line of credit, the bank agreed to loan Fresh World 70% of its "eligible" accounts receivable (i.e., those regarded by the bank as collectible).]

17. During the period January, February and March, 1983, Mr. Dixon had conversations with Mr. Scharf relating to matters pertaining to the corporation and with bank officials relative to the establishment of a line of credit from Security Pacific [referred to in Findings 15 and 16]. Fresh World was already doing business with the bank, and already indebted thereto. It was at this time that Terry Allen ordered Mr. Scharf to sign a collateral agreement as President of Fresh World. Mr. Scharf did not regard himself as President of Fresh World but was ordered to do this by Mr. Allen. Nevertheless, he acted in such capacity and held himself out to third persons as being President. Any third party has the right to rely upon officership as represented.

18. Prior to Mr. Dixon's acquisition of Fresh World, he reviewed numerous financial documents pertaining to its financial condition and knew of its negative net worth. Several of these documents consisted of unaudited statements. [However, in January 1983, when Mr. Dixon first looked at Fresh World's financial statement for December 31, 1982 (which shows "Total Capital" of $13,880.41 (CX 2, p. 2)), he understood that "Fresh World, Inc. had a net worth of approximately $14,000" (Tr. 485–86). Based on that understanding, his corporation (Food Source, Inc.) loaned $70,000 to Fresh World (see Finding 15). In the latter part of February 1983, Mr. Dixon received Fresh World's January 31, 1983, financial statement that was prepared on an accrual basis with accounts receivable judged to be uncollectible removed, and it showed "the company then moving to $125,000 negative net worth" (Tr. 161), actually negative $124,836.07 (CX 4, p. 2). Mr. Dixon was "angry at the fact we had already put money into the company on the basis of financial statements that Mr. Scharf had given me earlier showing a stronger company" (Tr. 161). Nonetheless, since Mr. Dixon was convinced by Cameron Dale and Mr. Scharf that Fresh World "could do much better" if capital were infused into the company (Tr. 963; see also Tr. 105, 107–08, 158–60), he subsequently provided the $500,000 guarantee resulting in his "acquisition" of Fresh World (see Findings 15–17).]

19. Mr. Dixon was furnished various Accountants' Compilation Reports which contained, among other things, the statements:

> A Compilation is limited to presenting in the form of Financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.
>
> Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position and results of operations. Accordingly, these financial statements are not designed for those who are not informed about such matters.

20. Mr. Dixon, prior to becoming President of Fresh World, Inc. caused the accountants, the Kemper Group, to convert the method of accounting from a cash basis to an accrual basis. Mr. Dixon believed that some of the accounts receivable were not good accounts, and should be eliminated so as to more correctly reflect the financial status of the corporation. The record does not disclose whether any of the eliminated accounts receivable were ever collected.

21. Mr. Scharf was hired by Mr. Dixon to buy and sell produce. Mr. Scharf received his instructions from Mr. Dixon as to the presentment of the invoices to Security Pacific Bank to receive advances on the accounts receivable.

22. Mr. Scharf bought and sold produce and acted as a broker for Fresh World, Inc.—he kept a record of each transaction in a separate folder which contained all the documents connected with each transaction. From time to time there were one or two other salesmen employed by Fresh World and each of them kept track of his own transactions. The record evidence does not disclose which, if any, of the unpaid creditors were the result of transactions with salesmen, other than Mr. Scharf.

23. Considerable evidence was adduced as to the financial situation of Fresh World, Inc. at the time of the stock acquisition by Mr. Dixon, who apparently turned the stock over to Food Source, Inc., which acted as a guarantor for the then existing liability of Fresh World, Inc. Despite the fact that apparently Food Source had the stock, nevertheless, Mr. Dixon did not believe that it had a positive value, and never entered it as an asset on the books of the corporation. In fact, according to advice which he said he obtained, Food

Source did not reveal either its contingent liability to the bank, or the asset value of the stock of Fresh World. Without having such items on its books, a potential creditor, etc. of Food Source would be unaware of such items.

24. Both Mr. Dixon and persons associated with him were sophisticated businessmen. Mr. Scharf had a high school education and was under a doctor's care [,i.e., he was seeing a psychologist twice a week (at Fresh World's expense) (Tr. 882, 966-69, 985-87).]

25. Complainant seeks to draw some sort of negative inference from Mr. Scharf's salary and other renumeration from the corporation, such as, that he was receiving, admittedly $1,500.00 salary per week and benefits which complaint alleges amount to $100,000.00 a year while other salesmen [for Fresh World] were receiving amounts of $15,000.00 and $20,000.00. By reason of this difference, the Complainant argues that Mr. Scharf was not a "mere salesman". This may be so, but there is nothing in the persuasive evidence to prove otherwise—i.e., that his salary was excessive, for instance there was no comparison of sales, results, duties, either intra-company or inter-company. Perhaps if such evidence were adduced it might be shown that salesmen with Mr. Scharf's background and ability to generate business might make more than he received. [From March 1983 through August 1983, Mr. Scharf was "General Manager" of Fresh World (CX 24, p. 3; Tr. 1009);[3c] he bought and sold produce without control as to prices, suppliers or

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[* Mr. Scharf at first denied that he was general manager of Fresh World. He testified (Tr. 950):

> Q. Did you ever consider yourself to be the general manager?
>
> A. There really wasn't a title addressed to myself.
>
> Q. Did you ever consider yourself to be the general manager?
>
> A. No.

However, Mr. Scharf later admitted that he was Fresh World's general manager, testifying (Tr. 1009-10):

> Q. From March of 1983 through August of 1983 did you ever have a title?
>
> A. Yes.
>
> Q. What was it?
>
> A. Generai manager.
>
> Q. Where did you get that title?
>
> A. Mr. Dixon gave it to me.

Similarly, Mr. Scharf stated in an affidavit (CX 24, p. 3) which he signed on November 25, 1983, after consulting with counsel (Tr. 1032-35):

> While I was employed at Fresh World, Inc., I was General Manager and worked with Jeff Leonard, a Salesman.]

customers (Tr. 1008-10; see also Tr. 109, 412-13, 787, 907-08, 964-65, 973-74);[3d] he had authority to hire and fire employees (Tr. 109, 687, 975, 988); he signed numerous bank documents (even prior to March 1983) (CX 15; Tr. 884-904), and starting in April 1983 he signed the documents that obtained the loans from Security Pacific Bank on the $500,000 line of credit (Tr. 789-91, 960-61, 970-71); and until August 9, 1983, he was authorized to sign (and signed) Fresh World's checks (Tr. 672, 907-08, 976, 1027), including salary checks (Tr. 787-88, 950), and checks to vendors and for other payables (Tr. 787-88, 965, 974).]

26. On or about the time that Mr. Dixon took over the ownership of the corporation, Miss Judy Allwardt came to Fresh World, Inc., as the bookkeeper and office manager, at first working on a part time basis and later on a full time basis. She previously had been employed by Mr. Terry Allen. Miss Allwardt subsequently left Fresh World, Inc., for a better position on or about August 10, or 11, 1983. She was replaced by Miss Leddemer. Miss Allwardt helped Miss Leddemer close the books for July, 1983. This was done the first half of August, 1983. In the [latter] part of [July], 1983, when Mr. Scharf wrote a check to himself [for $20,000, believing that he was entitled to 50% of the profits (Tr. 983-94)], Miss Allwardt caused Mr. Dixon to be informed [i.e., she told a lady at the bank, who relayed the information to a bank officer, who, in turn, told Mr. Dixon], and payment on the check was stopped [, but it was never negotiated since Mr. Dixon told Mr. Scharf that he was not entitled to the money. (Tr. 199-201)]

27. Miss Allwardt was in charge of the accounting aspects of the operation of Fresh World, Inc. Donald Scharf bought and sold produce and directed her to pay the vendors, and until his authority to do so was revoked, Mr. Scharf signed the checks therefor.

28. After becoming involved with the corporation, Mr. Dixon took steps to obtain a $500,000.00 line of credit with the Security Pacific Bank [referred to in Findings 15-18, 25]. The bank utilized its normal banking procedural methods for an extension of a line of credit, whereby the accounts receivable are hypothecated as security, and such receivables were reviewed on a constant basis by the

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[[3d] Mr. Dixon testified that he told Mr. Scharf in July 1983 that the bank had refused to lend any more money on Central Produce accounts receivable and that Mr. Scharf should cut back the sales to Central Produce and collect the monies owed (Tr. 188, 475-76). Mr. Scharf admits that Mr. Dixon told him in the latter part of June or the early part of July that the bank would not loan additional money on the Central Produce receivables, but he testified that Mr. Dixon told him to continue selling as much merchandise as he could to Central Produce (Tr. 992). The ALJ did not resolve this conflict (see Finding 39).]

bank. The agreement for the line of credit agreement was signed in March, 1983, and that agreement was guaranteed by Food Source, Inc. and Mr. Dixon, personally. Before the close of the hearing, it was disclosed that in order for Security Pacific to recover the amount of its advances to Fresh World, Inc., Security Pacific had instituted legal proceedings against Fresh World, Inc., Food Source, Inc., and Mr. Dixon, personally.

29. The bank indicated that as of November, 1983, it wanted Fresh World's receivables out of its portfolio although the said receivables could be put back in December [(Tr. 209); i.e., the bank wanted the accounts receivable line of credit paid up by November 1983 (Tr. 456).] During the period March, 1983, through September, 1983, the bank had extended close to the $500,000.00 line of credit on the basis of the monthly gross volume of business evidenced by the accounts receivable, which included the account of Central Produce.

30. Utilizing its standard banking procedures, the accounts receivable were reviewed on a constant basis and those which were older than ninety days were regarded as ineligible to be carried in the security portfolio. In approximately June of 1983, Security Pacific decided not to loan anymore against Central Produce receivables and this was [because the bank did not want to have more than "a 20 percent exposure for any one particular account, . . . and Central Produce's account exceeded that 20 percent" (Tr. 992).]

31. The documents that were submitted to Security Pacific [to obtain loans from the $500,000 line of credit referred to in Findings 15–18, 25, and 28–30] were prepared by Miss Allwardt, and she was responsible for that part of the operation of the company, although they may have been submitted to the Bank by Mr. Scharf, [and the documents submitted to the bank from April through August 1983 were signed by Mr. Scharf (Tr. 789–91, 960–61, 970–71).]

32. Donald Scharf was a signatory on the checking account of Fresh World, Inc. until his authority was removed by Mr. Dixon on August 6 [or 9], 1983. Mr. Scharf learned of this removal from the signature card at the bank on August 19, 1983. Not knowing that his signature had been removed, Mr. Scharf, between August 6 [or 9], 1983, and August 19, 1983, had signed several checks payable to vendors. When he talked to Mr. Dixon about this he was told that Mr. Dixon was President of the company, and that was the way he wanted it. The bookkeeper was not informed of the removal of Mr. Scharf's authority [, although she was told in August that Mr. Dixon wanted the checks prepared for his signature (Tr. 203–05, 397–99, 409, 413, 674–78).]

33. According to evidence of record, as of August 30, 1983, there were accounts receivable of $689,000.00 [, $523,426.95 of which were "eligible" accounts receivable (CX 13, p. 1, line 10)]; and, there was sufficient money in the account of Fresh World, Inc., to pay the vendors for the produce purchased by Donald Scharf. [Fresh World's loan balance owed to the bank on August 30, 1983, on the $500,000 line of credit referred to in Findings 15–18, 25, and 28–31 was $366,398.37 (CX 13, p. 1, line 19).] When Mr. Scharf was signing checks all of the vendors were paid as the obligations became due [, except that some of his checks bounced after his check signing authority was removed on August 9, 1983 (e.g., Tr. 81–86, 273–74, 318; CX 1, 17, 20).]

34. Mr. Dixon established a new procedure for payment of the vendors [in August 1983]. The checks were to be mailed to him in Larkspur, and then he would sign them and mail them directly to the creditors. However, Mr. Dixon, although receiving them, did not mail [many of] the checks to the creditors [, but about 25 to 50 creditors were paid by Mr. Dixon (Tr. 409, 413, 676–78).] The file containing the unsigned checks is said to be lost.

35. As the evidence clearly shows, times before and after, when produce suppliers were not being paid promptly, the funds of the corporation, Fresh World, Inc., were being depleted by the $70,000.00 withdrawn by Mr. Dixon (as repayment [of the loan referred to in Finding 15]) over the months of March through June or July, 1983. Also, after the removal of Mr. Scharf[']s check signing authority], and at a time when the company's books reflected large amounts of unpaid creditors, Mr. Dixon withdrew $20,000.00 for "management" fees, and another $100,000.00 from the operating account of the corporation, (of which others were unaware) which he caused to be deposited in a separate bank account at the First Interstate Bank, subject to his signature, as well as others.

36. On August 30, 1983, $17,447.32 was deposited into the account of Fresh World, Inc., as an advance on the accounts receivable line of credit. On September 13, 1983, $24,135.04 was deposited by Security Pacific Bank into the account of Fresh World, Inc.

37. On August 22, 1983, David Dixon drew a check on the account of Fresh World, Inc., to pay an obligation to Cessna, Inc., for an airplane owned by him. The amount of the check was $7,098.00.

38. A contention, crucial to the position of the Complainant, is that Mr. Scharf "knew", "permitted", or otherwise encouraged a debt accumulation of a Puerto Rico concern by the name of Central Produce, in the sum of approximately $300,000.00; that if Mr. Scharf had not dealt with this concern, or had effectuated payment of its account, then the creditors of Fresh World would have been

paid. It is true that Mr. Scharf was responsible for bringing The Central Produce Co., account to Fresh World, and that the majority of the business transactions were purchase and sale transactions as opposed to brokerage transactions. The extent and nature of Mr. Scharf's knowledge of the payment practices of Central Produce was not sufficiently proven by the record evidence. [However, Mr. Scharf admittedly was aware of the large increase in Central Produce's debt while it was happening (Tr. 991).] Also, who were the owners, stockholders, directors, the corporate charter, minutes, etc. of Central Produce were not proven of record by either party, and no findings of fact can properly be made thereto.[3*]

[Note: Finding 38(a)-(d) is added by the Judicial Officer]

[38(a) Mr. Scharf brought the Central Produce account to Fresh World as a result of his knowledge of Central Produce before joining Fresh World. Before joining Fresh World in 1982, Mr. Scharf worked for Amigo Foods in 1980 as a buyer and seller of produce (Tr. 806-07). Amigo Foods was owned by Harry Krupnick, and Robert Krupnick also worked there (Tr. 804). Amigo Foods sold produce to Central Produce, but Mr. Scharf was not personally involved in sales to Central Produce (Tr. 806).

[(b) In 1980 and 1981, Robert Krupnick went into business as Watermill Export Company in Scarsdale, New York (Tr. 808-09). Mr. Scharf went with him and worked for Watermill from the time it first started in business (Tr. 809). Watermill had six employees, a controller, three secretaries, Robert Krupnick and Mr. Scharf (Tr. 812-13). Mr. Scharf bought produce for Watermill and Robert Krupnick bought and sold produce for Watermill (Tr. 813). *Mr. Scharf knew that Watermill sold only to Central Produce, i.e., that all of the produce bought by Robert Krupnick and Mr. Scharf was sold to a single customer, viz., Central Produce and its subsidiaries* (Tr. 814). On occasions, when Robert Krupnick was not there, Mr. Scharf would talk to Pepe Fillgara of Central Produce about invoices and merchandise (Tr. 819-20).

[3* The ALJ did not accept Mr. Dixon's testimony that Mr. Scharf told him that Central Produce was partly owned by Mr. Scharf's friend and former employer, Robert Krupnick, who had been the silent 50% owner of North American Produce Distributors with Cameron Dale (Tr. 188-89). Mr. Scharf denied discussing Central Produce's ownership with Mr. Dixon (Tr. 791). Mr. Scharf did, however, admit that when he sold produce for Fresh World to Central Produce, Central Produce at times wanted the transportation handled by Luallipam, and that Robert Krupnick was one of the persons at Luallipam with whom he dealt (Tr. 858-61, 1005-08). Luallipam was located at the same address in Scarsdale, New York, where Watermill (see Finding 38(b), *infra*) had been located (Tr. 859).]

[Mr. Scharf testified that he was "told" that he was vice president of Watermill (Tr. 815), but he wrote to the Department of Agriculture on March 4, 1982, stating that "effective March 4, 1982, I, Don Scharf, am resigning my position as vice president and officer of Watermill Export, Inc." (CX 23).

[Watermill's PACA license was automatically suspended on April 23, 1982, because it failed to satisfy a reparation award issued against it *In re Watermill Export, Inc.*, 41 Agric. Dec. 1781, 1782 (1982). Mr. Scharf was not aware of that suspension (Tr. 854–55). Subsequently, Watermill's license was revoked on September 16, 1982, because it failed to pay promptly for $828,370.57 worth of produce, $292,265.82 of which remained unpaid (Tr. 811, 854; *In re Watermill Export, Inc.*, 41 Agric. Dec. 1781, 1781–82 (1982)). Mr. Scharf testified (Tr. 993):

> A. I didn't know exactly why Watermill went under because I was here in California when I read in the Packer [a trade magazine] about Watermill. I didn't know anything about what was happening as far as their financial problems.

[(c) After leaving Watermill in March 1982, Mr. Scharf was engaged in April 1982 by Steven L. Gilfenbain to do a feasibility study of going into the gourmet-type food operation in California (Tr. 815, 831–32). While working in California, Cameron Dale came to see Mr. Gilfenbain about a trucking project, and he also visited with Mr. Scharf (Tr. 833). Cameron Dale and Mr. Scharf knew each other many years previously (Tr. 832–33). Cameron Dale mentioned to Mr. Gilfenbain that there was an opening at Fresh World, Mr. Gilfenbain passed the information on to Mr. Scharf, and Mr. Scharf contacted Terry Allen of Fresh World, which resulted in his affiliation with Fresh World (Tr. 834–39). (This is the same Cameron Dale who interested Mr. Dixon in Fresh World.)

[(d) About three weeks after Mr. Scharf went to Fresh World, he began buying and selling produce for Fresh World (Tr. 852–56). He called people he had previously known through his prior employment. Pepe Fillgara of Central Produce was one of the first persons he called (Tr. 855–56, 863–64). Fresh World had not previously dealt with Central Produce (Tr. 856).

[Central Produce soon became Fresh World's largest customer. By December 1982, Central Produce received about 40% of all the produce sold by Fresh World (Tr. 895, 994). In 1983, Central Produce continued to receive about 40% of all the produce sold by Fresh World (Tr. 979–80, 994). Mr. Scharf made the majority of the sales to Central Produce, although Jeff Leonard made some (Tr.

752). (Central Produce's letter of January 18, 1984, referring to settlement discussions states that "Don Scharf" must be included in any settlement conversation "[s]ince it was he that we dealt with" (CX 14; Finding 40, *infra.*)

[Mr. Scharf told Mr. Dixon that Central Produce was a good receivable, and that based on previous experience, Central Produce had paid their bills (Tr. 160, 991–93).

[(e) Mr. Scharf is currently operating H & J Brokerage as a sole proprietorship, with a PACA license. He is not doing any business as a dealer, i.e., he does not take title to any produce. He operates solely as a broker. (Tr. 1016–17, 1024–25). He currently does brokerage business with Central Produce (Tr. 1017, 1024). Although he does not now operate as a dealer, Mr. Scharf would like to operate as a dealer if his license application is accepted (Tr. 1032).]

39. By July 31, 1983, Central Produce owed Fresh World an amount of $283,000.00, an increase from $42,000.00 which it owed in January, 1983. [By September 6, 1983, Central Produce owed Fresh World $342,144.66 (CX 12, 2d and 3d pages after cover page).] Mr. Dixon was aware of the large indebtedness owed by Central Produce at least by May, 1983, when it was brought to his attention by Security Pacific, which was lending on the account receivable. Although Mr. Dixon indicates that he told Mr. Scharf to cut back on the sales to Central Produce in June of 1983, this is contradicted by Mr. Scharf. It is reasonable to conclude, on the basis of the record as a whole, that both Mr. Scharf, and Mr. Dixon, as well as Judy, the bookkeeper, knew, could [have] known, or should have known, of the extent of the increasing indebtedness of Central Produce, at least from May, 1983.[*] It was information readily ascertainable, and, certainly, material to the operation of the company.

40. Central Produce has offered to settle its indebtedness to Fresh World, for the amount of $118,000.00, thus conceding that it owes at least that amount. Fresh World claims that Central Produce owes approximately $340,000.00. David Dixon has refused to discuss this account with any representatives from Central Produce, and in fact, he has refused to communicate with the members of Central Produce. Why greater effort was not made to collect this account is not clear from the record, but it seems that very little effort was directed to collecting it. [However, David Dixon did

[*Central Produce's debt to Fresh World was some $116,000 on May 6; $218,000 on June 10; $153,000 on June 13; $231,000 on July 8; $281,000 on July 15; $329,000 on July 22; $362,000 on July 29; $283,000 on July 30; $327,000 on August 5; $332,000 on August 23; and $342,000 on September 6, 1983 (CX 12).]

take a number of steps to collect the Central Produce debt. He began by writing one or two letters to each debtor, including Central Produce, demanding payment (Tr. 407, 449). Security Pacific Bank then took charge of collecting the receivables, and Mr. Dixon met with them about six times to review their letters and phone calls to Central Produce and other creditors (Tr. 450, 478, 603–09; RX E). Mr. Dixon also had two telephone calls with Pedro Gonzales of Central Produce in January 1984 (Tr. 450–51). But he did not have Mr. Scharf on the line, as requested by Central Produce. Central Produce stated in a letter to Mr. Dixon (CX 14; see, also, RX E, 3d letter):

> We have offered on many occasions to discuss the matter, however, any discussion must be had with those people that handled the sales and purchases. You have promised to contact me on Friday, January 20th, 1984. At that time we can go over the entire matter, however, we will insist that your Mr. Don Scharf be included in the conversation. Since it was he that we dealt with and the fact that you have no first-hand knowledge of any of the surrounding events Mr. Scharf must necessarily be included.

[Mr. Dixon met with the vice president of Western Growers Association (a trade association that handles collection and other matters for many West Coast produce firms), and gave them the responsibility for collecting the accounts receivable. For awhile, they worked concurrently with Security Pacific Bank, and then had complete responsibility when Security Pacific Bank discontinued collection efforts. (Tr. 451–52, 476–80).[3*]

[Mr. Dixon is also considering legal action against Central Produce, and has discussed the matter with counsel (Tr. 452–53, 476), since he is not willing to accept the $118,000 settlement offered by Central Produce, which claims that there were returns or bad produce (Tr. 494–95, 604–08, 767–69).

[Although the record does not reveal whether Mr. Scharf told Mr. Dixon that there were many "problem" shipments involving produce sold to Central Produce, Mr. Scharf testified that there were a "whole large series of transactions in May, June and July and August of 1983 between Fresh World and Central [Produce] in which goods arrived in Puerto Rico about which there were problems" (Tr. 1000; and see Tr. 994–1005). Mr. Scharf attempted to re-

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[* Mr. Dixon and Security Pacific Bank agreed that Mr. Dixon would pay off Fresh World's loan balance within one year (Tr. 612).]

solve the problems as they occurred, through discussions by telephone or Telex with Central Produce, suppliers, and other involved parties. He made some adjustments with Central Produce, and others were pending. (Tr. 897–98, 995–1005).]

41. As set forth herein and on the basis of the record as a whole, the evidence does not support the allegation, or contention, that Mr. Scharf was solely responsible for the non-payment of the creditors of Fresh World, Inc. However, the evidence does disclose that such non-payment did occur at a time when he had significant responsibilities and duties with the company. For instance, he was the principal factor in the corporation commencing to sell to Central Produce—an account which it did not have prior to his coming into the corporation; Mr. Scharf did sign documents which bound Fresh World to Security Pacific Bank with respect to loans and other financial concerns; also, commencing the first part of January, 1983, Mr. Scharf was operating as the chief operating officer, and everyday manager, which included making all decisions regarding [his] purchase[s] and sale[s] of produce, . . . and generally overseeing the activities of other employees. It may have been that Mr. Scharf was [or would have been] powerless to go against the wishes of the corporate owners, as portrayed by either Mr. Allen, or Mr. Dixon [, in those instances where they chose (or could have chosen) to exercise their superior authority.] Mr. Scharf was motivated to keep his job and to show increasing business activity on the part of Fresh World, Inc. However, his close association with this corporation, which did not pay its bills, is sufficient reason for the Secretary to find that the Respondent applicant is unfit to receive a PACA license. His role with Fresh World was not that of an insignificant clerk or employee.

42. The day [after] Labor Day 1983, at a time when Mr. Scharf had traveled East with the knowledge and consent of Mr. Dixon who had advanced him funds to do so, Mr. Dixon closed down the office of Fresh World, Inc., gave termination notices to its employees, had four men come and take the records thereof, and had them removed to Mr. Dixon's warehouse, except for the accounts receivables which he personally took. During his travels East, Mr. Scharf had intended to go to Puerto Rico for the purpose of discussing collection on the amounts due from Central Produce, Inc. During the time Mr. Dixon was closing down the office, and while Mr. Dixon was there, Mr. Scharf called and wanted to speak to Mr. Leonard relative to some new accounts which Mr. Scharf had acquired. It was at that time that Mr. Scharf was advised by Mr. Dixon that he was no longer employed.

43. Although Mr. Dixon withdrew Mr. Scharf's signatory authority at the bank on August 6 [or 9], 1983, Mr. Scharf was unaware until August 19, 1983, that he no longer had authority to sign checks for Fresh World, Inc. His awareness came about August 19, 1983, when he wrote a check to himself [for expenses. He went to the Security Pacific Bank to cash the check, but the bank teller told him that his signature was not authorized (Tr. 793).[3b]]

44. Mr. Scharf is untutored with respect to financial statements and he did not become acquainted with Fresh World's records except for the purchasing and payment aspects. There was maintained by him a tickler file which Mr. Scharf monitored to assure that payment to the vendors was made on time inasmuch as the sellers of produce had various times for payment, such as 10, 20, 30 or 35 days.

45. From March 1, 1983 through August 6 [or 9], 1983, when his authority to sign checks was removed, and, the first [part] of September, 1983, when he was dismissed as an employee, Mr. Scharf was employed to buy and sell produce, to manage the affairs of the corporation on a day-to-day basis including overseeing paying the bank, paying the personnel, paying the suppliers, and matters of like nature. Mr. Scharf was to report to Mr. Dixon on a monthly basis by way of financial statements. This was done through June or July, 1983. During this time period there were other employees of Fresh World, Inc. who were buying and selling produce including Mr. Schmidt and Mr. Leonard, each of whom handled his own account and was responsible for all aspects thereto.

46. *The evidence is undisputed that from and after August 6 [or 9], through September, 1983, Mr. Scharf did not have authority to sign checks and pay the bills.* However, he still had authority to buy and sell produce, and he did. A procedure was worked out whereby the bookkeeper was to make up the checks, give or send them to Mr. Dixon, who was supposed to either send them back to Fresh World's office for forwarding or was suppose[d] to sign the checks himself and put them in the mail. Utilizing this procedure, a number of the accounts for which the bookkeeper had written checks and sent to Mr. Dixon for signature and mailing never received the checks.

47. Mr. Scharf did not have control over the circumstances that caused the non-payment of the majority of the produce creditors

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[3b Mr. Dixon testified that he told Mr. Scharf on August 5 or 6, 1983, that his name was removed as a person authorized to sign checks on Fresh World's account (Tr. 386–99), but the ALJ apparently did not believe the testimony, which was contradicted by Mr. Scharf (Tr. 793).]

listed in the Notice to Show Cause [, except to the extent that the Central Produce debt resulted in such nonpayments.] A vast majority of the 85 transactions set forth in Paragraph VI of the Notice to Show Cause became due and payable at a time subsequent to August 6, 1983.[4] There are a number of other accounts which became due at dates prior to August 6, 1983. Although some of these accounts were due in either June or July, 1983, they were of relatively small amounts and some of them may have been the subject of dispute. Using a 10-day payment due date [which is not entirely accurate (see note 4)], or as set forth in the Notice to Show Cause, amounts which would have been due and owing prior to August 6, 1983, were:

Transaction	1.	-	$3,257.10	
	2.	-	3,948.00	
	10.	-	1,016.20	
	19.	-	2,834.50	
	20.	-	2,834.50	
	21.	-	2,834.50	
	22.	-	2,834.50	
	23.	-	2,834.50	
	41.	-	3,656.70	
	44.	-	8,000.00	(August 3, 1983)
	45.	-	8,000.00	(August 3, 1983)
	46.	-	7,484.00	(August 4, 1983)
	47.	-	1,380.00	(August 5, 1983)
	49.	-	3,335.00	(August 5, 1983)

48. Between August 6, 1983, and August 19, 1983, Mr. Scharf signed a number of checks which were subsequently returned because he did not have signatory authority. It is not shown on the record whether any of the above transactions were among them or if any of such transactions were the subject of dispute. An example of a returned check is Exhibit 20 to Oneonta Trading Corp. and Respondent's Exhibit A for $1,900.00.

49. There can be no question that from August 6 [or 9], 1983, the only individual, according to the evidence in this case, to have authority to sign the checks and to give instructions as to how the payment procedure was to be done, was Mr. Dixon.

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[4] These payment due dates set forth in the Notice to Show Cause may not coincide with the actual practice and payment procedures by Fresh World, Inc.; *for the purposes of this proceeding, the Complainant has not challenged the payment practices of Fresh World, Inc. wherein it paid its accounts at intervals ranging from 10 to 35 days.*

50. With respect to those accounts which fell due prior to August 6 [or 9], 1983, (assuming that these are proper due dates), the responsibility for the non-payment thereof must be weighed in light of the evidence. Once Mr. Dixon went to the bank [5] and withdrew Mr. Scharf's signatory authority capabilities, although Mr. Scharf was not so informed and he continued to sign checks after that date for Fresh World, Inc., some of which were returned for lack of authority to sign the checks, Mr. Scharf could not have paid creditors if he had wanted to. Mr. Dixon's activities in Fresh World, Inc. at this time were of such magnitude that he had to be well aware of what was occurring financially; on the other hand, Mr. Scharf was not. He was under the impression that there was plenty of money to pay the creditors based on the volume of business which he and other employees were generating. Accordingly, he never worried about the availability of funds for payment to the suppliers. [However, Fresh World's monthly financial statements (for which Mr. Scharf provided data (Tr. 456), looked at (Tr. 981-83), and discussed with Mr. Dixon (Tr. 170-78, 981-83)) show that the funds were largely coming from the $500,000 line of credit referred to in Findings 15-18, 25, 28-31, and 36. Specifically, Fresh World owed the bank on the line of credit about $185,000 on April 30 and May 31 (CX 8, p. 3; CX 9, p. 3), and about $357,000 on July 31, 1983 (CX 10, p. 2). Moreover, prior to September 1983, Mr. Scharf signed the documents obtaining the loans from the bank which showed the total loan balance (e.g., CX 13, p. 1, line 19; Tr. 789-91, 960-61, 970-71). For example, Mr. Scharf signed the loan document on August 30, 1983, showing the loan balance of $366,398.87 (CX 13, p. 1, line 19).]

51. The Complainant has taken the position by reason of the fact that Watermill, Inc. had as one of its customers, or as its only customer, Central Produce, Inc., a concern operating out of Puerto Rico, and because Central Produce became a customer of Fresh World, Inc. after the employment of Mr. Scharf, that this entitled the Complainant to bring into issue the alleged non-payment of suppliers by Watermill. This was not alleged in the Complaint and was not a matter upon which the Respondent was given notice prior to the hearing. Also, the Complainant cites no cases which entitled it, without notice, in a Notice to Show Cause proceeding, to determine the responsibility for non-payment of debts of another corporation on the sole basis that there was a common purchaser with Respondent. Moreover, the evidence sought to be adduced, and

[5] This is indicative of Mr. Dixon's ownership authority and Mr. Scharf's non-authority.

relied upon by Complainant, is not sufficient proof that Mr. Scharf was responsible for any violations by Watermill.

52. Robert Krupnick and his company, Watermill Export, Inc., were suspended from employment in the produce industry for failure to pay produce creditors. In this connection, agreement is reached with the contentions of the Respondent that the reason for failure to pay the produce creditors was not proven in this proceeding, and even if the Complainant's offer of proof had been admitted, it is insufficient to establish that such failure was caused by the customer, Central Produce, and/or the Respondent [or, rather, Mr. Scharf], who worked for Watermill as a buyer of produce.

53. At the oral hearing certain proferred evidence concerning the company "Watermill" was excluded because it was not alleged in the Notice to Show Cause as being a reason why a PACA license should be denied to Respondent. Moreover, Complainant's proof would not have shown facts which would have supported its conclusions drawn from "simple fact" and things being, "virtually inconceivable". It is upon this latter description that the Complainant relies for its statement that "It is virtually inconceivable that Mr. Scharf did not act as a seller of produce to [for] Watermill as well as a buyer from various customers". Reliability of this statement without proof cannot be granted. The evidence proferred herein is not sufficiently reflective of the financial picture of Watermill from which correct conclusions can be drawn.

54. The allegations of Paragraph 8 of the Complaint are most easily resolved. The evidence clearly shows that the records of Fresh World, Inc., were removed from the business premises by Mr. Dixon, or persons unknown. Respondent removed nothing. This is uncontroverted by the evidence. Therefore, paragraph 8 should be, and hereby is dismissed.

55. There has been a scarcity of evidence in this proceeding relative to numerous matters, such as who knew whom, and the relevance of such relationship, if any; and the financial status, according to generally accepted accounting practices, of Fresh World, Inc., at any given time.

56. The evidence in this case is insufficient to make a determination as to who were the owners of Central Produce.

57. The evidence is also insufficient in regard to transportation costs of the produce which was purchased for movement to Puerto Rico which obviously had to move over land, mostly by trucks, and picked up at a port of embarkation by a shipping and forwarding firm.

58. A disciplinary complaint was filed against Fresh World, Inc., on April 10, 1984, PACA Docket No. 2-6526, and a default Decision

issued thereon [finding that Fresh World "has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b)" (*In re Fresh World, Inc.*, 43 Agric. Dec. ____ (Oct. 4, 1984).]

59. Reparation awards have been granted by the Secretary of Agriculture to several of Fresh World, Inc.'s produce suppliers.

CONCLUSIONS

The granting or withholding of a license is a matter committed to the Secretary's expertise and discretion and is entitled to deference in the absence of violation of Constitutional, statutory, regulatory, or other legal mandates or restrictions.

By reason of the above findings of fact, it is concluded that:

a. Donald Scharf, a former employee, and, at least on paper, "President" of Fresh World, Inc. [at one time, and later "General Manager"], has engaged in practices of a character prohibited by the Act; and

b. Because Donald Scharf is president of and a holder of 75 percent of the outstanding stock of Respondent, H & J Brokerage, Inc., the Secretary of Agriculture may withhold the issuance of a license to Respondent.

Section 4(d) of the Act (7 U.S.C. 499d) reads in pertinent part:

> ". . . . If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, ... or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . . the Secretary may refuse to issue a license to the applicant."

Section 2 of the Act (7 U.S.C. 499h) lists the practices prohibited under the Act:

> "It shall be unlawful in or in connection with any transaction in interstate or foreign commerce . . . .
>
> * * * * * * *
>
> (4) For any commission merchant, dealer, or broker . . . . to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; . . . ."

The Act provides the framework by which the Secretary of Agriculture can regulate business practices in the perishable agricultural commodities industry. Essential to that regulation is the procedure outlined in Section 4(d) whereby the Secretary may question the fitness of any particular applicant for a license to conduct business in the perishable agricultural commodities industry. In the case of a corporate applicant, the inquiry into fitness extends not only to the corporate entity itself, but also to the principals of the corporation; specifically extending to an officer, director, or holder of more than 10 percent of the outstanding stock of the corporation. The inclusion of this level of inquiry into fitness, of course, recognizes that corporate activity is initiated by those persons who control the corporation.

Similarly, section 4(d) of the Act authorizes the Secretary to withhold the issuance of a license when a person who is responsibly connected with the applicant has engaged in practices of the nature prohibited by the Act. Hence, if there is evidence that a person responsibly connected with the applicant has engaged in a prior course of conduct which included practices of the nature prohibited by the Act, then that person should be restrained in his methods of doing business in the perishable agricultural commodities industry in order to protect those members of the industry who can and do conduct their business in accordance with the dictates of the Act. Donald Scharf was President for a time, as well as a responsible employee of Fresh World, Inc. and because Fresh World, Inc. did not, and has not, paid, truly and fully its creditors, such non-compliance with the Act renders the applicant unfit to engage in the business of dealing in perishable agricultural commodities in interstate or foreign commerce as a commission merchant, dealer, or broker.

As stated more fully in the Findings of Fact, Fresh World, Inc. engaged in practices of a nature prohibited by the Act. Fresh World, Inc. was a licensee under the Act, and violated section 2(4) of the Act by failing to account truly and correctly and make full payment promptly to the sellers of produce.

Under section 4(d), the Respondent-applicant is given the opportunity to "show cause why the license should not be refused". If the applicant fails to present sufficient evidence to prove its fitness to hold a license, then the Secretary is justified in refusing the issuance of the license. Complainant has established that Fresh World, Inc., with which Mr. Scharf was responsibly connected [, i.e., connected in a responsible manner with the violations], has engaged in a practice of a character prohibited by the Act.

The extent of responsibility for the non-payment of Fresh World's creditors is not exclusively with Mr. Scharf, as can be seen by the activity and withdrawals of corporate funds by others associated with the corporation. Even assuming that Mr. Scharf's remuneration was as stated by the Complainant, there is no showing that this was excessive when viewed in light of the business he generated, and the activities he engaged in. No case has been brought to my attention where a future applicant is denied a license because of a nonadjudicated determination of "responsibly connected." Complainant avoids this by making the "knowing" or the "permitting" of unpaid accounts by the Central Produce account as a basis for the denial of a license. However, as a result of the evidence adduced in this proceeding, it is more than evident that Mr. Scharf actively participated in the corporate affairs of Fresh World, Inc., even though he may not have been responsible for all of its activities.

This is a very close case as to who was responsible for the nonpayment of creditors, but Mr. Scharf was associated and closely involved with the operations of Fresh World, from June, 1983, through August 6 [or 9], 1983, when he could no longer sign checks, and until September, 1983, when he was dismissed as an employee. The documentation is not sufficiently complete to determine whether or not, if all the accounts receivables had been collected, and if withdrawals from the corporation had not occurred, the creditors could, or would, have been paid in full [, but I infer that they would have been fully paid]. However, all things considered, and from an evaluation of the entire record evidence, I find and conclude that the Secretary had sufficient and reasonable basis for refusing a license to the Respondent. Accordingly, I find that the evidence establishes that, as that term is used in the Act, Respondent is "unfit" to receive a PACA license.

By reason of the occurrences set forth in the above stated Findings of Fact, the financial status of Fresh World, Inc., from October, 1981, through September, 1983, was affected by the following transactions:

1) Although Mr. Faulkner was running the business on a day-to-day basis, others of the original incorporators may have been receiving consulting fees. There is evidence that Mr. Cameron Dale had a "consulting agreement" which was not reduced to writing and any amounts which may have been paid thereunder are not evident on the record.

2) Karl Allen caused to be withdrawn from the corporation an amount of $40,000.00 and still retained his 25%

ownership, which he subsequently tried to sell for $50,000.00. The original 75 shares of stock belonging to others than Karl Allen apparently were never surrendered to the corporation, and later became the object of purchase [or, rather, acquisition] by Mr. Dixon.

Also, without corporate books and records, such as audited profit and loss statements and balance sheets, normally maintained, it cannot be ascertained from this record what occurred, as it might affect the corporate structure when Mr. Faulkner left the business. Supposedly, he would have transferred his stock back to the corporation. Whether there was any consideration, other than a release from liability by the bank is not known.

Therefore, at the conclusion of the first 14 or 15 months of its existence, an amount coinciding with the entire capitalization of Fresh World, Inc., had been depleted. Mr. Scharf first became associated with the corporation as a consultant the latter part of June, 1982, and three months later, became a regular employee. During December, 1982, or January, 1983, Mr. Karl Allen withdrew the amount of $25,000.00 from the corporation, which is a part of the $40,000.00 mentioned above. There is no evidence that Mr. Scharf knew, or had any control over this withdrawal. The check was signed by Terry Allen, Mr. Karl Allen's brother.

Mr. Dixon indicated that the initial $70,000.00 which he utilized to [loan to] Fresh World, Inc. consisted of corporate funds from Food Source, Inc. for which Food Source, Inc. issued a check for $50,000.00 in January, 1983, and another check for $20,000.00 in February, 1983. Food Source, Inc. acquired no promissory notes for the transfer of the $70,000.00 from Food Source, Inc. to Fresh World. Food Source's books did not reflect either a separate loan to Fresh World nor did it carry Fresh World's stock in its capital asset account. With respect to this transaction, its books showed nothing. The implications of this are not explored herein and although Mr. Dixon was 100 percent owner of Food Source, Inc., according to the testimony of Karl Allen, he was only a 75% owner of Fresh World, Inc.

Mr. Dixon's own testimony indicates that the initial $70,000.00 advanced for the [loan to] Fresh World from Food Source was repaid over a period of months and his testimony reflects that by the end of July, 1983, the initial advance had been repaid.

In addition, as set forth herein, Mr. Dixon withdrew $120,000.00 from the corporation, Fresh World, Inc., at a time when it had unpaid creditors. According to Mr. Dixon's testimony, in August, 1983, he caused the disbursement of corporate funds from Fresh World in the total amount of $120,000.00; $20,000.00 of which he al-

located to himself to cover the cost of management and wrote four checks to Food Tech Corp. for $100,000.00 [, to be held to settle with the Security Pacific Bank on the line of credit (Tr. 234-35, 490-91)]. Food Tech was not the guarantor of Fresh World at the bank; Food Source and Mr. Dixon were.

The above mentioned facts take on significance, because the Complainant would have us believe that the creditors of Fresh World Inc., were not paid solely because of what Mr. Scharf did or did not do. Such an approach ignores the amounts withdrawn from the corporation by its owners.

The findings and conclusions herein have been premised upon a consideration of the entire record evidence, including an evaluation of the credibility of witnesses. However, there is a paucity of reliable evidence as to the corporate structure and activities of a number of corporate entities referred to, including Central Produce; North American Produce Distributors; and Luallipam.

Notwithstanding the various assertions of the parties, I find the evidence inconclusive and not sufficient to furnish a basis for determining who owned and controlled Central Produce. Ownership and control can be proven in many competent ways, including a copy of the corporate charter, minutes, financial statements, etc. This was not done.

From the evidence presented, an unresolved question in this case, and one upon which there is little credible evidence, is that of why greater effort was not made by the owners to effectuate payment from Central Produce. The dramatic increase in indebtedness from $42,000.00 to over $300,000.00 was not unknown, and although there is some evidence that a few statements were made to Mr. Scharf concerning the same, apparently greater effort was not expended. At the time that the Bank removed this account from its security portfolio, this indeed was an indication of the potential peril which this overdue account presented to Fresh World.

For whatever reasons, and the reasons are not clear on the record, the outstanding balance of Central Produce was allowed to increase to over $300,000.00 as of September, 1983, from approximately $97,000.00 in March, 1983, with, at best, only half-hearted attempts by the principals of Fresh World to collect the balance due, and some such attempts were made after September 6, 1983. However, the record does show that approximately $50,000.00 on account was received from Central Produce on or about August, 1983. There is also evidence of record that employees of the Bank considered the Central Produce account receivable as "good" and

could be collected—"They are a strong company."—and that credit reports so indicated [(Tr. 766–67).[5a]]

On Brief, Complainant continues to advance its "very determined position" that an employee of Security Pacific was incompetent to give testimony relating to the status and security aspects concerning an account, and the collection of same, over which the Bank had assigned him. The Complainant's many objections were overruled at the time of the oral hearing, and I believe rightly so. Fresh World had a substantial line of credit from the Bank, and, as security therefor, the Bank had taken the accounts receivable of the Company, which included the account of Central Produce, which constituted a substantial portion of the accounts receivable until it was removed as an ineligible account. At issue here is why the creditors of Fresh World were not paid—and if that was the fault of Mr. Scharf, to such a degree that he should be denied a license. Certainly, details concerning the servicing, status, and collection efforts of the Bank are relevant and material to this case.

If Complainant believes Mr. Red's testimony to be incorrect, it could have so shown by competent evidence. Complainant recognizes the importance of the Central Produce account to the nonpayment of the produce creditors—" * * * the whole difficulty was that the Central Produce account had not paid $342,000. * * *". This was of no less importance to the Bank which eventually removed Central Produce from the eligible security. To take a position that Mr. Red, a banking official, with assigned duties over this account, "* * * was not connected with, nor interested in, the payment of the amount due and owing [from] Central Produce and [to] Fresh World * * *" is unrealistic, as the Bank anticipated and intended to be paid, even if it had to resort to legal action.

The evidence was received not for the purpose of showing that Mr. Red knew "* * * exactly what was happening between Central Produce Corporation and Mr. Dixon on behalf of Fresh World", but rather, *for the purpose of showing what information the Bank had* with respect to the accounts receivable, which were the Bank's security.

Complainant's position, more clearly set forth in its Reply Brief, emphasizes that it does not assert, nor does it maintain that there

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[[5a] The bank testimony, should, however, be evaluated in the light of the fact that Mr. Dixon had previously testified (Tr. 489):

> A. We plan to assert a claim against Security Pacific Bank on behalf of the corporation that they were negligent in granting the credit against the receivables in the first place and in effect induced myself, Food Source and Fresh World, Inc. to borrow those funds when to do so was not prudent.]

was a conspiracy between Mr. Donald Scharf and other persons to deprive produce creditors of money that is due them.

Complainant's allegation is that Mr. Scharf knew of the problems of dealing with Central Produce Company in Puerto Rico because of prior associations with persons and a corporation which had dealt with Central Produce.

The allegation of the Complaint is to the effect that during the relevant period Donald Scharf:

> "* * * sold to Central Produce Corp., San Juan, Puerto Rico, substantial quantities of produce purchased by Fresh World, Inc., permitting an indebtedness from Central Produce Corp., to Fresh World, Inc., of more than $300,000.00 to accrue. * * *"

The above mentioned allegation of the Complaint goes beyond the subsequent position of Complainant on brief, i.e., the difference between "permitting an indebtedness" and "(knowing) of the problems of dealing with Central Produce Company".

The principles set forth in the case cited by the Complainant, namely, *In Re: Ludwig Casca*, 34 A.D. 1917 (1975), are applicable herein. The denial of a license is not to be regarded as a penalty imposed on the applicant, but rather a means whereby the Secretary protects the public interest. If the corporate respondent herein were to be granted a license, the public will be dependent upon Mr. Scharf to fulfill the responsibilities under the Act, albeit through a corporation. Under the terms of the Act, the Secretary *may* withhold the issuance of a license under circumstances where he finds that the applicant is unfit to engage in business as a licensee. To adopt the Respondent's view would be to accept the proposition that Mr. Scharf had absolutely nothing to do with the non-payment of creditors, and, the financial difficulties of the corporation, Fresh World. As I noted above, I do not believe that Mr. Scharf was solely to blame for the non-payment of creditors, but he indeed was more than nominally involved in the business transactions of Fresh World. Although the determination of who is responsibly connected with a corporation is subject to an administrative hearing and decision, this does not preclude an examination of the circumstances in this Notice to Show Cause proceeding as to the correctness of the Secretary's determination that the corporate applicant is unfit to be licensed under the Act.

The goal of the Perishable Agricultural Commodities Act is that only financially responsible persons should be employed in the business subject to the Act.

The concept that the corporation is a distinct entity, even when wholly owned by a single individual, is designed to serve normal, inoffensive uses of the corporate device and is not to be stretched beyond its reason and policy. The Respondent's reliance on *Quinn* vs *Butz*, 510 F2d 743 (C.A.D.C., 1975) does not preclude the result in this case. Mr. Scharf's officership [and, later, service as General Manager] was not purely nominal, and he did participate on an extensive basis in the management, on a day-to-day basis, of the business activities of Fresh World. Thus, this is a different situation than was present in such cases as *Minotto* vs *U.S.D.A.*, 711 F2d 406 C.A.D.C., 1983) where the Court in reversing a "responsibly connected" determination found that the petitioner therein was a "nominal" director to whom knowledge of the violations could not be imputed—essentially, the litigant therein was a clerical employee.

Mr. Scharf's association with Fresh World was not a passive one—as he indicated with respect to Exhibit C, although he did not have the responsibility of filling the form out (Miss Allwardt did), "The responsibility that I had was that my signature had to be affixed to the bottom of the sheet in order for the bank to accept it." (Tr. 790). This is reflective of executive responsibility—it would be unusual for corporate officers of a large business concern to personally sit down and compile the figures, reports, etc. This is usually done by clerical help and others.

He also signed a Security Pacific Note, and had a signature authorization and corporate resolution to obtain credit.

Even if Mr. Scharf was under the ultimate control of Mr. Dixon, the total circumstances of this case are such that he can not be absolved from the consequences of non-payment to the creditors of Fresh World, Inc., for produce which they supplied.

As set forth herein above, a disciplinary Complaint was filed against Fresh World, Inc. on April 10, 1984, by the Secretary, in PACA Docket No. 2-6526. By reason of official notice thereof, it is ascertained that no answer was filed thereto, and that the allegations of the Complaint contained assertions that during the period June, 1983, through September, 1983, Fresh World, Inc. violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 20 sellers of the agreed purchase prices or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultural commodities purchased, moved and accepted in interstate or foreign commerce. By reason of the admission of such facts by failing to file an answer thereto, a default decision was issued on October 4, 1984, which became final on November 16, 1984.

The officers and stockholders [and General Manager] of Fresh World, Inc., engaged in practices of the character prohibited by the PACA, and the Respondent/Applicant is unfit, as that term is used in the Act, to be licensed under the PACA. If this is a harsh result, then too, are the undeniable facts that, even as late as the oral hearing, there remained unpaid numerous produce suppliers who had furnished produce with the expectation of being paid. They were not.

An evaluation of the record as a whole establishes that the Secretary did not act illegally in denying the applicant a license under the Perishable Agricultural Commodities Act. The many and varied contentions of the parties have been carefully considered. Any motions, requests, or otherwise which have not been ruled upon, and which are inconsistent with this Decision, are hereby denied.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent argues (correctly) on appeal that Mr. Scharf was not "responsibly connected" (as defined in the Act) with Fresh World during the period that Fresh World failed to pay for produce. The term "responsibly connected" is defined as follows (7 U.S.C. § 499a(9)):

> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. . . .

However, the Secretary's authority to refuse a license to respondent arises under § 4(d) of the Act (7 U.S.C. § 499d(d)), quoted in the Preliminary Statement (*supra* pp. 5–6). That section does not use the term "responsibly connected." Under § 4(d) of the Act, the Secretary may refuse to issue a license to an applicant that is "unfit . . . because . . . any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this [Act]" (7 U.S.C. § 499d(d)). Since Mr. Scharf is admittedly president and treasurer and a 75% stockholder of the applicant, the Secretary may refuse to issue a license to respondent if it is unfit because Mr. Scharf "engaged in any practice of the character prohibited by [the Act]."

Although the "responsibly connected" definition in the Act and the cases cited by respondent construing the term "responsibly connected" are irrelevant in this case, it is worth mentioning briefly

(for the benefit of a reviewing court) under what circumstances a "responsibly connected" determination is relevant. Section 8(b) of the Act provides (7 U.S.C. § 499h(b)):

> (b) *Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties*
>
> Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—
>
> (1) whose license has been revoked or is currently suspended by order of the Secretary;
>
> (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or
>
> (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.
>
> The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Scretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a

> reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

Under § 8(b) of the Act, just quoted, since Mr. Dixon was "responsibly connected" with Fresh World, which was found to have committed flagrant and repeated violations of 7 U.S.C. § 499b (Finding 58), no licensee could employ Mr. Dixon without the approval of the Secretary, and such approval could not be given until one year after the issuance of the Fresh World decision, and then only if the licensee furnished a satisfactory bond. After 2 years, the Secretary could approve Mr. Dixon's employment without a bond.

The term "responsibly connected" is also used in granting the Secretary authority to refuse a license under conditions not relevant here. Specifically, § 4(b) of the Act, not involved here, provides (7 U.S.C. § 499d(b)):

> (b) *Refusal of license; grounds*
>
> The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is a person who, or is or was responsibly connected with a person who—
>
> (A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;
>
> (B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;
>
> (C) within two years prior to the date of the application, has been found guilty in a Federal court of having violated the provisions of sections 491, 493 to 497 of this title, relating to the prevention of destruction and dumping of farm produce; or

> (D) has failed, except in the case of bankruptcy and subject to his right of appeal under section 499g(c) of this title, to pay any reparation order issued against him within two years prior to the date of the application.

The inclusion of the "responsibly connected" criterion in § 4(b) of the licensing section of the Act, just quoted, while omitting the term in § 4(d) of the licensing section of the Act (which is applicable here), emphasizes that the "responsibly connected" criterion should not be implied in the place at which it was omitted. *Lang* v. *Comm'r of Internal Revenue*, 289 U.S. 109, 112 (1933); *Corn Prods. Ref. Co* v. *Benson*, 232 F.2d 554, 562 (2d Cir. 1956). Hence the fact that Mr. Scharf was not "responsibly connected" with Fresh World within the meaning of the Act is irrelevant.

The issue here is whether Mr. Scharf "engaged in any practice of the character prohibited by [the Act]" while he was General Manager of Fresh World (7 U.S.C. § 499d(d)). In order to make that determination, it is necessary to know what type of payment practices are prohibited by the Act, so that we can determine whether Mr. Scharf engaged in practices of that "character".

The Act has been interpreted in a very tough and harsh manner, with the overwhelming support and approval of the industry.[6] See, *e.g.*, *In re B.G. Sales Co.*, 44 Agric. Dec. ___ (Oct. 9, 1985), attached as an Appendix to this decision. A licensee which fails to pay for produce has its license revoked, irrespective of excuses (or if it has no license, a finding is made that it engaged in repeated or flagrant violations of the Act, which has the same effect on the violator and on persons responsibly connected with the violator as a license revocation),[7] since "the Act calls for payment—not excuses." [8] In fact, if the pleadings or bankruptcy papers of which of-

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[6] As stated in H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2:

> The law has fostered an admirable degree of dependability and fairness in this industry. . . . In spite of the strictness of some of the provisions of the law, the act and its administration by the Department of Agriculture have won the almost unanimous approval of this important food distributing industry and now have its virtually undivided support.

[7] *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748-49 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1151-52 (1981); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-15 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750-51 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977).

[8] *In re B.G. Sales Co.*, 44 Agric. Dec. ___ (Oct. 9, 1985) (non-payment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.*, 42

Continued

ficial notice is taken show that a licensee has failed to pay for an amount of produce that is not *de minimis* (and there is no dispute as to whether payment was due), the licensee is not even afforded an opportunity for a hearing to give excuses as to why payment was not made.[9]

Agric. Dec. ___ (Oct. 6, 1983) (non-payment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (non-payment because another firm failed to pay respondent $248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983) (non-payment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (non-payment because of bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (non-payment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (non-payment because of bankruptcy of another firm owing respondent $776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (non-payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (non-payment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (non-payment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (non-payment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (non-payment because of strike and failure of others to pay respondent), *aff'd* (unpublished), 673 F.2d 1329 (6th Cir. 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (non-payment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (non-payment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (non-payment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (non-payment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (non-payment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (non-payment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (non-payment because of bankruptcy of another firm owing respondent over $130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (non-payment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (non-payment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (non-payment because of financial difficulties).

[9] *E.g., In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. ___ (Apr. 8, 1986); *In re Top Quality Fruit & Produce Distributors, Inc.*, 45 Agric. Dec. ___ (Jan. 27, 1986); *In*

Continued

As in the case of failure to make full payment, excuses as to why payment could not be made promptly are ignored in determining violations or sanctions under the Perishable Agricultural Commodities Act since "the Act calls for payment—not excuses.[10]

In affirming the Department's refusal to consider mitigating circumstances in failure to pay cases under the Perishable Agricultural Commodities Act, the court held in *Finer Foods Sales Co.* v. *Block*, 708 F.2d 774, 781–82 (D.C. Cir. 1983):

> The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according to it, should have been viewed as excusing its failure to pay its debts. These include the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were wilful since 'the Act calls for payment—not excuses.'" *Quoting In re Kafcsak*, 39 Agric. Dec. 683, 686 (1980). See also *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982).
>
> The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. § 499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S.Rep. No. 2507, 84th Cong., 2d Sess. (*citing* H.Rep. No. 1196, 84th Cong., 1st Sess.), *reprinted in*

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re B.G. Sales Co., 44 Agric. Dec. ___ (Oct. 9, 1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. ___ (Oct. 7, 1985); *In re Veg-Mix, Inc.*, 44 Agric. Dec. ___ (Aug. 21, 1985), *appeal docketed*, No. 85-1771 (D.C. Cir. Nov. 22, 1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. ___ (Aug. 21, 1985), *appeal docketed*, No. 85-1590 (D.C. Cir. Sept. 19, 1985).

[10] *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746–47 (1982) (delayed payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1139–40 (1981); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978) (delayed payment because of financial difficulties resulting from weather conditions and withdrawal from business of a brother); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 167–68 (delayed payment because of financial difficulties resulting from inexperience, overbuying and credit sales), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons.*, 34 Agric. Dec. 120, 130–31 (delayed payment because of uncollectable accounts), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975).

1956 U.S. Code Cong. & Ad.News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.* 41 Agric. Dec. 89 (D.C. Cir. No. 81-1446, Jan. 19, 1982):

> Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers.

Quoting In re John H. Norman & Sons Distrib. Co., 37 Agric. Dec. 705, 720 (1978).

> In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick* v. *Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967) *quoted in Marvin Tragash Co.* v. *United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).
>
> The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

As shown in the cases cited in note 8, *supra*, the excuse frequently made by a licensee which fails to pay for produce is that another firm failed to pay the licensee. But that excuse has always been rejected. As stated in *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1158 (1983):

> Respondent contends that its violations were caused by the failure of Eicaar Export Company, Inc., to pay respondent $248,805.66. Notwithstanding respondent's many efforts to assure itself that Eicaar's ever increasing indebtedness would be paid in full, any seller extending credit on such a large scale to a single firm is taking a calculated risk, at the expense of the seller's suppliers, if the seller is unable to withstand a loss equal to the single firm's indebtedness.

In the present case, Mr. Scharf engaged in practices that led to the failure of Fresh World to pay for at least a large part of the produce involved in Fresh World's payment violations, albeit Mr. Scharf was not the only person connected with Fresh World who engaged in such practices. Mr. Scharf was General Manager of Fresh World (Finding 25). He selected Central Produce as a customer for Fresh World (Findings 38, 38(a)–(d)). He is the one who sold the great bulk of the produce to Central Produce (Findings 38, 38(a)–(d)). He was aware of the tremendous increase in Central Produce's debt to Fresh World while it was happening, i.e., while it was increasing from $42,000 to $342,000 (Findings 38, 39). He knew that Watermill sold only to Central Produce, and that Watermill went broke, but he made no effort to inquire as to whether Watermill went broke because Central Produce failed to pay for merchandise (Finding 38(b)).[11]

Although the record does not show whether Central Produce, which offered to settle the $342,000 debt for $118,000, was entitled to legitimate adjustments with respect to the produce (see Finding 40), in any event Mr. Scharf personally made at least the great bulk of those sales that proved catastrophic to Fresh World.

Respondent argues that Mr. Dixon was solely responsible for Fresh World's failure to pay suppliers, and respondent goes so far as to argue that Mr. Dixon planned from the beginning to withdraw from Fresh World and misappropriate its funds. However, the record does not support respondent's contention. I infer from the totality of the factual situation that Mr. Dixon took over Fresh World in good faith, risking $500,000 of his own money and that of his corporation (Food Source, Inc.) in providing needed capital for Fresh World (Finding 16), and that he took measures to protect his own interests (at the expense of suppliers) in the summer of 1983 only because the profits predicted by Mr. Scharf did not develop, and he was concerned about his large financial exposure and the tremendous debt owed by Central Produce.

Moreover, even though Mr. Dixon took protective measures (to himself) at the expense of suppliers, if the $342,000 had been available from Central Produce, Fresh World's suppliers could have been paid. Accordingly, Mr. Scharf's practices (which led to most, if not all, of the $342,000 Central Produce debt) caused suppliers not to be paid for their produce.

[11] Whether Watermill's failure was caused by Central Produce is not vital to complainant's case. In fact, the record does not explore the reasons for Watermill's financial failure. But a prudent salesman would at least have inquired as to whether Watermill's financial failure was caused by Central Produce's failure to pay Watermill.

The facts here are analogous to those in *In re Golden West Wholesale Fruit Distributors, Inc.*, 36 Agric. Dec. 1591 (1977), in which Golden West's license application was denied because Paul Gitmed, president and 50% stockholder of Golden West, had previously engaged in practices of a character prohibited by the Act when he was an employee of C&M Citrus Distributors, Inc. (C&M). Paul Gitmed was not "responsibly connected" with C&M, within the meaning of the statutory definition, but he was the employee who actually managed C&M's fruit department, and he prepared false entries on slips of paper that were utilized by the bookkeeper to pay consignors. In *Golden West* it is stated (36 Agric. Dec. at 1595–97, 1599):

> Respondent argued at the hearing and in its brief that Section 4(d) grants authority to withhold a license pending a hearing only if Paul Gitmed was "responsibly connected" with C&M. Because Paul Gitmed was not "responsibly connected" with C&M at the time violations occurred, respondent argues that a license cannot be denied.
>
> However, we see no merit in this argument, since Section 4(d) simply provides that a license may be withheld if the applicant (here respondent, Golden West) or one (Paul Gitmed) responsibly connected with the applicant (not some other licensee such as C&M) has engaged in any practice of the character prohibited by the Act.
>
> The issue of responsible connection has bearing only on the question of whether the person who committed the unlawful practices was responsibly connected with the applicant (Golden West in this case). By respondent's own admission, Paul Gitmed is the president and 50 percent shareholder of the respondent-applicant. As can be seen from the express language of section 4(d), there is no requirement that a person who has engaged in practices of the nature prohibited by the Act be responsibly connected with the business entity which is formally charged with the violations.
>
> The Act provides the framework by which the Secretary of Agriculture can regulate business practices in the perishable agricultural commodities industry. Essential to that regulation is the procedure outlined in section 4(d) whereby the Secretary may question the fitness of any particular applicant for a license to conduct business in the perishable agricultural commodities industry. In the

case of a corporate applicant, the inquiry into fitness extends not only to the corporate entity itself, but also to the principals of the corporation; specifically extending to an officer, director, or holder of more than 10 percent of the outstanding stock of the corporation. The inclusion of this level of inquiry into fitness, of course, recognizes that corporate activity is initiated by those persons who control the corporation.

Similarly, section 4(d) of the Act authorizes the Secretary to withhold the issuance of a license when a person who is responsibly connected with the applicant has engaged in practices of the nature prohibited by the Act. Hence if there is evidence that a person responsibly connected with the applicant has engaged in a prior course of conduct which included practices of the nature prohibited by the Act, then that person should be restrained in his methods of doing business in the perishable agricultural commodities industry in order to protect those members of the industry who can and do conduct their business in accordance with the dictates of the Act. Paul Gitmed as president and 50 percent shareholder of Golden West renders the applicant unfit to engage in the business of dealing in perishable agricultural commodities in interstate or foreign commerce as a commission merchant, dealer, or broker.

As stated more fully in the findings of fact, Paul Gitmed engaged in practices of a nature prohibited by the Act. From January 1973 through September 1974, C&M, a licensee under the Act, violated section 2(4) of the Act by failing to account truly and correctly and make full payment promptly of the net proceeds derived from the sale of deciduous fruits handled on consignment. During the time in which at least 117 of those violations occurred, Paul Gitmed operated the deciduous fruit department of C&M. . . .

* * * * * * *

Respondent's argument that Paul Gitmed could not have violated the Act while working for C&M, since C&M committed the violations, is irrelevant since Golden West's application for a license may be refused if it is "unfit" because "any officer or holder of more than 10 per centum of

> the stock * * * engaged in any practice of the character prohibited by this chapter" (7 U.S.C. 499d(d)). It is not necessary to find that Paul Gitmed, who is president of Golden West and holds 50% of its stock, violated the Act previously—only that he engaged in a practice *of the character* prohibited by the Act. That he clearly did.

Here, as in *Golden West*, Mr. Scharf did not previously violate the Act. Fresh World did. However, as General Manager of Fresh World, he engaged in practices that were a primary cause of Fresh World's violations. Hence respondent is unfit to engage in business as a licensee because of Mr. Scharf's association with respondent.

Respondent contends that the ALJ applied an erroneous standard of proof (pp. 42–43, *supra*). However, once complainant established that Mr. Scharf engaged in a practice of the character prohibited by the Act, the burden of proof was on respondent to show that it is, nonetheless, fit to receive a license. The Act states that if "after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to *show cause why the license should not be refused*" (7 U.S.C. 499d(d), emphasis added). The Act does not state that the hearing is to show cause why the license should not be *issued*. Under the wording of the Act, respondent is the proponent of an order that the "license should not be refused." Accordingly, respondent has the burden of proving "why the license should not be refused." See 5 U.S.C. § 556(d). As stated in *In re Golden West Wholesale Fruit Distributors, Inc.*, 36 Agric. Dec. 1591, 1598 (1977):

> Under section 4(d), the respondent-applicant is given the opportunity to "show cause why the license should not be refused". If the applicant fails to present sufficient evidence to prove its fitness to hold a license, then the Secretary is justified in refusing the issuance of the license. Once complainant establishes that a person who is responsibly connected with the applicant has engaged in a practice of a character prohibited by the Act, then the applicant must present evidence to rebut the presumption of unfitness. *In re Ludwig Casca*, 34 A.D. 1917 (1975); *In re Pappas Produce, Inc.*, 36 A.D. [684, 692–93], April 4, 1977.

In any event, however, even if complainant had the burden of proof in all respects, complainant met that burden here.

Respondent contends that the Notice to Show Cause did not adequately apprise respondent of the matters at issue. But there is no merit to that contention. The Notice to Show Cause states:

4. Donald Scharf was president and/or general manager, and/or a director of Fresh World, Inc., . . . during the period June 1982 through September 1983. . . .

* * * * * * *

6. During the period June 1983 through September 1983, Fresh World, Inc., violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 20 sellers of the agreed purchase prices or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultural commodities purchased, moved and accepted in interstate or foreign commerce. The details of these transactions are set forth below:

* * * * * * *

The total amount past due and unpaid these 20 sellers is $331,194.55.

7. On information and belief, during the period June 1983 through September 1983, Donald Scharf, acting as general manager, made all decisions regarding from whom Fresh World, Inc., would purchase and to whom it would sell perishable agricultural commodities. Until August 9, 1983, Donald Scharf had authority to issue checks for Fresh World, Inc. During the above period, Donald Scharf sold to Central Produce Corp., San Juan, Puerto Rico substantial quantities of produce purchased by Fresh World, Inc., permitting an indebtedness from Central Produce Corp., to Fresh World, Inc., of more than $300,000 to accrue. Central Produce has failed and refused to pay this indebtedness.

* * * * * * *

10. Donald Scharf, as president, director and/or general manager of Fresh World, Inc., during the period in which the violations of the PACA alleged in paragraphs 6 and 8 above occurred, is responsible for the commission of these violations. These acts constitute practices of the character prohibited by the PACA.

The Notice to Show Cause sets forth precisely complainant's contentions involved here. But even if the allegations had not been precisely stated, it is well settled that the formalities and technicalities of court pleading are not applicable in administrative pro-

ceedings.[12] It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled.[13]

In addition, complainant's attorney made his position plain throughout the hearing, e.g., he stated (Tr. 370; and see Tr. 610–11):

> The issue is whether Mr. Scharf engaged in practices of the contract [character] prohibited by the act. The practices with which we are concerned are the purchases of commodities for [from] produce sellers which were not paid for by Fresh World.
>
> And we respectfully suggest that we are laying responsibility on Mr. Scharf for those kinds of actions. . . .

Furthermore, complainant rested on February 10, 1984, and most of respondent's case was not put on until April 4 and 5, 1984. In a hearing conducted at intervals, there is little or no basis for a complaint as to the adequacy of the administrative allegations instituting the procedure.[14]

For the foregoing reasons, the following order should be issued.[15]

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[12] *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142–44 (1940).

[13] *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350–51 (1938); *Aloha Airlines, Inc.* v. *CAB*, 598 F.2d 250, 261–62 (D.C. Cir. 1979); *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co.* v. *United States*, 393 F.2d 247, 252–53 (7th Cir. 1968); *Cella* v. *United States*, 208 F.2d 783, 788–89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Pub. Ass'n* v. *NLRB*, 193 F.2d 782, 799–800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union* v. *NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co.* v. *FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co.* v. *FTC*, 142 F.2d 511, 518–19 (6th Cir. 1944); *A.E. Staley Mfg. Co.* v. *FTC*, 135 F.2d 453, 454–55 (7th Cir. 1943); *NLRB* v. *Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug 11, 1980); *In re Holcomb*, 35 Agric. Dec. 1165, 1173–74 (1976).

[14] *Locomotive Finished Material Co.* v. *NLRB*, 142 F.2d 802, 804–05 (10th Cir. 1944); *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 873 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

[15] It would be helpful in future cases if the ALJ would require the parties to number the pages of multi-page exhibits.

ORDER

The respondent's, H & J Brokerage, Inc.'s, application for a license under the Perishable Agricultural Commodities Act is denied.

Copies hereof shall be served upon the parties.

APPENDIX

In re B.G. Sales Co., 44 Agric. Dec. ____ (Oct. 9, 1985).
[Excerpt omitted.—Ed.]

In re: EMERSON ELLIOTT PRODUCE, PACA Docket No. 2-6970. Decided April 21, 1986.

Failure to make prompt payment—License revoked.

Edward M. Silverstein, for complainant.
Raymond Rotella, Orlando, FL, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 3, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May through October 1984, respondent purchased, received and accepted, in interstate and foreign commerce, from 16 sellers, 41 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $221,886.84.

A copy of the complaint was served upon respondent which filed an answer thereto admitting all of the material allegations of the complaint with one minor exception.[1] In view of this, and upon complainant's motion, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

[1] Respondent denies being indebted to Growers Packing Company, Florida City, Florida, in the amount of $22,773.80 for four lots of tomatoes. In its motion for a decision, complainant has withdrawn this allegation.

FINDINGS OF FACT

1. Respondent, Emerson H. Elliott, is an individual doing business as Emerson Elliott Produce, whose mailing address is P.O. Box 745, Casselberry, Florida 32707.

2. Pursuant to the licensing provisions of the Act, license number 801217 was issued to respondent on June 24, 1980. This license was renewed annually, and was next subject to renewal on or before June 24, 1986. However, respondent's license was automatically suspended on February 27, 1985, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d) when he failed to satisfy a reparation award issued against him in PACA Docket No. 2-6699 (44 Agric. Dec. ____).

3. As more fully set forth in paragraph 5 of the complaint, during the period June through October 1984 respondent purchased, received and accepted in interstate and foreign commerce, from 15 sellers, 37 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $199,113.04.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 37 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b). *Zwick* v. *Freeman*, 373 F.2d 110 (2d Cir.), *cert. den.*, 389 U.S. 835 (1967); *George Steinberg and Son, Inc.* v. *Butz*, 491 F.2d 988 (2d Cir.), *cert. den.*, 419 U.S. 830 (1974); *Marvin Tragash Co.* v. *United States Dept. of Agr.*, 524 F.2d 1255 (5th Cir. 1975); *United Fruit & Veg. Co.* v. *Dir. of Fruit & Veg. Div.*, 668 F.2d 983 (8th Cir.), *cert. den.*, 456 U.S. 1007 (1982); *Wayne Cusimano, Inc.* v. *Block*, 692 F.2d 1025 (5th Cir. 1982); *Finer Foods Sales Co., Inc.* v. *Block*, 708 F.2d 774 (D.C. Cir. 1983); and *Melvin Beene Produce* v. *Agricultural Marketing Serv.*, 728 F.2d 347 (6th Cir. 1984). Accordingly the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after

service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[Decision and Order became final on May 29, 1986.—Ed.]

In re: GULFPORT TOMATOES, INC., PACA Docket No. 2-7085. Decided June 12, 1986.

Failure to pay—repeated—publish.

Ben E. Bruner, for complainant.
William D. Bethea, Gulfport, MS, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a complaint filed on February 6, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period April 1984 through April 1985, Respondent failed to make full payment promptly to nine sellers, of the agreed purchase prices, or balances thereof, in the total amount of $165,635.43 for 52 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Gulfport Tomatoes, Inc., (hereinafter "Respondent"), is a Mississippi corporation, whose mailing address is P.O. Box 999, Gulfport, Mississippi 39501.

2. Pursuant to the licensing provisions of the Act, license number 681081 was issued to Respondent on December 20, 1967. This license has been renewed annually, but terminated on December 20,

1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period April 1984 through April 1985, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices, or balances thereof, in the total amount of $165,635.43 for 52 lots of perishable agricultural commodities, purchased, received, and accepted in interstate commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 4 above, for which the Order below is issued.

ORDER

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), and the facts and circumstances set forth above be published.

This order shall become effective on June 23, 1986.

Copies hereof shall be served upon the parties.

In re: GREEN VILLAGE FRUIT AND VEGETABLE, INC., PACA Docket No. 2-6845. Decided May 8, 1986.

Failure to pay promptly—application for license denied.

Jory Hochberg, for complainant.
Denise Langer, New York, NY, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding to discipline respondent and deny it a license was instituted by a Notice to Show Cause and Complaint filed on June 5, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture under the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.;* the "PACA"), applicable regulations (7 CFR 46.1 through 46.45), and Rules of Prac-

tice (7 CFR 1.130 through 1.151). The Notice to Show Cause and Complaint alleges that respondent, Green Village Fruit & Vegetable, Inc., violated section 2 of the PACA (7 U.S.C. 499b) by failing to make full payment promptly of the agreed purchase prices for 69 lots of mixed fruits and vegetables, all being perishable agricultural commodities, for a total of $259,618.92. Respondent filed an answer on July 22, 1985, in which it denied violating the PACA.

Oral hearing was held before me on December 5, 1985, in New York, New York. Complainant was represented by Jory M. Hochberg, Esq., Office of the General Counsel, U. S. Department of Agriculture, Washington, D. C. 20250. Respondent was represented by G. Oliver Koppell, 28 West 44th Street, New York, New York 10036. The complaint was amended at the hearing to include additional instances of respondent's alleged failures to make full payment promptly to H. Schnell & Co., one of the sellers originally named in the complaint.

Briefing was completed on April 25, 1986.

Upon consideration of the evidence of record, the arguments of counsel, and the proposed findings, conclusions and briefs filed by the parties, a finding is being entered that respondent committed repeated and flagrant violations of the PACA, and its application for a license under the PACA is being denied.

PERTINENT STATUTORY PROVISIONS

1. Sec. 2(4).

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

* * * * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with

any such transaction; or to fail to maintain the trust as required under Section 5(c);

2. Sec. 4(a).

(a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, or is automatically suspended under section 7(d) of this Act, but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: *Provided,* That notice of the necessity of paying the annual fee shall be mailed at least thirty days before the anniversary date: *Provided, further,* That if the annual fee is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 3(b), plus $5, which shall be deposited in the Perishable Agricultural Commodities Act fund provided for by section 3(b): *And provided further,* That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination;

3. Sec. 4(d)

(d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . or in case the applicant is a corporation, any officer or holder of more than 10 per cent of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . If after the investigation the Secretary believes that the applicant shall be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary

finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . or in case the applicant is a corporation, any officer or holder of more than 10 per cent of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . the Secretary may refuse to issue a license to the applicant.

4. Sec. 8(a)

(a) Whenever (a) the Secretary determines as provided in section 6 that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

PERTINENT REGULATIONS

Sec. 46.2(aa)

'Full payment promptly' is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. 'Full payment promptly,' for the purpose of determining violations of the [PACA], means:

* * * * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted.

* * * * * * *

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then pay-

ment within the agreed upon time shall constitute 'full payment promptly', *Provided,* That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

FINDINGS OF FACT

1. Respondent is a New York corporation whose address is New York City Terminal Market, No. 220A, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the PACA, on January 26, 1984, license number 840616 was issued to Sechin K. Kim, also known as Se Chin K. Kim, to do business in his own name. Since on its first anniversary date, Mr. Kim indicated on his renewal application that his business had incorporated, Mr. Kim was advised that it was necessary to apply for a corporate license. The individual license of Mr. Kim terminated on January 26, 1985, and thereafter, Green Village, of which Mr. Kim is the sole officer, director and stockholder continued to operate subject to the PACA without a valid license. On May 8, 1985, respondent, Green Village Fruit & Vegetable, Inc., applied for a PACA license.

3. During the period November 1984 through January 1985, Sechin K. Kim purchased, received, and accepted, in interstate and foreign commerce, 69 lots of mixed fruits and vegetables, all being perishable agricultural commodities, from three sellers set forth in the complaint for a total obligation of $255,169.82. He failed to promptly pay such obligations. During the period February 1985 through April 1985, Sechin K. Kim, now incorporated as respondent, purchased additional lots of mixed fruits and vegetables from one of these sellers and failed to promptly pay in full the agreed purchase prices and this seller, at the time of the hearing, was still owed approximately $90,000, although the other two sellers had been paid in full.

CONCLUSIONS

Respondent's failures to fully and promptly pay the agreed purchase prices for numerous lots of perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant and/or repeated violations of section 2 of the PACA (7 U.S.C. 499b). Respondent should be refused the PACA license for which it has made application because respondent and its sole officer, director and stockholder, Sechin K. Kim, engaged in conduct of a character prohibited by the PACA which makes it unfit to engage in the business of a commission merchant, dealer or broker.

DISCUSSION

A. Introduction

This is a combined Notice to Show Cause and disciplinary proceeding brought pursuant to sections 4 and 8 of the PACA (7 U.S.C. 499d, 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. (H.R. Rep. 1041, 71st Cong., 2d Sess. (1930)). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Chidsey* v. *Guerin*, 443 F.2d 584 (6th Cir. 1971); *O'Day* v. *George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 U.S.C. § 499b." *Id.* at 858. Enforcement is effectuated through a system of licensing with penalties for violation. H. Rep. 1041, 71st Cong., 2d Sess. (1930) 3. *See, also, George Steinberg and Son, Inc.* v. *Butz*, 491 F.2d 988 (2d Cir.), *cert. den.*, 419 U.S. 830 (1974). Complementary to this enforcement scheme, the Secretary has the authority to refuse to issue a license to an applicant which has committed the kind of acts which are prohibited under the PACA.

The purpose of the present proceeding is to determine whether respondent violated section 2(4) of the PACA (7 U.S.C. 499b(4)) and, if so, the appropriate sanction, if any, to be imposed, as well as whether respondent is unfit to be granted the new PACA license for which it has made application.

B. Respondent Violated the PACA

Section 2(4) of the PACA (7 U.S.C. 499b(4)) makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker as defined by the act (7 U.S.C. 499a(5)(6) and (7)), to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. "Full payment promptly," under Departmental regulation (7 CFR § 46.2(aa)(5)) requires that the agreed purchase prices for produce be paid in full within 10 days after the day on which the produce is accepted. Respondent stipulated at the hearing that full payment was not made promptly, as required by the regulations, for all of the perishable agricultural commodities accepted from Kleiman-Hochberg and D'Arrigo Brothers, as tabulated on

page 4 of the complaint, and that these amounts remained overdue for six months or more. Although complainant has stipulated that the indebtedness to D'Arrigo and Kleiman-Hochberg which was alleged in the complaint has now been fully paid, this does not alter the fact of the violations. *See, Baltimore Tomato Company, Inc.*, 39 Agric. Dec. 412 (1980); and *V.P.C., Inc., t/a Peter T. Glakas Produce*, PACA Docket No. 2-5844 (April 14, 1982).

Although respondent did not enter into any stipulations respecting its indebtedness to the remaining seller, H. Schnell & Co., it offered no evidence to contest the allegations that it failed to pay promptly for the perishable agricultural commodities shown on the invoices contained in Complainant's Exhibit Nos. 44 through 71, which cover the time period covered by the complaint. Instead, respondent contends that the indebtedness resulting from these particular transactions has now been paid, and that respondent's indebtedness at the time of the hearing to H. Schnell arose from subsequent transactions (for which the complaint was amended) and should not be considered. However, the testimony of Mr. Golding, H. Schnell's Office Manager, Complainant's Exhibit No. 72, and respondent's admissions at the hearing, provide ample support for the conclusion that respondent had failed to make timely payment and still owed for approximately $90,000 of perishable fruits and vegetables which it purchased and accepted from Schnell in interstate commerce.

Failures to make timely payment for produce purchased in interstate and foreign commerce are clearly in violation of the prohibitions of section 2 of the PACA (7 U.S.C. 499b). *Atlantic Produce*, 35 Agric. Dec. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. den.*, 439 U.S. 819 (1978). Moreover, numerous violations constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors* v. *United States*, 630 F.2d 370, 373-374 (5th Cir. 1980); *G. Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub. nom., George Steinberg and Son, Inc.* v. *Butz, supra*, 491 F.2d 988. Respondent's violations must be construed as willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, supra*, 32 Agric. Dec. 236, 263-269; *Goodman* v. *Benson*, 286 F.2d 896 (7th Cir. 1961). Respondent knew or should have known that it could not make prompt payment for the large amount of perishables it ordered and even after it had received complaints about its failures to pay promptly, respondent continuted to make purchases without making timely payments. Respondent was aware of the Act's re-

quirements yet it continued to buy knowing that each purchase would result in another violation. A licensee is required under the PACA to have sufficient capital with which to operate. Respondent did not and, consequently, could not pay its suppliers. Under these circumstances, it must be concluded that respondent was operating in careless disregard of the payment requirements of the PACA, and that its consequent violations were willful. *Atlantic Produce, supra,* 35 Agric. Dec. 1631, 1961; *Rudolph John Kafcsak,* 39 Agric. Dec. 683 (1980), *aff'd. mem.,* 673 F.2d 1329 (6th Cir. 1981).

C. Disciplinary Sanction and Denial of New PACA License

If a licensee who has failed to pay for produce is not current in his payments at the time the oral hearing is convened, the appropriate disciplinary sanction is revocation of an existing PACA license. *See Gilardi Truck & Transportation, Inc.,* decided January 27, 1984, and *Finer Foods Sales Co., Inc.* v. *John R. Block,* 708 F.2d 774 (D.C. Cir. 1983). This was explained to respondent's counsel in advance of the hearing which was delayed to give respondent time to become current. But respondent still owed $90,000 to a produce seller at the time of the hearing. From that point on, my discretion in this case, under controlling Departmental policy, became most limited. This, too, was explained to respondent's counsel who was advised that unless he could arrange for a voluntary settlement with complainant before I entered my decision, I would have to treat this as a "no pay" rather than a "slow pay" case which, under *Gilardi* and other Departmental decisions, requires the revocation of an existing license. As a disciplinary sanction for respondent's violations of section 2(4) of the PACA, complainant seeks, instead of revocation, a finding that respondent, an unlicensed entity, committed repeated and flagrant violations of the Act and that the finding be published. This sanction has the same effect on a violator and persons responsibly connected with a violator as does license revocation. *Jarosz Produce Farms,* 42 Agric. Dec. ____ (Oct. 5, 1983).This sanction is appropriate under controlling Departmental policy in light of the number of violations, the seriousness of the violations, the impact of violations on the industry as a whole, and the financial status of respondent. Taking all these factors into consideration, the sanction sought by complainant shall be granted. *See, J. H. Norman & Sons Distributing Co.,* 37 Agric. Dec.705 (1978); *G. Steinberg & Son, supra,* 32 Agric. Dec. 236.

In addition to being a disciplinary proceeding, this is a proceeding to show cause why respondent's pending license application should not be denied. The burden of proof in such a proceeding initially falls upon the complainant who must demonstrate good

reason why the license application is being challenged. However, once the complainant has provided such good reason, the burden of proof shifts to the applicant to show cause why its application should be granted. *Pappas Produce*, 36 Agric. Dec. 684 (1977).

In the present case, complainant has established that respondent's sole officer, director and stockholder violated section 2(4) of the PACA by failing to make prompt payment to three sellers in excess of $250,000 worth of mixed fruits and vegetables. The evidence further established that as of the date of the hearing, respondent owed long overdue debts in a total amount of approximately $90,000 to one of these sellers, H. Schnell & Co. This evidence provides substantial and sufficient reason for the denial of respondent's license application. Respondent's evidence does not sustain the contrary conclusion.

Respondent's sole witness and President, Mr. Kim, made absolutely no attempt to refute or deny his failure and that of respondent to pay for the transactions alleged in the complaint, or the subsequent transactions with H. Schnell shown on Complainant's Exhibit No. 72. Instead, he explained the failures to pay these debts as they became due on the basis of unpaid loans totalling $500,000 he made to friends some two years ago. By so doing, Mr. Kim left his business undercapitalized which is a circumstance that is never condoned under the Act. The Department of Agriculture treats its issuance of a PACA license to an applicant as an attestation to the industry that the applicant is believed able and determined to comply with the Act's financial requirements. *V.P.C. Inc.*, 41 Agric. Dec. 734 (1982). Respondent's financial history prevents the Secretary from so attesting. Under these circumstances, the respondent's license application shall be denied.

ORDER

Respondent, Green Village Fruit & Vegetable, Inc., has committed repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)).

The application for a license made pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) by respondent is denied.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[Decision and Order became final on June 16, 1986.]

In re: BATTAGLIA DISTRIBUTING COMPANY, INC., PACA Docket No. 2-7167. Decided June 18, 1986.

Violated suspension as dealer—application granted but suspended for 90 days—Consent.

Edward M. Silverstein, for complainant.
Leroy W. Gudgeon, Northfield, IL, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a Notice to Show Cause proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter the "PACA"). The Notice to Show Cause was filed on May 1, 1986, alleging that the respondent was unfit for the issuance of a license under the PACA. A hearing was scheduled on May 22, 1986. During negotiations which took place at the hearing, the parties agreed to an amicable settlement of this matter. Therefore, pursuant to this agreement, the following decision and order is issued without further proceeding.

FINDINGS OF FACT

1. Respondent, Battaglia Distributing Company, Inc., is a corporation whose business address is 2545 South Ashland Avenue, Chicago, Illinois 60608.

2. The persons who are responsibly connected with respondent are as follows: Frank P. Battaglia, president, director, and 33.3 percent stockholder; Anthony J. Battaglia, treasurer, director, and 33.3 percent stockholder; Joseph L. Battaglia, secretary, director, and 33.3 percent stockholder; and Ernest A. Battaglia, vice-president.

3. August Battaglia Processing Company, an Illinois Corporation, whose address is also 2545 South Ashland Avenue, Chicago, Illinois 60608, was issued license no. 841376 pursuant to the licensing provisions of the PACA. This license is still in effect, and is next subject to renewal on June 6, 1986. The persons who are responsibly connected with this company are as follows: Frank P. Battaglia, vice-president, treasurer, director, and 33.3 percent stockholder;

Anthony J. Battaglia, president, director, and 33.3 percent stockholder; Joseph L. Battaglia, secretary and 33.3 percent stockholder; and Ernest Battaglia, vice-president. Also, August J. Battaglia and George Battaglia are vice-presidents.

4. August Battaglia Company, Inc., is an Illinois corporation whose address is 15 South Water Market, Chicago, Illinois 60608, which was issued PACA license no. 106488 on March 27, 1947. This license terminated on March 27, 1986, pursuant to section 4(a) of the PACA (7 U.S.C. 499d(a)) when the firm failed to pay the required annual renewal fee. The persons who were responsibly connected with this company were as follows: Frank P. Battaglia, vice president, treasurer, and director; Anthony J. Battaglia, president and director; Joseph L. Battaglia, secretary and director; and Ernest Battaglia, vice-president. Also, August J. Battaglia and George C. Battaglia were vice-presidents, and A. Battaglia Holding Company was its 100 percent stockholder.

5. An audit of the business records of August Battaglia Company, Inc., was conducted from January through March 1985, in connection with a reparation complaint filed against it pursuant to section 6 of the PACA (7 U.S.C. 499f) by a shipper. This audit established that, from September 1983 through November 1984, August Battaglia Company, Inc., failed to account truly and correctly, and also failed to make full payment promptly, to five shippers of the net proceeds realized from the sale of fruit, all being perishable agricultural commodities, received and accepted on consignment, in interstate commerce. The amount which August Battaglia Company, Inc., was found to have underreported and underpaid to its principals totalled $50,901.54. August Battaglia Company, Inc., agreed to, and did, make full restitution to these shippers. Thereafter, pursuant to section 6(c) of the PACA (7 U.S.C. 499f(c)), a disciplinary complaint was filed and served upon August Battaglia Company, Inc. The corporation answered the complaint, admitted its violations of the PACA, and consented to the suspension of its PACA license for 45 days. On January 22, 1986, a Decision and Order was issued suspending the PACA license of August Battaglia Company, Inc., for the 45 day period January 22, 1986, through March 7, 1986. *See* PACA Docket No. 2-7048. By letter dated January 27, 1986, the responsibly connected persons affiliated with August Battaglia Company, Inc., named in paragraph 4 above, were advised as to the issuance of the Decision and Order, and also were advised that they were under employment and licensing restrictions during the license suspension period.

6. During the January 22, 1986, through March 7, 1986, suspension of the PACA license of the August Battaglia Company, Inc.,

August Battaglia Processing Company did not operate as a dealer as that term is defined in section 1 of the PACA (7 U.S.C. 449a).

7. On May 22, 1985, an application for a license pursuant to the provisions of the PACA was received from respondent. Respondent stated on its application that it had conducted business subject to the PACA since May 21, 1985. This application was returned to respondent for correction and amendment by a certified letter dated June 11, 1985, which was received by respondent on June 14, 1985. The firm resubmitted a completed application on July 23, 1985, but by letter dated August 12, 1985, requested that the application be withdrawn. Accordingly, under cover of certified letter dated August 22, 1985, and received by respondent on August 26, 1985, the application was returned. At that time respondent was warned that it could not operate subject to the PACA without holding a valid and effective license.

8. Despite being warned that it could not operate without holding a valid and effective license, respondent continued to operate as a dealer, as that term is defined in section 1 of the PACA (7 U.S.C. 499a). Such operation continued until on or about February 26, 1986.

9. Even before receiving the August 22, 1985, warning letter, respondent had operated as a dealer as that term is defined in section 1 of the PACA (7 U.S.C. 499a), but without holding a valid and effective PACA license in that, since at least August 22, 1983, it purchased numerous lots of perishable agricultural commodities in interstate and foreign commerce in sufficient quantities to require being licensed.

10. The acts of August Battaglia Company, Inc. in failing to truly and correctly account and make full payment promptly for consignment transactions as found in paragraph 5 above, constitute willful, repeated and flagrant violations of the PACA and also constitute practices of a character prohibited by the PACA.

11. The acts of respondent in operating as a dealer as that term is defined in section 1 of the PACA (7 U.S.C. § 499a), without holding a valid and effective license in violation of section 3 of the PACA (7 U.S.C. § 499c), from August 22, 1983, through February 26, 1986, and in particular during the 45-day period, January 22, 1986, through March 7, 1986, when the license of August Battaglia Company, Inc., was suspended, as found in paragraphs 9 and 10 above, constitute willful, repeated and flagrant violations of the PACA and also constitutes a practice of a character prohibited by the PACA.

CONCLUSION

The acts of August Battaglia Company Inc. referred to in paragraph 10 of the Findings of Facts as well as the acts of respondent referred to in paragraph 11 of the Findings of Facts, in particular respondent's in operation as a dealer as that term is defined in section 1 of the PACA without holding a valid and effective license during the period January 22, 1986, through March 7, 1986, when it was barred from so operating as a consequence of the suspension of its sister corporation August Battaglia Company, Inc., constitutes a willful, repeated and flagrant violation of the PACA, and also constitutes a practice of a character prohibited by the PACA. In view of this, the following order is issued.

ORDER

The respondent's application for a PACA license shall be granted on the effective date of this order.

Respondent's license is suspended for 90 days from the effective date of this order.

The effective date of this order is June 30, 1986.

Chief Administrative Law Judge John A. Campbell retains jurisdiction of this matter until 120 days after the effective date thereof. During this 120 day period, the complainant may file a motion seeking revocation of respondent's license on the basis that respondent, any of its responsibly connected individuals, or any entity with which its responsibly connected individuals, are employed as that term is defined in section 1(10) of the "PACA" (7 U.S.C. § 499a(10), has violated the terms of the 90 day suspension order.

If the respondent and/or any of its responsibly connected persons and/or any entity which employs its responsibly connected persons violate the terms of the 90 day suspension ordered above, the respondent consents to the revocation of its PACA license.

Copies of this order shall be served upon the parties.

REPARATION DECISIONS

MIC BRUCE, INC., a/t/a SINGER'S, *v.* CHIQUITA BRANDS, INC., PACA Docket No. 2-6608. Decided May 1, 1986.

Uniform Commercial Code—Custom of the industry—course of conduct—good delivery standards for bananas—proof of damages—reparation awarded.

Although there are no published standards to determine whether bananas make good delivery, the Secretary has jurisdiction to make such a finding, and will do so by applying a reasonable test. Where respondent claims it is not liable for damages because the custom of the industry is to settle on basis of f.o.b. price plus costs, it must prove such custom by showing specific instances. Since respondent failed to do so, and failed to prove acquiescence in such method by complainant, it is liable for damages in those cases in which complainant proved the bananas did not make good delivery.

Dennis Becker, Presiding Officer.
Stephen P. McCarron, Esquire, Silver Spring, MD, for complainant.
John G. Ingram, Esquire, New York, NY and *Richard J. Reisert, Esquire*, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $66,697.25, plus interest, in connection with fourteen transactions involving the purchase and sale of bananas during the months of March through May, 1983, in interstate and foreign commerce.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting that it owed complainant $9,286.00, and denying any liability to complainant with respect to the remaining $57,411.25. An order requiring respondent to pay complainant the undisputed amount was issued on September 18, 1984, leaving the question of liability for the remainder to be resolved in an oral hearing. Depositions were taken in which both parties were represented, and an oral hearing was held in Montvale, New Jersey, on June 11, and 12, 1985. Both parties were represented by counsel. Thereafter, both parties filed briefs.

FINDINGS OF FACT

1. Complainant, Mic Bruce, Inc., also trading as Singer's, hereinafter referred to as respondent or Singer's, is a corporation with an address at Unit 26, 4000 Orange Avenue, Northern Ohio Food Ter-

minal, Cleveland, Ohio 44115. At the time of the transactions at issue in this proceeding complainant was licensed under the Act.

2. Respondent, Chiquita Brands Inc., hereinafter referred to as respondent or Chiquita, is a corporation with an address at 15 Mercedes Drive, Montvale, New Jersey, 07645. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

3. Complainant and respondent had engaged in business with each other for at least two years prior to the date of the transactions involved in this proceeding. In those prior transactions complainant purchased bananas from respondent on frequent occasions. On three occasions prior to the transactions at issue in this proceeding complainant notified respondent that the bananas which it purchased were not in accord with contract specifications. Respondent afforded complainant adjustments for each of those transactions based upon what has been its longstanding practice in making adjustments when bananas arrived at their destination in other than a condition which is in accordance with contract specifications. Complainant accepted the amounts of money offered by respondent with respect to each of those transactions. However, with respect to two transactions which occurred in November 1982, complainant accepted the allowances under protest. Complainant stated in a letter dated December 29, 1982, that it did not have time to contest what it believed to be unfair settlements with respect to the two transactions, but that it would not permit such alleged unfairness to occur in the future. It also stated that one way or the other respondent would end up having to pay for its supposedly arbitrary method of settling contract disputes.

4. There are no published federal standards with respect to the quality or condition which bananas must manifest at shipping point or destination in order to make good delivery. Respondent, however, has developed and applied for many years its own method of granting adjustments to purchasers of its bananas based on the free on board price paid by the purchaser plus the purchaser's expenses, such as trucking, sorting and other handling, as computed by respondent. Respondent has not granted any adjustments based upon lost profits because the bananas did not meet contract specifications. Respondent applied its usual method with respect to the three transactions which occurred prior to 1983 in which complainant filed claims for adjustments. Respondent also utilized its own method of computing adjustments with respect to the fourteen transactions at issue in this proceeding, but did not specify in its accountings to complainant how it arrived at its final computation as to what the adjustments should be.

5. Commercial bananas are not grown in the United States. Rather, they are grown in Latin America, and shipped from the various countries to ports in the United States aboard vessels, where they are unloaded for further transportation to ultimate destination. Transportation from Latin America to port in the United States normally takes less than one week.

6. When bananas are loaded and shipped their skin has a dark green color. Respondent performs an inspection at shipping point in Latin America. The bananas are shipped under controlled temperature conditions in the vessels, so as to assure that they arrive in good commercial condition. At the port of destination the bananas are inspected again as they are unloaded to ascertain that their condition has not deteriorated during transit. This is called a discharge inspection. In addition, a sample of bananas is taken from the full shipment, and set aside by respondent for further inspection at a later time so as to determine whether after shipment from port to ultimate destination the bananas should have continued to be in good commercial condition. This is called an after-ripe inspection.

7. After the inspection on unloading the bananas from the vessel, bananas are reloaded aboard trucks or other transport for transportation to their ultimate destination. They are generally sold by respondent to the buyer free on board the port of discharge. Instructions are given to the transporters of the bananas as to the temperatures that are to be maintained during inland transit.

8. At destination, the bananas are unloaded by the receiver, and taken into its place of business for further ripening and eventual sale. Ripening occurs in special rooms for that purpose, and can be controlled so as to take as much as ten or twelve days to reach the desired amount of ripeness. Chiquita's practice has been that in the event the receiver or buyer determines that the bananas do not meet quality and condition standards under the applicable contract, the buyer must pay the full contract price, and wait for any potential refund from respondent. In order to prove that the bananas were not in accordance with contract specifications a receiver or buyer is required to notify respondent within 48 hours of their arrival that it believes the bananas have quality or condition defects. The receiver or buyer must also file a formal written complaint in which it specifies the amount of damages it claims within 60 days after it has received the bananas. Respondent provides its own inspector to ascertain the quality or condition of the bananas as soon after it receives notification as is possible. It is generally accepted that the inspections provided by respondent are excellent in terms of quality, and complainant acknowledged such is the

case. It is the usual practice of Chiquita to inspect only for the defects complained about in the claim filed by the receiver or buyer within 48 hours of their receipt, although at times it may also look for defects complained about in the written complaint.

9. On March 23, 1983, the vessel Rio Babahoya docked at Albany, New York. It contained bananas shipped in foreign commerce by respondent. Respondent unloaded bananas from that ship on that date, and loaded three trucks for delivery to complainant in Cleveland, Ohio. The sale price was $10.00 per carton for each load, f.o.b., plus $1,038.00 as a fuel surcharge, $934.20 for handling, and $45.00 for temperature recorders, for a total contract price for the three transactions of $27,967.20. Complainant made timely payment of this amount to respondent. Complainant also paid $1,742.31 for freight, bringing its total costs to point of destination to $29,709.51. One shipment with 875 cartons arrived on March 24, 1983, and the other two shipments arrived at respondent's place of business on March 25, 1985. They involved 870 and 850 cartons. The inspection at the port of discharge showed that the pulps of those bananas which were inspected ranged between 56 degrees and 58 degrees fahrenheit. The temperature recorders with respect to the load which arrived on March 24, 1983, and one of the loads which arrived on March 25, 1983, showed that the temperature of the carrying portion of the truck was 58 to 60 degrees fahrenheit and 64 to 66 degrees fahrenheit, respectively. The pulp temperatures of those two loads were recorded on arrival in Cleveland as 57 to 58 degrees fahrenheit and 62 to 63 degrees fahrenheit, respectively. The pulp temperature of the third truck on arrival was shown to be 54 to 58 degrees fahrenheit. Complainant received, accepted and unloaded the three truckloads of bananas. It also notified respondent within 48 hours of acceptance that it believed the bananas had difficulties, and stated orally that it believed that they were ripe and turning. Subsequently, complainant filed a written complaint in which it stated that "fruit was showing a chill effect w/out any other characteristics of chill except the grey cast to the peel. All temperatures w/in tolerance." In the remarks section of that same form respondent wrote "complaint on discoloration (and after ripening) on arrival. Customer requested our QC inspection." The bananas were inspected on March 28, 1983. The inspection showed with respect to the load which arrived on March 24, 1983 that eight percent of the bananas were ripe and turning or ripe. With respect to the truckload containing 850 cartons which arrived on March 25, 1983 it showed 14 percent of the cartons were ripe and turning or ripe. Complainant claimed to have lost $1,458.10 with respect to the load which arrived on March 24, 1983,

and $2,598.50 and $1,710.25 with respect to the two loads which arrived on March 25, 1983. Its total claim with respect to the three loads was $5,766.85. Complainant conveyed these claims to respondent. Sometime thereafter respondent made a settlement offer of $4,000.00. Respondent did not explain to complainant how it arrived at the $4,000.00 settlement figure. Having previously paid the contract price for the three loads of bananas in full complainant accepted the $4,000.00 as a partial settlement.

10. On March 31, 1983, the vessel Rio Sulaco docked at Charleston, South Carolina. It contained bananas shipped in foreign commerce by respondent. The bananas were unloaded from the Rio Sulaco on March 31, 1983, and placed aboard trucks for shipment to various receivers. Four loads were destined for complainant. The sale price was $9.00 per carton for each load, f.o.b., plus $1,358.40 as a fuel surcharge, handling charges of $1,154.00 and $90.00 for temperature recorders, for a total contract price for the four transactions of $33,167.04. Complainant made timely payment of this amount to respondent. Complainant also paid $3,483.99 for freight and $678.40 for handling, bringing its total costs to point of destination to $37,329.43. Two shipments arrived on April 2, 1983, one with 848 cartons and the other with 850. One shipment of 848 cartons arrived on April 4, 1983, and the fourth shipment with 850 cartons arrived on April 5, 1983. The bananas were inspected at the port of discharge and showed scorable defects between 3.4 percent and 4.1 percent with ripe and turning bananas between 0.8 percent and 1.5 percent. They showed pulp temperatures of 58 to 60 degrees fahrenheit. The pulp temperature on arrival on April 2, 1983 of one truck was 58 to 60 degrees fahrenheit. The pulp temperatures on arrival of the truck which arrived April 4, 1983 was 60 to 65 degrees fahrenheit. The temperature recorders with respect to the two loads which arrived April 2, 1983 showed carrying temperatures on the trucks of 55 to 56 degrees fahrenheit and 57 to 58 degrees fahrenheit, respectively. There were no temperature recordings shown with respect to the loads which arrived on April 4, 1983 and April 5, 1983. With respect to all four loads complainant made a request for inspection by respondent within 48 hours after the bananas arrived. With respect to the two loads which arrived on April 2, 1983, complainant based its initial claim for reimbursement on the fact that the bananas showed a grey color. With respect to the load that arrived on April 4, 1983, complainant filed its initial claim on the basis that the bananas were ripe and turning, and subsequently made its written claim on the basis that the bananas showed chill. All loads were inspected by respondent. The record shows specifically only with respect to the load of bananas

which arrived on April 4, 1983, that it was inspected on April 13, 1983. However, all loads were inspected on or about that date. The inspection reports for all loads show that 30 percent of the bananas had underpeel discoloration. With respect to the two loads of bananas which arrived on April 2, 1983, complainant claimed it lost $918.50 and $2,328.75, respectively, for a total loss on the two loads of $3,247.25. Respondent declined to give any settlement with respect to these two loads, but did not state its reasoning in declining to do so. With respect to the loads which arrived on April 4, 1983, and April 5, 1983, complainant claimed it lost $2,597.64 and $2,148.02, respectively, for a total claim of $4,745.66. After inspection respondent offered $1,365.00 in settlement without explaining its reasons why. Having previously made full payment with respect to these two loads complainant accepted the $1,365.00 as a partial settlement.

11. On April 7, 1983, the vessel Chion Trader docked at Charleston, South Carolina. It contained bananas shipped in foreign commerce by respondent. Respondent unloaded bananas from the ship on that date, and loaded three trucks for delivery to complainant in Cleveland, Ohio. The sale price was $9.50 per carton for each load, f.o.b., plus $1,030.00 as a fuel surcharge, $875.50 for handling, and $67.50 for temperature recorders, for a total contract price for the three transactions of $26,435.50. Complainant made timely payment of this amount to respondent. Complainant also paid $2,771.20 for freight, bringing its total costs to point of destination to $29,206.70. One truck carrying 875 cartons of bananas arrived on April 11, 1983, and the other two trucks, each carrying 850 cartons of bananas, arrived on April 12, 1983. The inspection at the port of discharge showed that the pulps of those bananas which were inspected ranged between 56 and 60 degrees fahrenheit. The temperature recorders with respect to the carrying portion of the trucks were 60 to 64 degrees for the load which arrived on April 11, 1983, and 58 to 66 degrees and 58 to 61 degrees, fahrenheit, respectively, for the loads which arrived on April 12, 1983. Inspections at the time of arrival show that the pulp temperatures of the bananas were 60 to 61 degrees, 59 to 61 degrees, and 59 to 60 degrees, respectively. Complainant received, accepted and unloaded the three truckloads of bananas. Complainant filed a complaint with respect to the condition of the three loads within 48 hours of their arrival, stating that they were mutilated, old, scarred, and of mixed grade. Subsequently, complainant filed a written complaint in which it stated that the reason for the complaint was that "upon ripening fruit was showing an off-color cast of grey as if to show chill without any other characteristics of chill and temperatures O.K. on ar-

rival." In the remarks portion of that same form respondent wrote "QC inspection after ripening brown discoloration." The bananas were inspected on April 13, 1983. The inspection showed with respect to two of the three loads that 35 percent (for the load arriving April 11, 1983) and 42 percent (for one load arriving April 12, 1983), of the clusters did not meet specifications. The inspection also appeared to show there was considerable underpeel discoloration. Complainant claimed that it lost $1,419.26, $1,611.00, and $1,924.25 with respect to the three loads for a total claim of $4,954.51. Complainant conveyed these claims to respondent. Respondent offered $2,000.00 in settlement with respect to one of the three loads which contained 850 cartons because it knew the bananas in that load had come from a hold in which there was considerable underpeel discoloration. Having previously paid the contract price for the bananas, complainant accepted the $2,000.00 offered as a partial settlement.

12. On May 4, 1983, the vessel Rio Babahoya docked at Albany, New York. It contained bananas shipped in foreign commerce by respondent. The vessel had been on the seas for a period of 12 days. Respondent unloaded the bananas on that date and loaded three trucks from Hold No. 4 for delivery to complainant in Cleveland, Ohio. The sale price was $11.50 per carton for each load, f.o.b., plus $1,020.00 as a fuel surcharge, and $918.00 for handling, for a total contract price for the three transactions of $31,263.00. Complainant made timely payment of this amount to respondent. Each truck contained 850 cartons. One truckload of bananas arrived at respondent's place of business on May 5, 1983, and two truckloads arrived on May 6, 1983. The inspection at port of discharge showed that the pulps of those bananas which were inspected ranged between 57 and 60 degrees fahrenheit. The bananas which came from Hold No. 4 showed that 3 percent were ripe and turning, and that there were a number of other condition defects. The pulp temperatures of the three loads on arrival in Cleveland were recorded as 57 to 60 degrees, 59 to 60 degrees, and 62 to 65 degrees fahrenheit, respectively. Complainant received, accepted and unloaded the three truckloads of bananas. Complainant notified respondent it was filing a claim on May 11, 1983. It filed a written complaint on or after that date in which it stated "These loads appeared to be old fruit. Upon arrival showed a slight discoloration, as if they were chilled, but temperatures were within tolerance. Upon ripening showed excessive discoloration and scarring with deep bruises—crown mold and occasional rot." The basis of its complaint was underpeel discoloration and the fact that the bananas were old. Respondent inspected the bananas on May 13, 1983. Its inspection re-

sulted in findings that "fruit appears fairly decent at end, but after processing too many show poor color but most not from chilling, and "100 boxes examined—sample divided between 3 rooms and 3 loads all gassed—avg color of all clusters 3—3½ OC—scattered throughout—34% med/sev—5%—off color from chilling 15%—Med/sev. 4%. Mostly large full mature fruit, 5% of boxes clusters showing ugly brownish outer peel discoloration and excessive amounts of CM/CR—NI/NR very mixed appearance, poor to fair." With respect to the three truckloads of bananas complainant claimed a total loss of $10,608.20. Respondent granted no adjustment with respect to the three truckloads.

13. On May 27, 1983, the vessel Olancho docked at the port of Albany, New York. It contained bananas shipped in foreign commerce by respondent. Respondent unloaded bananas from that ship on that date, and loaded one truck on that date for delivery to complainant in Cleveland, Ohio. The sale price was $10.00 per carton for 850 cartons, f.o.b., plus charges for a fuel surcharge, handling and a temperature recorder of $678.00, for a total contract price of $9,178.00. Complainant made timely payment of this amount to respondent. The shipment arrived at complainant's place of business on May 31, 1983. Complainant received, accepted and unloaded the bananas on that date. It immediately complained to respondent about the condition of the bananas. The inspection at port of discharge showed that the pulps of the bananas ranged from 58 to 60 degrees fahrenheit. It also showed that 90 percent of the clusters met specifications. The truckload arrived at complainant's place of business in Cleveland, Ohio on May 31, 1983, where it was received, accepted and unloaded. Upon arrival the temperature gauge for the carrying portion of the truck showed that the air temperature ranged during transit from 58 to 64 degrees fahrenheit. The pulps of the bananas on arrival were shown to be 61 to 62 degrees fahrenheit. Complainant filed an oral claim, and requested within 48 hours of their arrival that respondent inspect the bananas. The basis of its oral complaint was that the bananas showed mold, were old, ripe and turning, scarred and short. The basis of its written claim was the same. Complainant also said "This load was absolute *garbage.* The *WORST* load of bananas I ever received since entering the banana business." This complaint was filed on July 20, 1983. The bananas were inspected by respondent on June 1, 1983. The inspections showed that 45 percent of the bananas met specifications. Complainant claimed a loss with respect to the truckload of bananas of $6,369.10 based on costs of $9,178.00 less $3,424.50 fetched on resale as shown by its account of sale. Respondent of-

fered $1,921.00 in settlement. Complainant accepted the $1,921.00 as partial payment in settlement of the claim.

14. The total amount claimed by complainant with respect to the 14 loads of bananas described in paragraphs 8 through 12, above, was $35,691.57. The total amount granted by respondent in settlement was $9,286.00, leaving $26,405.57 of the initial claims by complainant unsatisfied.

15. Subsequent to the denials of the claims in the amount of $26,405.57, and more than 60 days after delivery, complainant on the advice of counsel, claimed allegedly lost profits as part of its damages, thereby raising its total claim to $66,697.25 less the $9,286.00 which had been granted by respondent, leaving a net amount it claimed as owed to it of $57,411.25, plus interest.

16. A major basis for the claims of damages with respect to the 14 transactions was that the bananas showed underpeel discoloration. Other claim bases were stated to be chill effect, grade, color, chill, off color, discoloration, and rot. With respect to the load which was unloaded from the Olancho there does not appear to have been a claim as regards chill effect or underpeel discoloration. Chill effect is generally manifested by a grey tone to the outer skin of the banana or speckling on the underpeel side of the banana. With very rare exceptions these two physical characteristics only occur if the bananas have been chilled below proper temperatures. The evidence of record with respect to the 13 transactions for which chill damage or underpeel discoloration was claimed shows that to the extent they were available at hearing the pulp temperatures of the bananas on arrival at the complainant's place of business in Cleveland, Ohio were at or above the pulp temperatures of the bananas when the bananas were discharged at port from the vessels which carried them in foreign commerce, with the exception of the load from the Rio Babahoya which arrived at the port of Albany on March 23, 1983 and at complainant's place of business with 850 boxes on the truck on March 25, 1983. There, the temperature of the pulp of the bananas on arrival was 54 to 58 degrees fahrenheit, whereas the temperature of the pulp of the bananas at discharge was 56 to 58 degrees fahrenheit. With respect to two transactions on the Rio Sulaco which arrived at the port of Charleston on March 31, 1983, pulp temperatures on arrival were not shown. In addition, the temperature devices contained in the carrying portion of the truck with respect to seven of the thirteen transactions showed that the bananas were carried at temperatures at or above the minimum at which they must be carried to obviate the occurrence of chilling. Records were not provided with respect to the temperatures at which the bananas were carried

from port of loading to port of discharge by respondent. Neither did complainant provide records as to the temperatures at which it ripened the bananas after it accepted delivery. The minimum temperature at which bananas may be held over a period of time without risk of chill effect, as manifested by grey color or underpeel discoloration, is 55 degrees fahrenheit. Even if the bananas were carried at a temperature slightly below 55 degrees fahrenheit for a period up to eight hours, it is unlikely that chill effect would occur.

17. A formal complaint was filed in this proceeding on April 3, 1984. An informal complaint was filed on September 21, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

The issues in this proceeding are unique and difficult of resolution. This is particularly so because, although there were no federal inspections of the bananas either at port of discharge or at complainant's place of business with respect to the fourteen transactions at issue in this proceeding, it is clear that both parties accept the validity of inspections by respondent insofar as the accuracy of the findings is concerned. However, the parties differ as to the interpretation which should be placed upon those findings. The case is further compounded by the fact that there are no federal standards with respect to condition or quality factors for the bananas. Therefore, a necessary step in the resolution of the dispute is to determine whether, given the nature and kind of defects found in the bananas upon respondent's inspections both at point of discharge and at complainant's place of business the bananas made good delivery. In effect, the tribunal must engraft upon this case reasonable tests as to the percentage of condition defects bananas may have at destination for it to determine whether they made good delivery. We derive some help in this regard through the conduct of respondent in granting allowances. We are also helped to some extent by looking at federal standards for other fruit, and to a lesser degree by an analysis of complainant's accounts of sale, which show the extent to which complainant lost money when it resold the bananas. In addition, in those instances in which we may find the bananas did not make good delivery, we must determine whether the adjustments in price granted by respondent were appropriate.

Complainant contends that it is entitled to damages, based upon the condition of the bananas when they arrived at its place of business. Although originally it filed lesser claims based primarily on its actual costs less sales price, it now contends that it is entitled to

the difference between the price the bananas would have fetched on resale at the market had they made good delivery and their actual value as manifested by the price fetched at resale. Respondent, on the other hand, contends that complainant cannot make such a claim. It offers three theories for why its computation and proffered allowances are proper. First, it claims that the custom of the trade with respect to bananas is such that the adjustments which are awarded when the shipper of the bananas finds that the receiver is entitled to an adjustment will be based on the free on board price plus expenses such as handling, trucking, and repacking that portion of the load which was not in suitable condition upon arrival. It also claims that insofar as complainant is concerned, by virtue of a course of conduct between complainant and respondent over a period of two years with respect to settlements, complainant has accepted respondent's methodology for the settlement of claims. Third, it claims that when it submitted its initial claims complainant engaged in a course of performance in which it used the delivered costs less the value of the bananas on resale, which course of performance restricted it to respondent's method of computing damages utilizing such delivered costs, which is the same as f.o.b. pricing plus other expenses.

Before discussing whether there are standards for condition defects which may be applied, we must address respondent's intriguing claim that since there are no federally published standards by which to determine whether bananas made good delivery Chiquita cannot be held to have violated section 2 of the PACA (7 U.S.C. § 499b). Section 6(a) of the Act (7 U.S.C. § 499f(a)) provides that "Any person complaining of any violation of any provision of Section 2 of this Act . . . may "file a complaint with the Secretary." Section 6(c) of the Act (7 U.S.C. § 499f(c)) provides for investigations of such complaints, and if the investigation reveals there may have been a violation, a hearing on the issues. These are the provisions which trigger reparation proceedings such as the one with which we are concerned here.

Section 2 of the PACA (7 U.S.C. § 499b) provides in pertinent part:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * * * * *
>
> (2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or

contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.

It is the above-quoted provisions with which we are concerned in this proceeding.[1]

Section 6(a) of the PACA clearly contemplates that in order to initiate a reparation proceeding the complaining party must allege that there has been a violation of section 2. Complainant did so. Section 6(d) of the Act (7 U.S.C. § 499f(d)) provides in pertinent part that after oral hearing the Secretary shall determine whether a dealer has violated any provision of section 2 of the PACA. The Secretary has made such determination in prior cases involving bananas in which their condition was in issue. See *Ecuadorian Fruit Import Corporation* v. *L & S Bananas*, 18 Agric. Dec. 485 (1959); *Ecuadorian Fruit Import Corporation* v. *Matthew Mercurio*, 16 Agric. Dec. 1245 (1957). Respondent's argument that there must be published federal standards before there can be a violation of section 2 must necessarily fail. There is no requirement in the PACAthat standards be established for the largest amount of condition defects a commodity of a given grade may show and still make good delivery. Rather, the Department has established such standards, primarily for commodities which are grown domestically, as the need has arisen to assist in the federal inspection of fruits and vegetables. The lack of federal standards does not affect the principle of whether a commodity makes good delivery. Rather, such standards establish a method by which to apply the principle. The lack of such standards merely forces this tribunal to find alternative, fair methods by which to determine whether a commodity has made good delivery.

In the usual reparation case under the Perishable Agricultural Commodities Act in which a party claims that a fruit or vegetable has not made good delivery there are published standards with respect to the condition which such product must meet at point of destination, dependent upon its grade, in order to meet contract specifications. Proof of a breach of contract on the part of the seller because it did not ship goods which made good delivery is most easily done based upon a federal inspection. When the product has greater than a specified percentage of condition defects it is said not to have made good delivery, as a result of which the receiver or buyer can then claim damages based upon the differential between the price fetched on resale and the market price, or on some other

[1] Respondent's brief addressed whether this portion of section 2 and section 2(5) were applicable. Section 2(5) deals with what is known as "misbranding" rather than breaches of contract, and need not be discussed further.

formula. Here, where there are no published standards with respect to the condition of bananas at the point of destination, and where the general practice is not to obtain a federal inspection, the resolution of a dispute in which a party claims that the bananas did not make good delivery is much more difficult. Based upon the evidence in this proceeding, in which both parties acknowledge that the inspections performed by the respondent are very well performed, and accurately describe the condition of the bananas both at port and at their ultimate destination, with one exception we accept the findings in those inspection reports as being accurate, and sufficiently probative of the issue of the condition of the bananas for use in this proceeding. See *Commonwealth Fruit & Produce Company, Inc.* v. *Idaho Falls Bonded Produce & Supply Co.*, 32 Agric. Dec. 1734 (1973); *Henry Skeba* v. *Battleground Farms*, 18 Agric. Dec. 183 (1959). However, our acceptance of such reports does not resolve the ultimate question with respect to condition, which is what standard should be applied.

In *Ecuadorian Fruit Import Corporation* v. *L & S Bananas*, *supra*, the issue as to how to deal with condition defects in bananas was raised indirectly. However, it is helpful in this proceeding. In that case the complainant complained that the bananas were green select, whereas respondent said that they were not. A witness testified that there were four grades of classification for bananas at that time; *i.e.*, select, special (reject), turning, and ripe, and that there was a differential in price between each such grade. The witness defined select as "green, proper grade and finger size, clean and uniform". The evidence in this proceeding shows that the classification of bananas has progressed substantially from the period of time involved in *Ecuadorian Fruit*. However, it is important to acknowledge that purchasers and sellers of bananas have long known that there are various grades which result in price differentials. Indeed, in *Ecuadorian Fruit* the tribunal stated that "there was an implied warranty that the bananas would ripen properly under normal ripening procedures. Complainant knew from the nature of the business, as well as previous sales to respondent, that respondent intended to ripen the green bananas prior to selling to stores." (Id. at 489) Such is also the case here. The testimony of complainant, through its witness Michael Zurowski, showed clearly that complainant expected to receive green bananas of high quality (a condition as to which Chiquita prides itself), that it had ripening rooms of excellent quality for bananas, and that it utilized these ripening rooms after receipt of the bananas in order to get them to an appropriate stage for resale to other businesses. It is both upon the receipt of the bananas by complainant, and during the subse-

quent ripening process that the bananas underwent in complainant's ripening rooms, that the various condition defects of the bananas became clearly discernible.

One way to determine whether the bananas made good delivery is to ascertain the percentage of condition defects which is tolerable at the time of shipment to or receipt at the ultimate destination by complainant. Such resolution is consonant with applicable PACA procedures for commodities for which there are published condition standards. This method is consistent with the requirement that a seller must sell goods which are in suitable shipping condition. The warranty of suitable shipping condition placed upon a seller of goods is defined in section 46.24(j) of the regulations issued pursuant to the PACA (7 CFR § 46.24(j)) "to mean, in relation to direct shipments, that the commodity at the time of billing is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery at the destination specified in the contract of sale without abnormal deterioration." *John M. Evans Produce Co.* v. *D. L. Piazza Company*, 18 Agric. Dec. 1452, 1454 (1959). An inspection of the various allowances for condition defects with respect to certain kinds of fruit of U.S. No. 1 quality for which standards have been promulgated reveals that the percentage of condition defects permissible at shipping point ranges between 8 and 10 percent, with between 4 and 5 percent permissible serious damage at shipping point. At destination, for those commodities for which there are tolerances given the range tends to be between 10 and 12 percent with a range of 5 to 6 percent for serious damage. For U.S. No. 1 cantaloupes, at shipping point there may be 8 percent condition defects by count with not more than 4 percent serious damage, and at destination 12 percent condition defects with not more than 6 percent serious damage (see 7 CFR 51.476). For U.S. No. 1 melons there may be 10 percent condition defects by count at shipping point with not more than 5 percent serious damage. No tolerances are given at destination (See 7 CFR 51.3744). For U.S. No. 1 nectarines there may be 8 percent condition defects by count with not more than 4 percent serious damage at shipping point and 12 percent condition defects with not more than 6 percent serious damage at destination (See 7 CFR 51.3150). For U.S. No. 1 pineapples there may be 10 percent condition defects by count at shipping point with not more than 5 percent serious damage. No tolerances are given at destination. (7 CFR 51.1486). For U.S. No. 1 watermelons there may be 10 percent condition defects by count at both shipping point and destination with not more than 5 percent serious damage. (See 7 CFR 51.1973).

An analysis of the standards for the fruits and melons described above shows that 10 percent grade and condition defects, with not more than five percent involving serious damage, at shipping point, including not more than one percent decay (rot), is a reasonable standard for bananas. In order to determine whether the bananas in the 14 transactions involved in this proceeding made good delivery, we shall apply that criterion as one of the methods by which we can draw conclusions. Both parties implicitly agree that underpeel discoloration or ripe and turning bananas are serious condition defects. It is axiomatic that rot is a serious condition defect. Therefore, it is reasonable to conclude that up to eight percent serious damage by discoloration should be allowed for the bananas to make good delivery at destination on an f.o.b. sale, but not more than three percent of that amount may be decay (rot). We apply a more lenient standard at destination because tolerances for such defects are typically more lenient there than at the shipping point. See *Pope Packing & Sales, Inc.* v. *Santa Fe Vegetable Growers Cooperative, Inc.*, 38 Agric. Dec. 101, 104–105 (1979); *Denise & Filice Packing Co.* v. *Super Food Services, Inc.*, 38 Agric. Dec. 744, 746–747 (1979). Under such circumstances this tribunal has a basis by which to make the necessary threshold determination for most of the transactions as to whether the bananas made good delivery based upon percentages of condition defects.

In evaluating whether the parties agreed on the method by which damages would be computed we conclude that there is no written document which sets forth the full understanding of the parties. The invoice sent by respondent with respect to each transaction contains some terms and conditions with respect to filing claims, but does not contain a statement of the methodology by which allowances will be granted. The obverse of the invoice states in pertinent part:

> 5. *Claims*—Notice of every claim in respect of Products must be given, orally or in writing . . . within 48 hours after the Products arrive at Purchaser's ripening premises. Such Notice will specify the defect or defects complained of, the date of such arrival and the date the Products will leave the ripening premises, and must assure Company an opportunity to inspect the Products. A formal claim or Company Form SC–10 with supporting loss statement must be filed with local Company representative within 60 days after giving such notice. Purchaser shall make all reasonable efforts to minimize losses in respect of products claimed to be defective. . . .

6. *Adjustments*—Company agrees to investigate every claim made as provided above and will make prompt and fair adjustment thereof if found meritorious. Purchaser, however, shall in every instance pay to Company the full amount of the invoice without any deduction or set off whatsoever.

The above terms had been in effect for about 25 years prior to 1983. Complainant had received invoices from respondent containing those terms for at least the two years preceding the transactions in issue in this proceeding. Therefore, we conclude that it knew of them, and that even though complainant had not signed a document expressly agreeing to these terms, by course of conduct both parties have agreed to them with respect to the settlement of claims. However, other than those contained on the front of the invoices we also conclude that these are the only provisions to which the parties have agreed.

Complainant met both conditions set forth in paragraph 5, above, when it notified respondent of a claim in which it specified the defects in 11 of the 14 transactions within 48 hours of its receipt of the bananas in Cleveland. It also provided respondent with written claims for all 14 transactions in which it set forth the bases thereof along with a statement of losses within 60 days of its receipt of the bananas. In addition, complainant faithfully paid respondent the full amount of the invoices even though it had made the claims. This, of course, gave respondent a powerful tool by which to offer complainant an allowance on its own terms. Respondent also investigated each claim, and offered to make adjustments which it found to be appropriate. However, we do not read the language as to adjustments in paragraph 6 to imply that a receiver of bananas cannot challenge the validity of the allowances. Finally, complainant did not accept the amounts which were tendered as full settlement of the claims.

The above discussion provides the necessary backdrop to discuss respondent's contentions that complainant must accept the amounts tendered to it as full settlement of its 14 claims. Respondent set forth three alternative, but not necessarily mutually exclusive, reasons for its contention that pursuant to the Uniform Commercial Code, hereinafter U.C.C., complainant is precluded from recovering more than it was offered in settlement.[2] It claims that by

[2] All references to the Uniform Commercial Code are to the Ninth Edition, 1978, American Law Institute and National Conference of Commissioners On Uniform State Laws.

virtue of usage of trade (industry practice), course of conduct, or course of performance, the complainant has accepted its methodology of granting allowances based on the f.o.b. price of bananas plus necessary expenses such as transportation and handling when the bananas have condition defects.

Section 1-205(2) of the U.C.C. defines usage of the trade as:

> . . . any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts.

Note 4 to 1-205(2) of the U.C.C. states that usage of trade is "a factor in reaching the commercial meaning of the agreement which the parties have made." It does not "displace or negate 'established rules of law.'" Pursuant to Note 5 a usage of trade need not be "ancient or immemorial." Rather, there must be "regularity of observance." As the proponent of the claim that by usage of the trade settlements for bananas that do not meet contract terms are based on f.o.b. price plus other necessary costs respondent has the burden of proof. *International Produce Distributors, Inc.* v. *A & L Produce Co., Inc.*, 31 Agric. Dec. 356 (1972); *Santelli* v. *Rubinstein*, 21 Agric. Dec. 1053 (1962); *Spada Distributing Co.* v. *Frank Kenworthy Co.*, 17 Agric. Dec. 347 (1958). Based on our analysis of the facts in this case we conclude that respondent has failed to prove that all banana dealers grant allowances for shipments which do not meet contract specifications based on f.o.b. price plus necessary expenses. Respondent provided testimony that it does so. It provided somewhat murky testimony that Castle and Cooke does so. The business of those two companies encompasses about 60 percent of the banana business in the United States. Even construing the testimony in the light most favorable to respondent we cannot conclude that respondent has proved that its allowance procedures with respect to bananas rise to the point where they are customary in the trade. At a very minimum such a conclusion could be drawn only after extensive review of testimony by buyers rather than self-serving statements made by sellers, and the custom would have to be established through numerous cases of actual practice, and not through the opinion of a witness. *Coast Marketing Company* v. *World Wide Produce Company*, 30 Agric. Dec. 1742 (1971); *California Fruit Exchange* v. *Spracale Fruit Co.*, 89 F. Supp 580 (W.D. PA, 1950). Even more important is the fact that respondent failed to provide meaningful explanations as to why it gave allowances in the amounts it did, and in some instances denied them, with re-

spect to the 14 transactions in issue here. It certainly did not prove that the trade grants allowances without giving fuller explanations than were given to complainant as to how the computations were arrived at, or that receivers are denied an opportunity to negotiate final settlements.

Section 1-205(1) of the U.C.C. defines course of dealing as:

> . . . a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

This provision should be read in conjunction with section 2-208(1) of the U.C.C. which provides that:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

The parties dealt with each other on a weekly basis under the common contract provisions written by respondent for two years prior to the 14 transactions which are involved in this proceeding. However, that there were many prior transactions does not indicate that complainant accepted or acquiesced in the claims procedures followed by respondent. The record shows that complainant had an opportunity to object to those procedures on only three occasions prior to March 1983. It filed claims for allowances based on its belief the bananas involved did not meet contract specifications only on those three occasions. Furthermore, for the latter two claims, which arose in November 1982, complainant strongly expressed its dissatisfaction with respondent's settlement procedures in a letter to respondent dated December 29, 1982.[3] Even though it also accepted the settlement of another claim on respondent's terms after it made the 14 claims with which we are concerned, there are not sufficient claims in which complainant accepted re-

[3] Complainant stated:

> "It is with much regret that I return these 2 claim files accepting your ridiculous offer of settlement, and simply because we are closing our books for the fiscal year and I do not have the time, nor the accessability to the necessary records at this time, to be able to photostat the copies of each ticket to prove my loss, though at any other time I guarantee you I would subpoena all your records to make you prove how you arbitrarily amongst yourselves came up with a figure like you did."

spondent's proposed settlement for us to conclude it acquiesced in its methodology. This is particularly true in view of complainant's vociferous opposition to the two November settlements, and the fact it did not accept the proffers on the 14 transactions. Therefore, we conclude that there has not been a course of dealing or performance which gives rise to the conclusion that respondent's claim settlement procedures are acceptable to both parties.

Singer's requested damages in the amount of $66,697.25 in its formal complaint filed on March 15, 1984. In an Order dated September 18, 1984, the Secretary ordered respondent to pay $9,286.00, the amount it admitted it owed complainant. That left for resolution in this proceeding a claim of $57,411.25. However, paragraph 5 of the contract between the parties, as shown on the reverse side of every invoice for each of the 14 transactions provides that "a formal claim . . . must be filed . . . within 60 days after giving . . . notice [of a claim]". Having dealt with respondent for two years, during which period the same contract was always utilized for many transactions, complainant is charged with knowledge of the provision, and with having accepted it terms, thereby giving rise to a course of performance as provided in section 2-208(1) of the U.C.C. Since the last transaction involved in this proceeding occurred on May 31, 1983, more than 60 days elapsed with respect to all of them prior to the filing of the complaint. Therefore, complainant is limited to no more than it claimed in the formal written claims it filed with respondent within 60 days of the receipt of the bananas with respect to each transaction. The total amount of such claims was $35,691.57, less $9,286.00 already paid by respondent, or $26,405.57. The original individual claims, as lumped together by date of discharge of the bananas from each of five ships, appear to have been based on the difference between complainant's total costs, including contract price, fuel surcharge, transportation, temperature recorders and handling, and the total price fetched on resale, as shown by accounts of sale for each transaction. Under these circumstances complainant did not originally claim lost profits, and as discussed previously, cannot do so now.

In view of our findings that bananas are subject to regulation under the P.A.C.A. even though there are no published grade standards with respect to good delivery, and that certain provisions of the U.C.C. which would insulate the parties from coverage under the PACA are not applicable in this instance, it is necessary to de-

termine the extent to which complainant is entitled to damages. Our analysis of Singer's claims follows.[4]

1. Transactions No. 1 through 3—Rio Babahoya; docked at Albany, New York with unloading March 23, 1983.

The Rio Babahoya docked at Albany, New York, and respondent's bananas were unloaded from that vessel on March 23, 1983. Three truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $10.00 per carton with respect to each load. One truck carrying 875 cartons of bananas arrived at complainant's place of business March 24, 1983. The other two trucks, one with 870 cartons and the other with 850 cartons of bananas arrived on March 25, 1983. All three truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $25,950 for the 2,595 cartons of bananas, respondent invoiced complainant $1,038.00 as a fuel surcharge, $934.20 for handling charges and $45.00 for temperature recorders for two of the three trucks, for a total contract price for the three transactions of $27,967.20. Complainant made timely payment of this amount to respondent. In addition, complainant paid $1,742.31 for freight, bringing its total costs to point of destination to $29,709.51.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Rio Babahoya. The inspection showed that seven percent of the cartons were ripe and turning, thereby constituting a significant condition defect.

When the bananas had been unloaded into its ripening rooms from the trucks, complainant gave oral notice to respondent on March 25, 1983, that it believed they were not in accordance with contract specifications. Chiquita responded to the complaint by performing an inspection on March 28, 1983. After that date complainant filed its written complaint and statement of damages. It set forth as the basis for its claim that "fruit was showing a chill effect w/out any other characteristics of chill except the grey cast to the peel. All temperatures w/in tolerance." In the remarks section of

[4] Respondent claimed that an adverse inference should be drawn from complainant's failure to provide temperature charts to show the temperatures at which the bananas were maintained after they were unloaded. We decline to do so because for the most part complainant filed prompt complaints with Chiquita, indicating that the problems existed at the time of delivery. While we are tempted to draw adverse inferences from respondent's failure to provide charts showing the temperatures on board the ship even though such charts were requested by Singer's prior to hearing, we shall not do so primarily because the issues can be decided without invoking adverse inferences.

that same form respondent wrote "complaint on discoloration (and after ripening) on arrival. Customer requested our QC inspection". The inspection showed with respect to the load which arrived on March 24, 1983 that 8 percent of the bananas were ripe and turning or ripe. With respect to the truckload containing 850 cartons which arrived on March 25, 1983 it showed 14 percent of the cartons were ripe and turning or ripe. The record does not show a quality control report at destination for the third truckload. However, based on the discharge inspection and the other two inspections at destination we find that the preponderance of the evidence shows it did not make good delivery, particularly since Chiquita granted a $4,000 allowance without distinguishing between the three loads. In addition respondent either did not look for or did not find any underpeel discoloration, which would reflect chill damage.

Complainant kept careful records of its sales with respect to the three truckloads involved. The accounts of sale showed that the bananas fetched $7,402.75 for the load which arrived March 24, 1983, and $8,846.00 and $8,056.25 for the other two loads for total sales of $24,305.00. This is $5,404.51 less than its computed costs for the 2,595 cartons of bananas. Complainant claimed $5,766.85 as its total losses on the three loads. The $362.34 difference is unexplained. Respondent offered $4,000.00 in full settlement without giving complainant the benefit of an explanation as to why it was doing so.

We find, based on our review of the evidence with respect to the three truckloads of bananas, that they did not meet contract specifications when they were delivered to complainant. Respondent dealt with the three loads as if they were one unit. It implicitly acknowledged that bananas that were at least 8 percent and as much as 14 percent ripe and turning or ripe at the time of delivery were defective when it granted a $4,000.00 allowance. While it provided a rationale for the amount granted at hearing in the form of a worksheet, this was not a document to which complainant was privy at the time the allowance was granted. Rather, it constituted respondent's unilateral determination as to the amount of the allowance it wanted to grant. The best evidence of the damages suffered by complainant are its three accounts of sale, which reflect the total prices fetched for the three transactions. The difference between its computed costs and the total price fetched on resale is the appropriate measure of damages in this instance. That amount is $5,404.51. We will disallow the additional claim of $362.34 as being unsupported by the evidence. Respondent has previously paid

complainant a $4,000.00 allowance. Therefore, we shall award complainant $1,404.51 with respect to these three claims.

2. Transactions No. 4 through 7—Rio Sulaco; docked at Charleston, South Carolina with unloading March 31, 1983.

The Rio Sulaco docked at Charleston, South Carolina, and respondent's bananas were unloaded from that vessel on March 31, 1983. Four truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $9.00 per carton with respect to each load. Two trucks arrived at complainant's place of business April 2, 1983. One truck carried 850 cartons of bananas, and the other carried 848 cartons. One truck carrying 848 cartons arrived at complainant's place of business on April 4, 1983, and the fourth truck, carrying 850 cartons, arrived on April 5, 1983. All four truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $30,564.00 for the 3,998 cartons of bananas, respondent invoiced complainant $90.00 for four temperature recorders, a fuel surcharge of $1,358.40, and handling charges of $1,154.64 for a total contract price for the four transactions of $33,167.04. Complainant made timely payment of this amount.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Rio Sulaco. The inspection showed scorable defects ranging from 3.4 percent to 4.1 percent depending on the hold from which the bananas were taken. Ripe and turning bananas ranged between 0.8 percent and 1.5 percent of the cartons, which is not a significantly high percentage of defects.

When the bananas had been unloaded into its ripening rooms from the trucks complainant gave oral notice to respondent with respect to the truckloads which arrived on April 2, 1985 that it believed the bananas were not in accordance with contract specifications because they had a grey color, and with respect to the other two truckloads which arrived on April 4, 1983 and April 5, 1983, that they were ripe and turning. Respondent was not able to inspect the bananas immediately. Therefore, complainant kept them in its ripening rooms while it sold other bananas. Respondent performed an inspection on April 13, 1983.

After April 15, 1983, complainant filed its written complaint and statement of damages with respect to the two loads of bananas which arrived on April 2, 1983. It set forth as the basis of its claim that "upon ripening and some on arrival, the fruit was turning a grey color, as if to show chill, without any other characteristics of chill and temperatures within tolerance." In the remarks section of that same form respondent wrote "Soft and breaking fruit on arriv-

al." The destination inspection showed with respect to these two loads that 30 percent of the bananas had underpeel discoloration.

After April 11, 1983 complainant filed its written complaint and statement of damages with respect to the two loads of bananas which arrived on April 4, 1983 and April 5, 1983. It set forth as the basis of its claim that "upon ripening fruit had a grey cast as if to show chill effects without any other characteristics of chilling and temperatures within tolerance." In the remarks section of that same form respondent wrote "ripe & turning". The destination inspection showed with respect to these two loads that 30 percent of the bananas had underpeel discoloration.

Complainant kept careful records of its sales with respect to the four truckloads involved. The accounts of sale showed that the bananas fetched $8,329.50 and $6,919.25 for the first two truckloads, and $6,459.00 and $6,959.50 for the second two loads for total sales of $28,667.25. This is $8,661.18 less than its computed costs for the 3,998 cartons of bananas, which includes $3,483.99 for transportation and $678.40 for handling in addition to the sales price and other fees paid to respondent. Complainant claimed $3,247.25 with respect to the first two transactions, and $4,745.66 with respect to the other two transactions, for a total claim of $7,992.91. Respondent granted no allowance with respect to the first two transactions, and offered $1,365.00 for the other two, leaving $6,627.91 as the total claim for which it did not grant an allowance. Respondent explained to complainant that it declined to grant an allowance for two truckloads, because there was no underpeel discoloration at discharge, and gave less of an allowance than complainant requested on the other two without an explanation.

We find based on our review of the evidence with respect to the four truckloads of bananas that the second two truckloads did not meet contract specifications when they were delivered to complainant. Respondent implicitly acknowledged that there were condition defects warranting the grant of an allowance when it offered complainant $1,365.00. Unfortunately, its reasons are murky, at best. The issue as to whether respondent should have granted more allowances turns on our determination of which party was responsible for the underpeel discoloration on these two loads.

Both parties agree that underpeel discoloration is a serious condition defect. Both parties agree that it arises only as a result of chill damage. It is also the case that underpeel discoloration is sometimes noticeable because the outer skins of the bananas have a dull grey cast to them. However, the best way to tell whether there is underpeel discoloration is to peel back the skin of the

banana and look at its underside. Speckling or spots indicates there is underpeel discoloration.

That underpeel discoloration was not found when the Rio Sulaco was unloaded in Charleston does not mean the chill giving rise to this condition had not yet occurred. The condition does not appear immediately upon chilling the banana. Thre are no temperature records to show the hold temperatures on board ship. These records were requested of but not furnished by respondent.

With respect to the second two truckloads of bananas the pulp temperature when the bananas were unloaded was 58° to 60° fahrenheit. The pulp temperature on arrival of one of the two trucks was 60° to 65° fahrenheit. None was shown for the other truck. Temperature ranges for the two trucks while they were in transit were not provided.

Based on our review of all the evidence we conclude that the second two truckloads of bananas delivered to complainant from the Rio Sulaco did not make good delivery. The pulp temperatures at discharge from the ship were 58° to 60° fahrenheit. The pulp temperatures at the time of arrival of the trucks were at or above those at the time of unloading from the ship. Complainant filed complaints as to the condition of the fruit immediately upon accepting delivery. The inspection was not held until between eight and eleven days after the arrival of the fruit, during which time complainant carefully monitored the ripening process. While it is true the chill could have occurred during this period, we believe it is likely it occurred while the bananas were on the ship because by offering partial reimbursement respondent admitted there were problems with the bananas on arrival in Cleveland, and there was no showing of defects other than underpeel discoloration. Under the circumstances it should have granted a full allowance based on complainant's proved losses. The fact that the inspection was held 8 days after arrival is subsumed by respondent's grant of a partial allowance.

With respect to the two loads which arrived on April 2, 1983, respondent must prevail. The distinction in facts between these two loads and the two on which we have awarded damages is that there is no admission by respondent as to its liability. The inspection by Chiquita for all four loads was so distant in time from the arrival of the trucks at complainant's place of business that we cannot ascribe responsibility for the condition defects found to one party as opposed to the other. Therefore, having accepted the goods by unloading them, complainant had the burden to prove respondent was responsible for the defects. *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Rydell California Potato*

Co. v. *the Kaufman-Brown Potato Company,* 16 Agric. Dec. 1055 (1957). It failed to sustain that burden.[5]

We accept complainant's accounts of sale and computations of costs as accurate. Complainant lost $4,745.66 on the two loads for which we are awarding damages. However, since respondent granted an allowance of $1,365.00 for them, we shall award damages of only the difference, or $3,380.66.

3. Transactions No. 8 through 10—Chion Trader; docked at Charleston, South Carolina with unloading April 7, 1983.

The Chion Trader docked at Charleston, South Carolina, and respondent's bananas were unloaded from that vessel on April 7, 1983. Three truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $9.50 per carton with respect to each load. One truck carrying 875 cartons arrived at complainant's place of business on April 11, 1983, and two trucks, each carrying 850 cartons, arrived on April 12, 1983. All three truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $24,462.50 for the 2,575 cartons of bananas, respondent invoiced complainant $1,030.00 as a fuel surcharge, $875.50 for handling, and $67.50 for temperature recorders, for a total contract price for the three transactions of $26,435.50. Complainant made timely payment of this amount to respondent. In addition, complainant paid $2,771.20 for freight, bringing its total costs to point of destination to $29,206.70.

Respondent followed its usual practice of inspecting the bananas for various defects when they were unloaded from the Chion Trader. Among other findings the inspection showed that 18 percent of the cartons of bananas from hatch 3 showed underpeel discoloration.

When the bananas had been unloaded into its ripening rooms from the trucks, complainant gave oral notice to respondent that it believed they were in accordance with contract specifications. Respondent came to complainant's place of business, and performed an inspection on April 13, 1983. At some time after April 12, 1983 complainant filed its written complaint and statement of damages. It set forth as the basis for its claim that "upon ripening fruit was showing an off-color cast of grey as if to show chill without any other characteristics of chill and temperatures O.K. on arrival". In the remarks portion of that same form respondent wrote "QC in-

[5] Complainant need not have waited for Chiquita's inspectors to arrive. Federal inspection service is available in Cleveland, Ohio. Complainant was free to secure and rely on the results of such an inspection. It should have done so under these circumstances.

spection after ripening brown discoloration". The inspection showed with respect to two of the three loads that 35 percent (for the load arriving April 11, 1983) and 42 percent (for one of the loads arriving April 12, 1983), of the clusters did not meet specifications. This is very high in both instances. There was no quality control inspection shown for the third load of bananas. The certificates also appear to show that there was considerable underpeel discoloration.

Complainant kept careful records of its sales with respect to the three truckloads involved. The accounts of sale showed that the bananas fetched $8,561.00 for the load which arrived on April 11, 1983, and $8,062.00 and $7,748.75 for the loads which arrived on April 12, 1983, for total sales of $24,371.75. This is $4,834.95 less than its computed costs for the 2,575 cartons of bananas. Complainant claimed $4,954.51 as its total losses on the three loads. The $119.56 difference is unexplained. Respondent offered $2,000.00 in full settlement for one of the truckloads containing 850 cartons because the bananas for that load were known to have come from a hold in which excessive underpeel discoloration was found. The record does not reflect which truck was involved. The amount of money, however, most closely approximates the segregated claim by complainant for $1,924.25, and we will ascribe the allowance to that truckload. The inspection report which showed that 35 percent of the clusters did not meet specifications clearly related to the truck which arrived on April 11, 1983 with 875 cartons of bananas.

We find based on our review of the evidence with respect to the three truckloads of bananas that the two loads for which inspections were provided did not meet contract specifications when they were delivered to complainant. The inspections were made either one or two days after the bananas were received and accepted, with percentages and types of defects which were too high to be ascribed to deterioration while in transit and after delivery. With respect to the third load complainant has failed to meet its burden of proof that the bananas did not make good delivery, particularly since respondent treated each truckload separately, and our finding of liability is dependent on the results of inspections. Respondent has made full compensation with respect to one load which did not make good delivery, as discussed above. With respect to the third load involving 875 cartons we find complainant's claimed loss of $1,419.26 to be proved by the evidence, and we shall award complainant that amount.

4. Transactions No. 11 through 13—Rio Babahoya; docked at Albany, New York with unloading May 4, 1983.

The Rio Babahoya docked at Albany, New York, and respondent's bananas were unloaded from that vessel on May 4, 1983. Three truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $11.50 per carton with respect to each load. Each truck contained 850 cartons. One truck arrived at complainant's place of business on May 5, 1983, and the other two trucks arrived on May 6, 1983. All three truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $29,325.00 for the 2,550 cartons of bananas, respondent invoiced complainant $1,020.00 as a fuel surcharge, and $918.00 for handling, for a total contract price for the three transactions of $31,263.00. Complainant made timely payment of this amount to respondent.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Rio Babahoya. The inspection showed three percent of the cartons from hold number 4, the hold from which Singer's bananas were taken, were ripe and turning, and that overall there were a number of condition defects. The inspection at discharge did not reveal any underpeel discoloration.

After the bananas had been unloaded into its ripening rooms from the trucks, complainant gave oral notice to respondent on May 11, 1983, that it believed they did not meet contract specifications because they showed underpeel discoloration and were old. Respondent made an inspection of the three truckloads of bananas on May 13, 1983. On or after that date complainant filed its written complaint and statement of damages. It set forth as the basis for its claim that "These loads appeared to be old fruit. Upon arrival showed a slight discoloration, as if they were chilled, but temperatures were within tolerance. Upon ripening showed excessive discoloration and scarring with deep bruises—crown mold and occasional rot." Respondent did not enter comments in the "remarks" section of the complaint form.

The inspection showed "fruit appears fairly decent at end but after processing too many show poor color but most not from chilling", and "100 boxes examined—sample divided between 3 rooms of the 3 loads all gassed—avg color of all clusters 3—3½ OC—scattered throughout—34% med/sev—5%—off color from chilling 15%—Med/sev. 4%. Mostly large full mature fruit, 5% of boxes clusters showing ugly brownish outer peel discoloration and excessive amounts of CM/CR—NI/NR very mixed appearance, poor to

fair." [6] The bananas were obviously not in good condition on May 13, 1983.

Complainant kept careful records of its sales with respect to the three truckloads involved. The accounts of sale showed that the bananas fetched $8,343.75, $7,086.00, and $7,061.50, for total sales of $22,491.25. This is $10,563.20 less than its computed costs for the 2,550 cartons of bananas, which is comprised of the $31,263.00 invoiced by respondent and $1,791.45 for hauling, or a total of $33,054.45. Complainant originally claimed $10,608.20 as its total losses on the three loads. The $45.00 differential is probably a deduction for unloading one of the trucks. Respondent declined to grant any allowance on the three loads on the grounds that:

> Discharge reports do not show any evidence of underpeel discoloration at discharge. Further, boxing dates indicate no excessive age of fruit at loading or at discharge.
>
> Although our Quality Control inspector did find off-color fruit at your location on May 13, 1983, it is our contention that the fruit was damaged by improper conditions during transit or ripening. To further support this, the carrier report on Lot 440 indicates that the load arrived in Cleveland on May 5, "but could not deliver due to cooler problems."

We find based on our review of the evidence with respect to the three truckloads of bananas that complainant did not prove they did not meet contract specifications when they were delivered to it. It did not file a claim within 48 hours of accepting the bananas, as required by the contract, which defense was not raised by respondent, but which is recognized here. Additionally, the record shows that the bananas were on board the Rio Babahoya for about 12 days, which is a long time. The pulp temperatures of the bananas were 57§ to 60° Fahrenheit when they were unloaded from the ship. On arrival at Singer's in Cleveland the pulp temperatures were 57° to 60°, 59° to 60°, and 62° to 65°, respectively. All these temperatures are all right, although those for the latter truck are somewhat high. Of great importance is the fact that respondent found a low percentage of ripe and turning and no underpeel discoloration at the time the bananas were unloaded from the ship, even though they had been in transit a long time. Furthermore, complainant did not file an oral complaint with respondent until May 11, 1983, six days after the first load had arrived, and five

[6] CM is not defined in the record. OC means off color. CR means crown rot, NI means neck injury, and NR means neck rot.

days after the other two arrived. The bananas were admittedly old when they were inspected. Some were off color, with 15 percent of them experiencing underpeel discoloration. Another five percent of the fruit had other condition defects. Unfortunately for Singer's, having accepted the bananas it has the burden to show that they did not make good delivery. *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Rydell California Potato Co.* v. *The Kaufman Brown Potato Company*, 16 Agric. Dec. 1055 (1957). In this instance it did not provide enough evidence for us to conclude such was the case. We are particularly impressed by its failures to complain about the condition of the bananas when it received them or to provide temperature charts for the inland transit and the seven and eight day periods between the arrival of the fruit and when it was inspected. These charts were critical to its proof in this instance because the percent of defects of various kinds cannot be said to be of such a nature and amount that they could occur only prior to unloading from the ship, and not after arrival at complainant's place of business.

5. Transaction No. 14—Olancho; docked at Albany, New York with unloading May 27, 1983.

The Olancho docked at Albany, New York, and respondent's bananas were unloaded from that vessel on May 27, 1983. One truckload of bananas was sold to complainant, f.o.b. port of discharge. The sale price was $10.00 per carton for 850 cartons or $8,500.00, plus charges for a fuel surcharge, handling and a temperature recorder of $678.00, for a total cost of $9,178.00. The truck arrived at complainant's place of business on May 31, 1983, and was received, unloaded and accepted. Complainant immediately complained to respondent about the condition of the bananas. Subsequently, complainant made timely payment in full.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Olancho. It showed that 90 percent of the clusters met specifications.

After the bananas had been unloaded into its ripening rooms from the truck complainant immediately gave oral notice to respondent that it believed they did not meet contract specifications because they were old, had mold, were ripe and turning, were scarred, and were short. It filed its formal written complaint and statement of damages on July 20, 1983. It set forth as the basis of its claim that "This load was absolute *garbage*. The *WORST* load of bananas I ever received since entering the banana business."

Respondent inspected the bananas on June 1, 1983. The inspection showed that only 45 percent of the clusters of bananas met specifications. The report stated in pertinent part:

> R & T 4%, 1 Cluster in each of 2 boxes color 6+, balance of all clusters 2-2½, fruit breaking (Not gassed)—(5 boxes examined for PCMS—Score 45 Heavy SR 50%—Very large full mature fruit, very long fingers (difficult to pack)—about 5% C.M.—overall poor appearing quality, dull color and dirty appearance.

The bananas were obviously not in good condition on June 1, 1983, only four days after they were unloaded from the Olancho. Based on respondent's own inspection report we have no choice other than to conclude that the bananas did not make good delivery, particularly since the in-transit temperatures from dock to Singer's place of business were in the acceptable range, 58° to 64°, with the high temperatures occurring only for a short period.

Complainant kept careful records of its sales with respect to the truckload of bananas. The account of sales showed that the bananas fetched $3,424.50 on resale. This is $5,753.50 less than its computed costs of $9,178.00. Complainant originally claimed $6,369.10 as its total losses. Respondent granted an allowance of $1,921.00 without giving any explanation as to its reasons for doing so. Respondent is liable for the differential of $4,448.10.

In summary we have found that respondent has failed to grant allowances to complainant in the following amounts:

1.	Transactions 1-3	$1,404.51
2.	Transactions 4-7	3,380.66
3.	Transactions 8-10	1,419.26
4.	Transactions 11-13	0.00
5.	Transaction 14	4,448.10
	Total	$10,652.53

Its failure to pay complainant $10,652.53 in 11 transactions constitutes violations of section 2 of the PACA for which reparation should be awarded with interest.

As the prevailing party complainant is entitled to reasonable attorney's fees and expenses. *Bill Offutt, Inc.* v. *Marvin E. Berry*, 37 Agric. Dec. 1218, 1225 (1978). It filed a timely request for reimbursement, and respondent did not file any objection to the claim. The total amount requested by complainant was $6,482.10, which included $4,375 for attorney's fees. We find the claim appropriate.

Therefore, complainant should be awarded $6,482.10 for fees and expenses.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $6,204.43, with interest thereon at the rate of 13% per annum May 1, 1983 until paid.

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $4,448.10, with interest thereon at the rate of 13 percent per annum from July 1, 1983, until paid.

Within 30 days from the date of this order respondent shall pay fees and expenses to the complainant, as reparation, in the amount of $6,482.10, with interest thereon at the rate of 13% per annum from the date of this order until paid.

Copies of this order shall be served upon the parties.

BARTON WILLOUGHBY d/b/a WILLOUGHBY FARMS, *v.* FRITO-LAY, INC., PACA Docket No. 2-6614. Decided May 1, 1986.

Agreement to grow potatoes—statute of frauds—oral modification of written contract—agency—apparent authority—estoppel—reparation awarded.

Where employees of respondent dealt exclusively with complainant regarding his crop of potatoes, and in doing so induced him to delay delivery beyond dates provided in written contract, the respondent is held to have given such agents apparent authority to modify the contract on its behalf. It is held that an oral modification of a written contract does not violate the statute of frauds. Further, having relied to his detriment on the promises of respondent's agents, complainant may claim that respondent is estopped to deny that the contract was modified.

Dennis Becker, Presiding Officer.
Stephen P. McCarron, Esquire, Silver Spring, MD, for complainant.
Joseph Nealon, Esquire, Washington, DC, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499 *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $84,825.83 in connection with a transaction involving the sale and shipment of chipping potatoes in interstate commerce. Respondent filed a counterclaim in which it seeks a refund of an alleged overpayment for the potatoes it bought from complainant in the amount $1,790.15.

A copy of the formal report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Since the amount claimed in the complaint exceeds $15,000.00, and respondent requested an oral hearing, such oral hearing was held in Washington, D. C., on April 16 and 17, 1984. One witness testified on behalf of complainant, and two witnesses testified on behalf of respondent at the hearing. In addition, several depositions were placed in evidence by the parties. Complainant amended its complaint after evidence had been taken, as a result of which the hearing was held open for a period of ninety days to enable respondent to determine whether it wished to offer other evidence. Respondent determined it did wish to do so, and the oral hearing was concluded on September 19, 1985. Subsequent to the hearing both parties filed briefs and claims for fees and expenses. Complainant filed an objection to respondent's request for fees and expenses.

FINDINGS OF FACT

1. Complainant, Barton Willoughby, (hereinafter either "Mr. Willoughby" or "complainant") is an individual doing business as Willoughby Farms, with an address at P.O. Box 117, Gordon, Alabama. As a producer he was not subject to license under the Act during the period in issue in this proceeding.

2. Respondent, Frito-Lay, Inc., (hereinafter either "Frito-Lay" or "respondent"), is a corporation with an address at P.O. Box 35034, Dallas, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. In 1982 complainant and respondent initiated talks with respect to whether complainant would grow chipping potatoes for sale and delivery to respondent. As a result of those discussions a written contract was entered between complainant and respondent on January 24, 1983, under which complainant was to grow for sale to respondent 25,000 hundredweight of chipping potatoes at a price of $5.50 per hundredweight, f.o.b., U.S. Commercial, 90 percent U.S. No. 1, and which were to be size "A". 8,000 hundredweight were to be delivered to respondent during the week of June 13, 1983, 8,000 hundredweight were to be delivered to respondent during the week of June 20, 1983, and 9,000 hundredweight were to be delivered to respondent during the week of June 27, 1983. The contract further provided in pertinent part that:

"All potatoes shipped under this contract guaranteed to chip to Frito-Lay's satisfaction upon arrival. Frito-Lay reserves the option of not accepting deliveries which do not meet the above shipping schedules.

* * * * * * *

Purchaser may at any time return to seller at seller's expense any portion of goods listed herein, when in the opinion of purchaser in its sole discretion such goods do not chip to its satisfaction and purchaser, at its election, shall be entitled to receive from seller for such returned goods full credit therefor or replacement thereof with goods that do chip to purchaser's satisfaction. Seller guarantees proper loading according to carriers' tariff specifications and guarantees lowest through rate.

Seller's obligations hereunder shall not be mitigated or reduced in any way by virtue of seller's having obtained or purchased seed potatoes from purchaser to produce the potatoes to be shipped hereunder."

4. In late February and early March 1983 complainant bought sufficient quantities of seed potatoes from respondent to enable it to plant 103 acres of its fields with potatoes so as to be able to make delivery to respondent of 25,000 hundredweight in accordance with the contract terms set forth in paragraph 3, above. The seed potatoes were known as FL–162 Potatoes, which is a special type of potato developed by respondent because it chips well. In entering into the contracts for the purchase of such seed potatoes, complainant agreed that "the potatoes produced from the above seed cannot be sold or disposed of without the expressed permission (documented) by Frito-Lay, Inc." The contracts also provided that "Confirmation contingent upon grower having a 1983 Frito-Lay chip contract. . . ."

5. Respondent received two shipments of seed potatoes on February 26, 1983, and either February 28, 1983, or March 1, 1983, respectively. It is not known when other shipments of seed potatoes were received by complainant. Complainant let such potatoes lie for about two weeks so as to prepare them for planting. Some of the FL–162 seed potatoes had been planted by March 15, 1983.

6. Respondent eventually planted 103 acres of FL–162 seed potatoes. Complainant anticipated that it would harvest a yield of about 250 hundredweight of potatoes per acre. It takes between ninety and 110 days to grow FL–162 potatoes to a maturity at

which they are size "A", which size is 1 and 7/8 inches in diameter or larger.

7. Harold Willingham was the regional representative of respondent. He was the primary individual during the period March through July 1983 with whom complainant dealt insofar as the contract was concerned. Complainant also dealt with Michael Anderson, a subordinate employee to Mr. Willingham, during a portion of the months of June and July 1983 because Mr. Willingham was on vacation. Mr. Anderson acted as Mr. Willingham's substitute during that period. Both Mr. Willingham and Mr. Anderson had authority to deal directly with complainant, although to an undetermined extent they in turn were supervised by their home office in Dallas, Texas. By virtue of their actions in dealing with Mr. Willoughby, he properly relied upon their representations as being binding upon respondent.

8. During the week of June 13, 1983, complainant and Harold Willingham discussed the contractual agreement under which complainant was to deliver 8,000 hundredweight of potatoes to respondent. Complainant stated that his potatoes could use more sizing because they were late in maturing, and that not more than 75 percent of them were size "A". He felt that if he waited until later in the month he would have a higher percentage of size "A" potatoes. Complainant could have delivered 8,000 hundredweight of potatoes during the week of June 13, 1983, had it been necessary for him to do so. However, in doing so he would have seriouly jeopardized his ability to deliver the remaining 17,000 hundredweight of potatoes in the ensuing two weeks because he would have had to dig too many acres of potatoes to make the total 8,000 hundredweight. Respondent, through Mr. Willingham, expressed its willingness to delay taking delivery of the potatoes because the crop in that area of the South was late in maturing due to weather conditions, and other plantings in which Frito-Lay had an interest needed to be harvested first. In particular, respondent had not taken delivery of a large quantity of potatoes from Baldwin County, Alabama. Those potatoes were grown in accordance with joint ventures between respondent and various farmers whereby both respondent and the farmers split the costs and profits. This business arrangement had been going on for several years prior to 1983. The parties mutually assented to a delay in delivery of the potatoes.

9. During the week of June 20, 1983, complainant and either Mr. Willingham or Mr. Anderson again discussed delivery of potatoes by complainant to respondent under the contract. Respondent's agent told Mr. Willoughby that respondent did not wish to take his potatoes during that week because there had been a further delay

in the harvest of the potatoes in Baldwin County, Alabama, and respondent wished to clear out those potatoes first. Mr. Willoughby indicated that he was able to deliver 8,000 hundredweight of potatoes during the week of June 20, but agreed to delay delivery for the benefit of both parties because he knew that his potatoes could size up better if there were a delay. Respondent's agent assured him that Frito-Lay was interested in taking all of his potatoes.

10. Mr. Willingham went on vacation after the week of June 20, 1983, and Mr. Michael Anderson substituted for him during the time he was on vacation. During the week of June 27, 1983, complainant was willing to deliver as many potatoes as respondent would take. However, on Monday, June 27, 1983, in a discussion with Mr. Anderson in which he and Mr. Anderson discussed the status of complainant's crop, he expressed a willingness to delay harvest. This was done primarily for the benefit of respondent, although there was some benefit to complainant because the potatoes would grow a little more. Mr. Willoughby acceded to Frito-Lay's desires more than he sought the delay in the harvest. On June 29, 1983, however, Mr. Willoughby asked Mr. Anderson to send him purchase orders so that he could dig the potatoes and deliver them to respondent. Mr. Anderson said he would try to get purchase orders. Mr. Anderson was not able to do so after checking with Dallas, Texas, except for one order, and he and Mr. Willoughby agreed that the first load of potatoes should be dug on Thursday, June 30, 1983. Mr. Anderson provided a purchase order for this purpose. The potatoes were dug, delivered to respondent, received, and accepted. However, no other purchase orders were provided to complainant during that week.

11. It is the practice of Frito-Lay in Alabama that potatoes for which it has contracted should not be dug unless a purchase order is first provided to the farmer. This is necessary because potatoes in that region do not store well once they have been dug. Complainant knew that this was the practice of respondent even though he had never farmed potatoes previously. It was also the practice of respondent to work with a farmer with which it had contracted to assure that the potatoes which he had planted under contract were bought by Frito-Lay. It was not unusual for Frito-Lay to delay taking the potatoes from a specific farmer because of its own particular needs insofar as production of potato chips is concerned. Respondent was able to control its receipt of potatoes through use of the purchase order. Unless a farmer received a purchase order for a truckload of potatoes the farmer was not in a position to deliver them to respondent. Complainant was aware of the practice of Frito-Lay to delay receipt of potatoes which it had con-

tracted for, and was willing to deal with the respondent on the verbal understandings that eventually respondent would accept his potatoes. During the week of June 27, 1983, complainant was ready and able to deliver all the potatoes to respondent. He was diligent in his request for the provision of purchase orders during that week. He was willing, however, because of the practice of Frito-Lay to extend the period of a contract, to wait to deliver them. Effectively, complainant was precluded from digging potatoes during the week of June 27, 1983, with the exception of the one load which was dug, by the actions of respondent in requesting him to delay, and because respondent did not provide him with purchase orders.

12. July 4, 1983, fell on a Monday. On July 5, 1983, Michael Anderson visited complainant at his farm to talk to him about his crop. Complainant was insistent on that date that respondent allow him to dig his potatoes and deliver them to the respondent because they were beginning to deteriorate in the field. Mr. Anderson told Mr. Willoughby that the Baldwin County potatoes had to be cleared out first, and that his potatoes would be next. Because the FL-162 variety of potato was protected by Frito-Lay, and could be delivered only to Frito-Lay unless respondent released them for delivery to someone else, complainant was in no position to dig the potatoes, or to sell them to anyone else.

13. During the week of July 5, 1983, respondent gave complainant six purchase orders. However, during this week it declined to deal with complainant to any further extent because it was clearing out the Baldwin County potatoes. Mr. Willingham had returned from vacation, and he promised Mr. Willoughby that once the Baldwin County potatoes were cleared out the complainant would be next to receive purchase orders. However, this did not occur. Mr. Willoughby discovered on or about July 11, 1983, that Mr. Willingham and Mr. Anderson went to Sand Mountain, Alabama, which is in the Northerly portion of the state, and began to place purchase orders there for delivery of potatoes to respondent. Effectively, complainant had been by-passed. Complainant knew that his potatoes were beginning to melt in the ground, and otherwise deteriorate. Whereas at one point he could have harvested as much as 250 hundredweight of potatoes per acre, his yield began to drop radically in the second week of July. Complainant demanded that his potatoes be harvested. During June and July 1983 he would have been able to load six trucks a day, with each load containing 450 or more hundredweight of potatoes. When he discovered that the Sand Mountain potatoes were being harvested before his he grew angry. He took what action he could to harvest and

sell his potatoes. He sold some of the potatoes to other purchasers even though Frito-Lay had not released them for such sale.

14. Complainant delivered 18 loads of potatoes to respondent in June and July 1983, which comprised 8,588.64 hundredweight. 1,907.04 hundredweight of the potatoes delivered to respondent were rejected because they were not of satisfactory chipping quality, or otherwise did not meet respondent's needs. Complainant received net $35,508.97 for the 6,681.60 hundredweight of potatoes which were accepted, after deduction by respondent of $2,585.80 for its costs attendant on three of the four loads of potatoes which it rejected. Complainant also sold 3,329.93 hundredweight of potatoes to other purchasers in an effort to mitigate his damages. He received $14,580.00 for these potatoes. On July 18, 1983, respondent told complainant that his potatoes did not meet respondent's needs, and that complainant was free to dispose of them as he pleased.

15. With respect to the potatoes which complainant sold to respondent, respondent paid complainant $5.75 per hundredweight rather than the $5.50 per hundredweight called for in the contract signed on January 24, 1983.

16. The formal complaint in this matter was filed on March 6, 1984, which was within nine months from the time the cause of action herein accrued.

DISCUSSION

The most serious legal question presented by this case is whether a written contract between the parties may be varied by conduct on the part of the parties, or whether it must be strictly construed in such a manner that none of its provisions may be altered. There is a secondary question as to whether there was a separate contract entered between the parties under which respondent agreed to purchase and accept all of the potatoes grown by the complainant. Based upon the facts in this case, and our analysis of the applicable law, we conclude that the contract need not be strictly construed, but can be varied by the conduct of the parties. Therefore, we do not need to reach the secondary question.[1]

On January 24, 1983, complainant and respondent entered a contract under which complainant was to grow, sell, and deliver to respondent 25,000 hundredweight of chipping potatoes, which deliv-

[1] If we were to consider this issue we would find that there was not a new contract because all of the essential elements of such contract must be clear, and they were not. *Peters & Gorabedian* v. *Coyner-Evans Co., Inc., et al.*, 28 Agric. Dec. 752 (1969). There is lacking in any verbal agreement between the parties after June 30, 1983, certain required terms such as the price of the potatoes, the time for delivery, and the place for delivery.

ery was to be over a three week period, with 8,000 hundredweight delivered during the week of June 13, 1983, 8,000 hundredweight delivered during the week of June 20, 1983, and 9,000 hundredweight delivered during the week of June 27, 1983. The contract also provided that the potatoes were to be U.S. Commercial 90 percent U.S. No. 1, size "A", chipping potatoes. They were to be delivered free on board the Willoughby farm in bulk. They were to be shipped to "Any receiving location designated by Area Potato Buyer." Furthermore it was provided that "All potatoes shipped under this contract guaranteed to chip to Frito-Lay's satisfaction upon arrival. Frito-Lay reserves the option of not accepting the deliveries which do not meet the above shipping schedules." Finally, it was provided that "Seller's obligations hereunder shall not be mitigated or reduced in any way by virtue of seller's having obtained or purchased seed potatoes from purchaser to produce the potatoes to be shipped hereunder." The contract was signed by Barton Willoughby on behalf of complainant and by Arthur Goldstein on behalf of respondent. Arthur Goldstein was located in Dallas, Texas.

As a direct result of entering the above contract for growing and selling potatoes, complainant entered four individual contracts for the purchase of seed potatoes from respondent. It did this because respondent had developed a brand of potatoes known as FL-162 which is a good chipping potato. The contracts provided, inter alia, that "the potatoes produced from the above seed cannot be sold or disposed of without the expressed permission (documented) by Frito-Lay, Inc." They further reflected that "Confirmation contingent upon grower having a 1983 Frito-Lay chip contract. . . ." The testimony reflects, and it is obvious by virtue of the above quoted provisions, that complainant would not have bought the seed potatoes unless their purchase was directly connected with the growth and sale of the 25,000 hundredweight of potatoes in the contract entered on January 24, 1983. It is also clear that both the January 24, 1983, contract to grow and sell potatoes and the purchase agreements with respect to the seed potatoes are contracts that are very favorable to Frito-Lay. Effectively, the seed potato contracts preclude the sale of potatoes grown therefrom to entities other than respondent, except with respondent's permission. The purchase and sale contract voids any obligation on the part of Frito-Lay which might arise as a result of the use of FL-162 seed potatoes by complainant. Furthermore, it gives respondent the option in its sole discretion to refuse to accept any potatoes which do not chip to its satisfaction. It allows Frito-Lay to reject the delivery of those potatoes which do not meet the shipping schedules set forth in the writ-

ten contract. The seed potato contracts permit respondent to decline to deliver seed potatoes if complainant has not entered a growing contract with Frito-Lay. In short, the seed contracts and growing contract, when read together, tied complainant in knots. Furthermore, because of the cross references contained in the growing contract and seed contracts, we find that the contracts are interrelated, and were entered by both parties in contemplation of an exclusive means by which respondent could assure itself of a supply of chipping potatoes. We reject any claim by respondent that the seed potato contracts are not related to the growing contract.

A contract is not a one sided agreement. Rather, it is an agreement between two (or more) parties under which each party agrees to assume certain responsibilities in return for consideration from the other party. Just as complainant had a duty to deliver potatoes to respondent, respondent had a duty to take them. Frito-Lay would place an added burden on complainant that he demand respondent accept delivery or subject himself to a finding he breached the contract rather than place an equal duty on itself to request delivery. Such a result would mean Frito-Lay could not breach the contract unless such demand was made. We cannot subscribe to such a result since it would be one-sided and further enhance respondent's already very favorable position, and in any event is illogical.

Complainant testified that he could have delivered 8,000 hundredweight of potatoes during the week of June 13, 1983, had it been necessary for him to do so, but that it was in his self interest not to because only about 75 percent of the potatoes lying in the field were size "A", as a result of which he would have had to dig too many acres to be able to deliver all 25,000 hundredweight as provided for in the contract, having only planted about 103 acres of potatoes, and having expected a yield of about 250 hundredweight of potatoes per acre. Therefore, he acknowledged that he agreed to withhold delivery of potatoes during the week of June 13, 1983. Complainant also acknowledged that during the week of June 20, 1983, he agreed to withhold delivery of 8,000 hundredweight of potatoes because, while he could have delivered them, his field could still size a little more. The willingness of complainant in both of these weeks to withhold delivery of potatoes to respondent was based upon conversations with respondent's representative. We find complainant's version of what happened to be totally credible. Mr. Willoughby was a most forthright, earnest, and honest witness. He would not have agreed to delay delivery of the potatoes on the dates specified by the contract unless he had received assurances

from respondent's agent that Frito-Lay was going to take the potatoes he had in the field. Mr. Willoughby is an experienced farmer with about 2,000 acres of farmland in production. He knows that crops in the field are perishable, and must be harvested in a timely fashion. He was bound by the seed contract not to sell the potatoes he grew to any party other than Frito-Lay.[2] Frito-Lay was obviously willing to delay receiving potatoes from complainant. We find that Mr. Willoughby's version of his conversations with Mr. Willingham is accurate. Among other things it reflects that respondent continually expressed a need to clear out potatoes from Baldwin County before dealing with complainant. Therefore, it is only logical to conclude that Mr. Willoughby acted upon the representations, as he suggested, of respondent's agent that Frito-Lay wanted to delay taking his potatoes.

Frito-Lay has claimed in this proceeding that Mr. Willoughby somehow acted improperly because he did not demand to deliver his potatoes to respondent on the contract dates. Respondent would put all burdens on complainant to assure that delivery occurred. We cannot draw a conclusion that this is a proper interpretation of the contract. As discussed above Frito-Lay has an equal responsibility to demand that complainant deliver potatoes in accordance with the contract terms. Indeed, had complainant not been able to deliver, Frito-Lay could have claimed damages. Therefore, we conclude the parties verbally agreed to a modification of the contract in both the weeks of June 13, 1983 and June 20, 1983, under which complainant, and respondent agreed to delay delivery of potatoes to a later date. The remaining question for resolution with respect to the 16,000 hundredweight of potatoes involved in the weeks of June 13, 1983, and June 20, 1983, is whether respondent's agent had authority to modify the contract, or whether the contract could not be modified because of the statute of frauds. This will be discussed subsequently.

The occurrences during the week of June 27, 1983, are even easier to resolve. By this time complainant's field effectively had sized to the maximum that it could. Mr. Willingham was on vacation during the week commencing on Monday, June 27, 1983. Therefore, Mr. Willoughby had to deal with Mr. Michael Anderson, Mr. Willingham's subordinate. The testimony shows conclusively that Mr. Willoughby was able to deliver the potatoes during the week of June 27, 1983, but that he knew they could probably size a

[2] Mr. Willoughby's integrity is manifested by the fact he did not sell potatoes to any other party until he had to on July 14, 1983, because they were deteriorating in the field. Such action was appropriate as an effort to mitigate damages.

little bit more. It is clear based upon the testimony in this case that it was more at the behest of Frito-Lay that on June 27, 1983, Mr. Willoughby acceded to Frito-Lay's desire to delay delivery of the potatoes. In effect, it was the respondent which did not meet the contract terms insofar as delivery dates are concerned. Mr. Michael Anderson testified that Mr. Willoughby indicated he was not yet ready to harvest the potatoes. We do not find Mr. Anderson's testimony in this regard to be credible.[3] Mr. Anderson, either constructively or actually, convinced complainant that it was all right to wait for a while longer before his potatoes were delivered to respondent. He reiterated what Mr. Willingham had said about the need to clear out the Baldwin County potatoes before taking Mr. Willoughby's crop. Our conclusion in this regard is supported, moreover, because in actuality purchase orders for Monday and Tuesday of a given week are issued on Thursday or Friday of the preceding week. There is no showing that Mr. Willoughby knew this. Mr. Willingham and Mr. Anderson did. In fact on June 27, Frito-Lay had no purchase orders to give for the early part of the week, at least.

Two days later, however, Mr. Willoughby decided that he could not wait any longer because his potatoes were fully mature, and there was a danger they would begin to deteriorate if left in the field. Therefore, on June 29, 1983, he contacted Mr. Anderson and requested that he be allowed to dig his crop. Mr. Anderson attempted to put him off, saying that he did not know if he could get purchase orders. Obviously, Frito-Lay was in the position of denying to Mr. Willoughby the opportunity to harvest his crop by not providing purchase orders. Mr. Anderson eventually offered to provide several purchase orders to Mr. Willoughby for the week of June 27, beginning with June 30. Mr. Anderson, however, was only able to deliver one purchase order, and withdrew his promise to deliver more than that. He then convinced Mr. Willoughby that that one purchase order would be for a load of potatoes which would be used as the test load for the delivery of the rest of Mr. Willoughby's potatoes. Mr. Willoughby, lacking the ability to do other-

[3] We do not find Mr. Anderson's testimony, in general, to be particularly credible. There was a tendency throughout his testimony on the witness stand for Mr. Anderson to remember those points which were favorable to respondent, but to have a memory lapse when his testimony might be favorable to complainant. In addition, his testimony with respect to the July 5, 1983, visit that he made to Mr. Willoughby's farm is in direct contravention of what was happening during that period of time. To say that he was merely making a courtesy visit when Mr. Willoughby was demanding that he be given an opportunity to dig his potatoes is not credible testimony.

wise, acceded to Mr. Anderson's representations in this regard. He delivered a load of potatoes which apparently were of very good chipping quality. Complainant was not provided purchase orders so as to be able to dig any more potatoes until after the end of June, 1983.

On Tuesday, July 5, 1983, while Mr. Willoughby was working in the field, Mr. Anderson paid what he called a courtesy visit. We find that such visit was not a courtesy visit. Rather, it was visit predicated upon the fact that Mr. Willoughby was strongly asserting his need to dig his potatoes, and respondent, acting in a businesslike fashion, was checking out the situation with respect to Mr. Willoughby's crop. On July 5, 1983, Mr. Anderson told Mr. Willoughby again that the Baldwin County crop was late, was not in as good condition as were Mr. Willoughby's potatoes, and had to be harvested first. Mr. Willoughby said he was ready to dig then. Mr. Anderson at least implied that his crop would be next, that all Mr. Willoughby had to do was to be patient. Further, the clear implication of Mr. Anderson's visit is that respondent did not consider its contract with complainant to have ended. Rather, the visit is consistent with Mr. Willoughby's claim the contract had been modified to carry over into July. Otherwise, respondent would have released Mr. Willoughby to sell to other buyers. It is totally inconsistent for respondent to claim the contract had ended, but not to have released Mr. Willoughby to sell the potatoes elsewhere.

As a result of Mr. Anderson's visit however, respondent did give Mr. Willoughby a series of purchase orders. Respondent gave complainant 12 purchase orders beginning with July 5, 1983, and ending on July 13, 1983, in which potatoes were delivered by complainant to respondent. All those potatoes were accepted. There was one purchase order on July 5, one on July 6, two purchase orders on July 7, one on July 8, one on July 11, three on July 12, and three on July 13, 1983. During this period of time Mr. Willoughby was insisting that he needed more purchase orders. He made it clear that he could dig six loads of chipping potatoes a day, each load approximating 450 hundredweight. In the meantime, because Frito-Lay was not giving him more purchase orders, and recognizing what was happening to his potatoes in the field, Mr. Willoughby began to look for other purchasers, despite the fact that the seed potato contracts would not allow him to sell such potatoes to others unless he were released from their prohibitory provisions. On July 14, 1983, he sold a load to a company known as Mid-State. On July 16, 1983, complainant got four more purchase orders, and four loads were delivered to Frito-Lay. Three of those loads were rejected because they could not meet Frito-Lay's requirements. On

July 18, 1983, Frito-Lay took one last load from complainant, which load was rejected by respondent. On that same day Frito-Lay finally allowed Mr. Willoughby to sell his potatoes to other buyers. The load shipped to Frito-Lay on July 18 was resold to a third party. Complainant sought to mitigate his damages by the sale of eight more loads between July 18 and July 21, 1983. Two of these loads were rejected by the purchaser. After that period of time the crop was allowed to rot in the field because the potatoes had deteriorated too much to warrant harvesting.

Frito-Lay did not immediately begin to take complainant's potatoes after it finished digging in Baldwin County. Rather, Mr. Willoughby determined on or about July 11, 1983, that Mr. Willingham and Mr. Anderson had by-passed him and gone to Sand Mountain, Alabama, in the Northern part of the state. At that point he was fully aware that his potatoes were beginning to deteriorate, and that his yield per acre was going down rapidly. Respondent did not keep the promises made by its agents that it would take complainant's potatoes after the Baldwin County crop was cleared out.

Complainant did everything he could to mitigate his damages. Complainant acted responsibly during the entire contract period in his dealing with respondent. His actions in not delivering potatoes during the weeks of June 20, 1983 and June 27, 1983 were taken in reliance on representations made by the agents of respondent. He relied to his detriment on their representations that respondent wanted all of his crop, and that he would be next to receive purchase orders after the Baldwin County potatoes were harvested.

In view of the above the first question which must be resolved is whether Mr. Willingham and Mr. Anderson had actual or apparent authority to bind respondent. Frito-Lay claims it had given them no authority, actual or apparent, to bind it. While we believe that they had actual authority to do so, we need not reach that issue because we find, based upon the facts of this case, that they had apparent authority to do so, which is all that is required. Case law is abundant that when the agent of a principal has apparent authority to act on behalf of that principal, the other party to a contract has a right to rely upon such apparent authority in making his business decisions. *George Arakelian Farms, Inc.* v. *Leonard O'Day Company, et al.*, 31 Agric. Dec. 1395 (1972), and cases cited therein. We have previously held that when a business permits a field representative, who is the only person with whom the other party to the contract can deal, to appear as its agent, and such person makes representations, such representative has apparent authority, and his principal is bound by his actions. *A Levy and J.*

Zentner Co. v. *American National Growers*, 19 Agric. Dec. 1022 (1960); *Goldston* v. *Murlas Bros.*, 21 Agric. Dec. 542 (1962).[4] This is especially necessary when we are dealing with a perishable product because otherwise the other party to the contract cannot hope to recover his losses when promises are not kept. He does not have a product which can be sold to some third party at a later time.

We are drawn to the conclusion that Mr. Willingham and Mr. Anderson had at least apparent authority to bind Frito-Lay because of the way in which respondent operated. While the growing contract between Frito-Lay and Mr. Willoughby was signed by a Frito-Lay representative located in Dallas, all subsequent contacts between complainant and respondent were between Mr. Willoughby and either Mr. Willingham or Mr. Anderson. It is clear that respondent expected complainant to deal with those individuals. For respondent to argue that complainant could have got in touch with somebody in Dallas constitutes a denial of the way in which it was conducting its business operation. Frito-Lay further maintained control of its potato purchasing operation by providing purchase orders for four plants in the Southeast region of the United States out of its Dallas, Texas office. Mr. Willingham, and at times Mr. Anderson, had to get such purchase orders from Dallas, and give them to farmers who were under contract to sell potatoes to respondent. They clearly had input into who received the purchase orders, both by their own admission, and because out of necessity they were the only individuals with whom the farmers were dealing directly. The farmer was kept in the dark as to what was going on. Indeed, Mr. Anderson, in one of his more forthright statements, acknowledged that it was a practice of Frito-Lay not to tell the farmer any more then it had to. A farmer could not deliver potatoes to Frito-Lay unless he got a purchase order. That put the farmer into a subservient position in which he had to try to please the representatives of Frito-Lay in order to get what he was entitled to as of a date certain by virtue of the provisions of the contract. It is no wonder that Mr. Willoughby was willing to put off the harvest of his potatoes. Frito-Lay had him in a bind. For this reason, unless, as discussed below, the statute of frauds precludes changes in the contract dates by either Mr. Willingham or Mr. Anderson, we must find Frito-Lay breached its contract.

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[4] We also find for complainant on the basis of estoppel. *Tri-State Sales Agency* v. *Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955). Respondent held Messrs. Willingham and Anderson out as its agent, complainant relied on their representations, and was injured as a result of such good faith reliance.

Respondent's principal defense in this proceeding is that because there was a written contract entered on January 24, 1983, with respect to the terms and conditions surrounding the delivery of the potatoes, including the specification of exact weeks in which exact amounts of potatoes were to be delivered, those provisions cannot be varied by subsequent oral modifications agreed to between the parties.[5] Section 7-2-201(1) of the Alabama Commercial Code states:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract of sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

Because the statute of frauds provision of Alabama states that it is not enforceable unless there is a writing when the contract is for more than $500, the holdings in *Rothenberg* v. *H. Rothstein & Sons*, 183 F.2d. 524 (3rd Cir. 1950), must be considered. The Third Circuit found with respect to transactions subject to the Perishable Agricultural Commodities Act that state law was not necessarily controlling with respect to a contract subject to the statute of frauds. It found that if a state statute of frauds rendered an oral contract void because it was not in writing, then the Secretary of Agriculture could not look further to determine whether there had been a breach of contract. If, however, the state statute of frauds, as is the

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[5] Respondent raised numerous other defenses. They were essentially procedural in nature. It maintained, among other things, that complainant was inconsistent in his pleadings and testimony insofar as his theory of the case is concerned. We are not impressed by respondent's defense in this respect. While complainant did broach at least two different theories as to why the contract had been breached, i.e. that the contract time for delivery was extended by mutual agreement and that there were new contracts after July 1, 1983, between the parties, we do not believe that they are inconsistent with each other. Neither do we believe that respondent was put in any kind of difficult position by virtue of the fact that complainant amended its complaint during the hearing to reflect its belief that the contract provision had been amended to provide for delivery after July 1, 1983. This is particularly so because respondent was given and took advantage of the opportunity to have the hearing reopened to take further evidence. We would also note parenthetically that the fact that complainant's arguments on brief were not precisely attuned to his earlier theory of the case hardly lessens the credibility of Mr. Willoughby's testimony. The credibility of Mr. Willoughby's testimony is determined by the Presiding Officer based upon his observation of the witness, and the consistency with which Mr. Willoughby provided answers to questions, many of which were asked more than once. Mr. Willoughby at all times was a credible witness.

case for Alabama, is merely unenforceable if it is not in writing, it is only procedural and the Secretary of Agriculture can consider whether the oral contract was breached because pursuant to section 5 of the PACA (7 U.S.C. 499e) a party may sue either under state law or under the PACA.[6] Section 5 states in pertinent part as follows:

> (b) "Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter remedies now existing at common law or by statute, and the provisions this Act are in addition to such remedies."

Rothenberg, then, permits the Secretary of Agriculture to look at the facts standing behind an oral modification to a written contract to determine whether there has been a breach. This is extremely important in the perishable agricultural commodities industry because produce is perishable in nature, and if it is not rapidly disposed of, becomes worthless. The rule set forth in *Rothenberg* makes sense in terms of the industry which is to be regulated by the PACA. This industry is unique because the commodities are so perishable, frequently making it impossible for the seller to dispose of the commodity if it is rejected by a buyer who makes an oral promise to accept it.[7] Such is the case here. It is clear on the facts

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[6] Complainant expressed some ambivalence as to whether the Texas or Alabama statute of frauds was applicable. Respondent dealt only with the Alabama statute. We find that the essential terms of the contract were entered in Alabama, and that the law of Alabama controls. In any event the statute of frauds of Texas renders contracts for the sale of goods of more than $500 unenforceable rather than void. See *Hegel Branch* v. *Mission Shippers*, 35 Agric. Dec. 726 (1976).

[7] Indeed, most contracts under the PACA are both for more than $500.00, and entered by oral communication which is subsequently memorialized by an invoice issued by the seller, but not assented to by the buyer except through acquiescence. The industry could be devastated if for each such contract the statute of frauds could be invoked to defeat enforceability.

Although there are factual distinctions, the principle set forth in *Hegel Branch* v. *Mission Shippers, Inc.*, supra note 6, at pages 731-32 is apposite here. The Judicial Officer stated:

> In matters involving the statute of frauds under the Perishable Agricultural Commodities Act, the Department has long followed the guidelines laid down in *Joseph Rothenberg* v. *A. Rothstein & Sons*, 183 F.2d 524 (3rd Cir. 1950), 9 A.D. 1272. In that case the court made it clear that a federal district court hearing a case on appeal from the Secretary under the Act does not sit as another court of the state and is not governed by the rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Such a case is rather "to be determined under the same rules of sub-

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in this case that respondent's agents, Willingham and Anderson, in discussions with complainant, agreed to a modification of the contract. Such modification included all pertinent contractual terms. While there was no discussion as to price, it was clear that the price was to be the same as that provided for in the written contract simply because the agents were talking only about an extension of time in which to have the goods delivered to respondent.[8] Further, we are not aware of any holding which precludes an integrated written contract subject to the statute of frauds from being modified by subsequent oral agreement. Indeed, the Restatement of Contracts appears to point in the other direction.[9] What has not

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stantive and procedural law as were involved in the Secretary's proceedings." (*Rothenberg*, supra). By the same token, *Rothenberg* also makes it clear that where the Act or regulations of the Secretary do not provide a solution to a problem of the validity of a contract, then state law is applicable. In the *Rothenberg* case the Court of Appeals, recognizing that since the statute of frauds of Pennsylvania was procedural rather thansubstantive it would not be applicable in a reparation proceeding. The court reasoned that "the federal act intends to grant a new remedy which is not dependent upon but is in addition to such other remedies as may be available to the parties at common law or by the statutes of any state", and that *where the statute of frauds of a particular state only precluded enforcement of an oral contract as a remedy, but left it otherwise valid, though unenforceable, such a procedural statute would have no effect upon a proceeding before the Secretary of a subsequent appeal therefrom.*

We feel that the substantive-procedural distinction as drawn in *Rothenberg* is valid and should remain applicable in reparation proceedings before the Secretary. There has always been a *reluctance to apply the statute of frauds in reparation decisions, due to the simple fact that oral contracts are extremely common in the fruit and vegetable industry.* Sales are commonly made interstate by phone, and where a broker is involved and issues a written confirmation, it is frequently not clear whose agent he was in the transaction. These factors combine to create situations where the application of the statute would work a fraud rather than prevent one. While the Secretary could by regulation provide that state statutes of frauds would not be applicable in reparation proceedings, he has not in fact done so. However, in the absence of such regulations we feel warranted in holding that in future cases the burden of showing that a particular statute of frauds is a part of the substantive law of a state in the sense that it renders an agreement null and void as a contract and not merely unenforceable should be upon the party claiming the benefit of the statute. (emphasis added).

[8] It is basic contract law that any modification to a contract must be assented to by both parties. Further it is basic contract law that all of the essential terms of a contract must be set forth in the modification. We find that both of these requirements have been met in this instance.

[9] See Restatement Of The Law Second, Contracts 2d, ALI, 1981; section 216 of which states:

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been determined is whether respondent's agreement to the modification of the contract was of such a nature that it must be held liable for the value of the entire 25,000 hundredweight of potatoes, less those which it received, accepted and paid for, and those which were sold by complainant to other purchasers in mitigation of damages.

The evidence shows clearly that each truckload of potatoes could comprise approximately 450 hundredweight. The evidence further shows that complainant could dig six truckloads worth of potatoes a day. Thus, from June 27 through July 1, 1983, complainant could have dug and delivered 30 truckloads of potatoes. This amounts to 13,500 hundredweight of potatoes.[10] In addition, it is clear that between July 5, 1983, and July 13, 1983, all of complainant's potatoes which wer e delivered to respondent were received and accepted as meeting respondent's requirements. Assuming that no potatoes would have been dug over the Fourth of July weekend, there would have been as many as 54 truckloads of potatoes dug during the nine day period between July 5 and July 13. That would amount to 24,300 hundredweight of potatoes. When added to the previous 13,500 hundredweight we arrived at a figure of 37,800 hundredweight of potatoes which could have been dug by complainant by July 13, 1983. That is more than the contract called for. Given the high quality of the load dug on June 30, 1983, as acknowledged by Mr. Anderson, We must assume that all of complainant's potatoes would have been acceptable to respondent had they been delivered by July 13, 1983. That they were not is the fault of respondent, who did not provide complainant with enough purchase orders to be able to do so. As mentioned before complainant relied upon the

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"(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not complete integrated if the writing omits a consistent additional agreed term which is

(a) agreed to for separate consideration, or

(b) such a term as in the circumtances might naturally be omitted from the writing."

We find that the agreement herein was not completely integrated because it would be natural to omit an understanding that the actual dates for delivery of complainant's crop might vary in accordance with maturity and the needs of Frito-Lay for the potatoes. The agreement entered was a standard agreement for the purchase and sale of a crop.

[10] We are not impressed by the testimony by Mr. Anderson that complainant's equipment was consistently breaking down. Complainant explained that equipment on a farm always breaks down. He further stated that he keeps several thousand dollars worth of parts available to repair the equipment.

promises made by respondent's agents, who had at least apparent authority to make them, that his potatoes would be purchased, received, and accepted if they met the quality requirements of respondent. Therefore, complainant has met his burden of proof that all 25,000 hundredweight of potatoes were of the quality required by Frito-Lay. That leaves for resolution only the amount of damages which must be awarded.

The total contract price agreed upon between the parties for the 25,000 hundredweight of potatoes, at $5.50 per hundredweight, was $137,500.00. Respondent purchased, received and accepted 6,681.60 hundredweight of potatoes, and paid complainant $35,508.97, at the rate of $5.75 per hundredweight for those potatoes, less certain deductions pertaining to three loads which were reject. Complainant mitigated his damages by selling 3,329.93 hundredweight of potatoes to other purchasers in eight transactions, for total receipts of $14.580.00. Therefore, complainant suffered damages in the total amount of $87,411.03. Respondent's overpayment for the potatoes which it did receive at the rate of $.25 per hundredweight has been taken into account in the above computation. Since complainant only requested damages of $84,825.83 in its complaint, and damages were in an amount greater than that requested in the complaint, complainant's award shall be limited to the amount originally requested. Respondent's failure to pay complainant $84,825.83 is a violation of section 2 of the Act for which reparation should be awarded with interest.

As the prevailing party complainant is entitled to reasonable attorney's fees and other expenses. Complainant claimed his attorney spent 16 hours preparing for the hearing at a rate of $100.00 per hour, and 15 hours at the hearing at a rate of $125.00 an hour, for a total charge of $3,475.00. Complainant's attorney also charged $100.00 per hour for 15 hours of time preparing for taking four dispositions for a total charge of $1,500.00. In addition, complainant's attorney spent 6½ hours taking the depositions at $125.00 an hour, for a total charge of $812.50. Total attorney fees, therefore, were $5,787.50. In addition, there was $600.00 claimed for attorney travel to take the depositions. $1,550.00 was claimed for travel by witnesses, and subsistence, in order to appear at the hearing. Finally, there was a claim of $535.89 for transcripts of the hearing and the depositions. The total claim for fees and expenses related to the hearing by complainant was $8,473.39. We find this sum to be reasonable, and an award in this amount should be made in favor of complainant, with interest thereon.

Respondent shall pay to complainant $84,825.83, with interest thereon at the rate of 13 percent per annum from August 1, 1983, until paid.

Respondent shall pay to complainant for attorney's fees and other expenses $8,473.39, with interest thereon at the rate of 13 percent per annum from the date of this order until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

FRUIT MARKETING, INC., *v.* LOFCHIE INC., a/t/a BRUCE CO., PACA Docket No. 2-6857. Decided May 1, 1986.

Burden of proof as to breach and damages on respondent—breach of suitable shipping condition warranty—damages incurred by respondent deducted from contract price—reparation awarded.

Respondent sustained its burden of proving a breach of complainant's suitable shipping condition warranty regarding the truckload of peaches it accepted. Respondent incurred damages based on the difference between the contract price plus freight and the amount obtained upon resale. Respondent held liable for the contract price less its damages.

Andrew N. Stanton, Presiding Officer.
Complainant, *pro se*.
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,323.00 in connection with a truckload of peaches sold to respondent and shipped, in interstate commerce, to respondent's customer.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an op-

portunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answering statement, and complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Fruit Marketing Inc., is a corporation whose address is P.O. Box 399, Del Rey, California.

2. Respondent, Lofchie Inc., a/t/a Bruce Co., is a corporation whose address is 325 W. Shields, Suite 102, Fresno, California. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately September 7, 1984, complainant sold to respondent a truckload of peaches consisting of 660 cartons at $5.85 per carton, plus $.70 per carton for cooling and palletization, for a total contract price of $4,323.00, f.o.b. The peaches were to be shipped to respondent's customer, Finest Fruit Co., Inc., Bronx, New York.

4. On September 8, 1984, complainant loaded the truck with 660 cartons of peaches and prepared a bill of lading, showing the shipping date of September 8, 1984, the destination as New York City, and the temperature to be maintained enroute as 36° F.

5. The peaches arrived at the place of business of respondent's customer in Bronx, New York, on September 14, 1984. At 3:45 a.m. that same day they were subjected to a federal inspection, which found as follows, in relevant part:

> VARIOUS CONTAINERS Range 38° *To 39°F.*
>
> Peaches "Del Pak Summerset 48-50". . . *Applicant States:* . . . 660 cartons of peaches. . . .
>
> *Condition: Peaches:* Mostly firm ripe, some ripe. Yellow ground color. 4 to 18%, average 11% damage by bruising, scattered throughout pack, affecting all stages of ripeness. 6 to 20%, average 13% damage by external brown discoloration. No decay.

6. The Market News Service Reports for Bronx, New York on September 14, 1984, shows that the supply of such peaches were too few to enable the quoting of a market price.

7. Respondent resold the peaches to Finest Fruit Co., Inc., for a total of $4,747.50.

8. Respondent has paid complainant $1,810.00 for the load of peaches at issue.

9. A formal complaint was filed on March 21, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Respondent admits receiving and accepting the peaches, but claims that a federal inspection taken upon arrival showed they contained an excessive amount of condition defects, in breach of complainant's suitable shipping condition warranty. Complainant claims that it was not notified until September 25, 1984, 11 days after the peaches arrived, that the peaches had been inspected and found to contain condition defects. Complainant also contends that respondent has failed to prove that the temperature during transit was proper. Complainant further disputes respondent's claimed damages derived from its resale of the peaches.

Having accepted the peaches, respondent became liable for the agreed upon contract price, less damages arising from any breach of warranty by complainant. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Farm Market Service Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983). As this was an f.o.b. sale, complainant gave the implied warranty of suitable shipping condition, which is defined at 7 CFR 46.43(j) as meaning "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The September 14, 1984, federal inspection (Finding of Facts 5) revealed an average of 11% damage by bruising and 13% damage by external brown discoloration, for a total of 24% condition defects, which constituted abnormal deterioration. Complainant appears to be claiming that transportation conditions were abnormal, therefore voiding the suitable shipping condition warranty. While we agree with complainant that in an f.o.b. sale it is respondent's burden to prove that transportation conditions were normal (*Oneonta Trading Corporation* v. *Tommie's Cello-Pak, Inc.*, 40 Agric. Dec. 1798 (1981)), the evidence in the record shows that respondent has sustained this burden. The peaches were shipped from complainant in Del Rey, California on September 8, 1984, and arrived in Bronx, New York on September 14, 1984, six days later, which is a reasonable transit time for the distance covered. Further, the inspection report shows the temperature of the peaches as from 38° to 39°F., which is well within the normal range. The 11% damage by bruising was most likely caused by complainant loading some fruit that was softer than it should have been, as shown by

the inspection report's description of the peaches as "mostly firm ripe, some ripe." In view of the abnormal deterioration exhibited by the peaches when they arrived at respondent's place of business, and considering that transportation conditions were normal, we conclude that complainant breached its warranty of suitable shipping condition with respect to these peaches.

As damages from complainant's breach of warranty, respondent is entitled to the difference, at the time and place of acceptance, between the actual value of the peaches and their value if they had been as warranted. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest* v. *Garden State Farms, Inc.*, 42 Agric. Dec. 922 (1983). The actual value is determined by a prompt and proper resale. Respondent has provided evidence that it sold the 660 cartons of peaches to Finest Fruit Co., Inc., Bronx, New York, for $4,747.50. There is nothing in the record indicating that this resale was not prompt and proper. For the value of the peaches if they had been as warranted, respondent urges that reference be made to the Market News Service Reports at Bronx, New York. However, the Market News Service Reports contain no listings for California peaches on September 14, 1984, the date of acceptance. We will therefore use the contract price plus freight. The contract price for these peaches was $6.55 per carton, for a total f.o.b. contract price of $4,323.00. According to the account of sales of Finest Fruit Co., Inc., the freight was an additional $1.91 per carton or $1,260.60, for a total of $5,583.60. If we subtract the actual value of the peaches, $4,747.50, from their value if they had been as warranted, $5,583.60, we find respondent's damages to have been $836.10. Respondent has not claimed any incidental damages. Therefore, respondent's liability to complainant is the f.o.b. contract price of $4,323.00 less its damages of $836.10, resulting in $3,486.90. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,486.90, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

THOMAS B. SMITH d/b/a THOMAS B. SMITH FARMS, *v.* I. M. C. BROKERAGE & PRODUCE CO., INC. PACA Docket No. 2-6777. Decided May 5, 1986.

Acceptance by taking possession of, and reselling, produce—neutral inspection necessary to show condition of produce—open-ended allowance not proven—failure to submit accounting of resale precludes award of damages—accord and satisfaction by holding check not shown—reparation awarded.

In f.o.b. sale of tomatoes respondent accepted by taking possession and reselling. Testimonial evidence of poor condition on arrival was discounted, a neutral inspection being necessary to establish condition of perishable produce. Respondent alleged that it was granted an open-ended allowance, but failed to prove this allegation by a preponderance of the evidence. Respondent failed to submit an accounting, and therefore could not have established its loss even had the allowance been proven. Complainant's retention of respondent's check marked "paid in full" was not deemed an accord and satisfaction, because complainant failed an informal complaint shortly after receiving the check and requested that the Department secure the check's release as an undisputed amount.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
James A. White, Esquire, Fayetteville, GA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $7,844.82 in connection with the shipment in interstate commerce of a truckload of tomatoes. The formal complaint was later amended to request an award in the amount of $10,362.00 in connection with the same load.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering

statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant is an individual, Thomas B. Smith, doing business as Thomas B. Smith Farms, whose address is Route 1, Box 129, Quincy, Florida.

2. Respondent, I. M. C. Brokerage & Produce Co., Inc., is a corporation whose address is 120 Lakeview Drive, Woolsey, Georgia. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about August 4, 1984, complainant sold to respondent, on an f.o.b. basis, one truckload of tomatoes having an invoice value, after deduction of an $800 credit on a previous load, of $10,362.00.

4. On or about August 4, 1984, complainant shipped the tomatoes from loading point in Quincy, Florida to respondent in Woolsey, Georgia by means of respondent's truck. Upon arrival at respondent's place of business in Woolsey, Georgia the tomatoes were accepted by respondent. Respondent tendered payment to complainant in the amount of $3,318.00, marking the check payment in full. Complainant returned this check to respondent.

5. The formal complaint was filed on January 28, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the full purchase price of a truckload of tomatoes sold to respondent. Although respondent contends that the tomatoes were not accepted, the record clearly shows that respondent took possession of the tomatoes and resold them. There is no credible evidence that respondent gave complainant any timely notice of rejection prior to unloading the tomatoes. See *Santa Clara Produce* v. *Caruso Produce Inc.*, 41 Agric. Dec. 2279 (1982). Since respondent accepted the tomatoes it became liable to complainant for the full contract price less any damages resulting from any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *J. Prettyman, Jr.* v. *D. J. LaMantia*, 41 Agric. Dec. 1614 (1982).

Respondent contends that the subject tomatoes arrived in poor condition. Respondent also contends that it deducted substantial amounts from complainant's invoice because of poor deliveries on two other shipments of tomatoes which are referred to by complainant in his formal complaint. Respondent sought to establish

by affidavit testimony that the tomatoes were in poor condition. We have held many times that testimonial evidence in regard to the condition of perishable produce must be discounted. An inspection by a neutral party conducted on the basis of scientific sampling and an accurate description of the percentage of grade defects, or condition defects, is necessary. See *Mutual Vegetable Sales, v. Select Distributors*, 38 Agric. Dec. 1359 (1979).

Respondent submitted an affidavit by one of its employees, J. Ron Howard, who stated that he was in charge of sales, purchasing, and receiving tomatoes. Mr. Howard stated that as to one of the two previous loads of tomatoes, that which was shipped on July 16, 1984, he had a conversation with a person identified only as "Bud" who he understood to be the person in charge of sales for complainant. Mr. Howard stated that Bud acknowledged that the July 16, load of tomatoes was of poor quality, and promised that "any loss as a result of the poor quality would be made up." Respondent asserts that the loss on the load was $2,028.00. Complainant submitted the affidavit of W. H. Fulford, Jr., who stated that on or about July 16, 1984, he spoke directly with Mr. I. M. Cartwright of respondent's firm about respondent's dissatisfaction with the July 16, 1984, load of tomatoes. Mr. Fulford states that, as the salesman involved, he was authorized by Mr. Smith to grant to Mr. Cartwright a 50 cents per box credit for the tomatoes which totalled $800. Mr. Fulford stated that this amount was deducted from the invoice for the tomatoes shipped on August 4, 1984. We find that respondent has failed to prove the open ended allowance which it has alleged. In addition we note that respondent failed to supply us with any accounting of the resale of the tomatoes shipped on July 16, 1984, and that consequently respondent would not have been able to recover the alleged loss of $2,028.00 in any event.

Mr. Howard also made essentially the same allegations in regard to tomatoes shipped on July 26, 1984. Mr. Fulford stated in his affidavit that he did not speak with Mr. Cartwright about any other complaints, and that there was a price adjustment on only one load, namely the load on July 16, 1984. Again, as to this load respondent did not submit an accounting of the resale of the tomatoes, and therefore we could not allow the alleged loss of $768.00 in regard to these tomatoes in any event.

In regard to the subject tomatoes shipped on August 4, 1984, Mr. Howard again alleged that he had conversations with "Bud" concerning the alleged poor quality of the tomatoes and resulting losses. Mr. Howard stated that "Bud" advised that the problem would be taken care of. This allegation is, of course, also answered

by the affidavit of Mr. Fulford, and again, we note that respondent did not submit an accounting of the resale of this last load of tomatoes. Accordingly respondent could not have recovered the alleged loss of $4,248.00 in any event.

In its answer respondent raised as a defense the allegation that there had been an accord and satisfaction in regard to the August 4, 1984, shipment of tomatoes as a result of the retention by complainant of an August 20, 1984, check in the amount of $3,318.00 which had typed thereon the notation "paid in full all tomatoes". The record discloses that respondent did not return the check to complainant until February 8, 1985, when it filed its amendment to the formal complaint. However, the record also shows that complainant filed with this Department an informal complaint on October 3, 1984, and clearly stated therein that he was not accepting respondent's check for $3,318.00 marked paid in full. Respondent was given notice of the informal complaint by a letter from this Department dated October 16, 1984, and such letter specifically requested that respondent release the check to complainant as an undisputed amount without prejudice to the rights of either party regarding the balance in dispute. The Department asked that respondent reply by October 30, 1984. Respondent did not reply to the Department's letter until November 30, 1984, and in its reply made no reference whatever to the check being held by complainant. We do not believe that the record in this proceeding supports respondent's contention that there was an accord and satisfaction as a result of retention of the check by complainant.

As we stated earlier respondent accepted the tomatoes, and thus became liable to complainant for the full purchase price of $10,362.00. Respondent has not proven any breach on the part of complainant, or any modification of the original contract which would allow payment of a lesser amount. Accordingly, respondent is liable to complainant for the full purchase price of $10,362.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $10,362.00, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

G.A.C. PRODUCE CO., INC., *v.* THE OTAY PACKING CO., PACA Docket No. 2-6872. Decided May 5, 1986.

Allegation of credit uncontradicted—undisputed—complaint dismissed.

Complainant failed to offer any rebuttal to respondent's allegation that a credit had been allowed on two shipments of tomatoes. It was concluded that the credit had been granted.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $53,166.00 in connection with several shipments of tomatoes in contemplation of movement in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability to complainant in the amount of $50,574.00, and denying liability to complainant for the balance claimed. An order requiring respondent to pay complainant the sum of $50,574.00 as an undisputed amount was issued on August 26, 1985, pursuant to section 7(a) of the Act (7 U.S.C. § 499g(a)) and section 47.8(b) of the Rules of Practice (7 CFR § 47.8(b)).

Although the amount claimed in the formal complaint exceeded $15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. However, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, G.A.C. Produce Co., Inc., is a corporation whose address is P.O. Box 1231, Nogales, Arizona.

2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between September 17, and September 22, 1984, complainant sold to respondent 8,664 containers of tomatoes, 6×6 size and larger, approximately 85% U.S. No. 1 grade or better, for the total price of $53,166.00 f.o.b. complainant's warehouse in Chula Vista, California.

4. Between September 17, and September 22, 1984, complainant shipped the tomatoes from its warehouse in Chula Vista, California to respondent in Chula Vista, California in contemplation of subsequent movement in interstate commerce. Respondent accepted the tomatoes upon arrival.

5. At some time after arrival of the tomatoes complainant granted respondent an allowance of $1.00 per carton on two shipments containing 1,296 cartons each, or a total allowance of $2,592.00.

6. The formal complaint was filed on March 5, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent admitted liability to complainant, in its answer, in the total amount of $50,574.00. On August 26, 1985, an order was issued requiring respondent to pay complainant the amount of $50,574.00 as an undisputed amount. In its answer respondent's vice president, Earl Tachiki, stated that complainant had agreed to give respondent a credit of $1.00 per carton on two shipments containing 1,296 cartons each. The total amount of the alleged credit was $2,592.00. Complainant had the opportunity to rebut the statement by respondent's president but failed to do so. There is no evidence in the record which contradicts the statement by respondent's president. Accordingly, we conclude that complainant granted respondent an allowance of $1.00 per carton on the two shipments, or a total allowance of $2,592.00. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

NAPLES TOMATO GROWERS, INC., *v.* PETER G. PAPPAS and PHILIP G. PAPPAS d/b/a PETE PAPPAS & SONS, PACA Docket No. 2-6879. Decided May 5, 1986.

F.o.b. sale—special price agreement—reparation awarded.

Parties agreed that tomatoes were to be sold f.o.b. with price to be determined by "next week's market." Respondent contended that price was to be determined as of the day following shipment. It was held that the price term used required use of an average price for the whole business week following shipment.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
George S. Charles, Washington, DC, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,800.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Naples Tomato Growers, Inc., is a corporation whose address is Route 2, P.O. Box 1700, Naples, Florida.

2. Respondent, is a partnership composed of Peter G. Pappas and Philip G. Pappas doing business as Pete Pappas & Sons, whose address is 1401 Okie Street, N.E., Washington, D. C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about January 20, 1985, complainant sold to respondent one truckload of mature green tomatoes consisting of 800 25 pound cartons of size 6×6, and 800 25 pound cartons of size 6×7, Beef Stake Brand, with the price to be established on the basis of "next week's market".

4. The tomatoes were federally inspected on January 20, 1985, at shipping point, and found to grade U.S. combination with at least 85% U.S. No. 1, and no decay.

5. Complainant shipped the tomatoes to respondent on January 20, 1985, and such tomatoes were accepted by respondent on arrival in Washington, D. C.

6. The average of the prices quoted for the Florida shipping point market during the week of January 21-25, 1985, was $15.33 for size 6×6, and $13.25 for size 6×7 tomatoes, 85% U.S. No. 1 or better. The average of the prices during the same period of time for the Washington, D. C. area (Jessup, Maryland) was $15.50 for size 6×6, and $13.50 for size 6×7 tomatoes of generally good merchantable quality and condition.

7. The formal complaint was filed on April 16, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks to recover for the tomatoes sold to respondent on the basis of $14.00 per carton for the size 6×6 tomatoes, and $12.00 per carton for the size 6×7 tomatoes. This would amount to a total price of $20,800.00 for the truckload of tomatoes, and complainant also maintains that it should be allowed $240.00 for palletizing, or a total of $21,040.00, f.o.b., Naples, Florida. Respondent has remitted to complainant $16,240.00 for the truckload of tomatoes, which amounts to $11.00 for the size 6×6 tomatoes, and $9.00 for the size 6×7 tomatoes, plus $240.00 for palletizing. Both parties seem to be agreed that the term "next week's market" referred to the week beginning January 21, 1985, rather than the literal next week which would begin on Sunday January 27, 1985. Respondent submitted Market News Reports for Jessup, Maryland which not only showed tomato prices for that market, but also showed shipping point prices for South & Central Florida. The reports submitted by respondent covered Monday, January 21, through Monday, February 4, 1985. As stated in the Findings of Fact, the average price for the size 6×6 tomatoes during the week of January 21, through 25, at shipping point, was $15.33 per carton, and for the 6×7 tomatoes, $13.25 per carton. However, this is an average of only 3 days, namely January 21, 24, and 25, since there were no price quotations for January 22, and January 23. The prices shown

at shipping point for January 21, for size 6×6 were $9.00 to 10.00, mostly $10.00, and for size 6×7 $7.50 to $8.00. The prices for January 24, and January 25, were $18.00 for the size 6×6, and $16.00 for the size 6×7. A corresponding rise in price was also shown for the Jessup, Maryland market, but such market additionally showed quotations for January 22, and 23. These prices were generally sustained for Monday, January 28, and began falling on January 29, 1985.

Respondent maintains that the price which it should pay to complainant should be based on the market price for January 21, 1985. However, although the record does not disclose when the tomatoes arrived, it is unlikely that respondent could have begun selling the tomatoes any earlier than January 22, 1985, at the earliest. We believe that the terms of sale used by the parties contemplated that the price would be set on the basis of the average price for the week of January 21, 1985. Such average price, both at shipping point and at Jessup, Maryland, was in excess of the price being asked in this proceeding by complainant. We conclude that the terms of sale require that respondent pay complainant at least such price, or the requested $14.00 per carton for the size 6×6, and $12.00 per carton for the size 6×7, plus $240.00 for palletizing, or a total for the truckload of $21,040.00. Respondent has already paid complainant $16,240.00 of this amount, which leaves a balance still due of $4,800.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $4,800.00, with interest thereon at the rate of 13 percent per annum from February 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC., *v.* METRO PRODUCE INC., PACA Docket No. 2-6883. Decided May 5, 1986.

Contract price protected on arrival—with acceptance, buyer must pay contract price less damages proven—reparation awarded.

Buyer/respondent accepted potatoes but claimed agreement was that price was to be protected through sale. Complainant asserted contract term was that price was protected only until arrival. Conflicting affidavits could not be resolved but evidence showed market did not drop between shipment and arrival and that respondent's

real concern was with the quality of potatoes. Respondent offered no evidence as to breach and damages as to quality nor no evidence to show it promptly and properly resold potatoes and the price it received. Therefore, respondent was liable for contract price less amount already permitted.

Peter V. Train, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,275.00 in connection with the sale of potatoes in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

In its answer, respondent denied liability claiming that the contract price was not to be determined until after sale, and asserting that it had paid complainant the amount respondent received after sale.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Both parties filed opening statements. Both parties declined an opportunity to file briefs.

FINDINGS OF FACT

1. Complainant Nick Delis Company, Inc., hereinafter referred to as the complainant, is a corporation whose mailing address is P.O. Box 1089, Millbrae, California 94030.

2. Respondent Metro Produce, Inc., hereinafter referred to as respondent, is a corporation whose mailing address is 12374 Helen, Southgate, Michigan 48195.

3. Both parties are, and at all times material herein were, licensed with the Secretary of Agriculture to do business under the Act.

4. On April 26, 1984, complainant sold to respondent 910 cartons of U.S. No. 1 White Rose potatoes at an invoice price of $6.00 per carton plus a temperature recorder at $22.50 for a total F.O.B. in-

voice price of $5,482.50. The goods were shipped in interstate commerce and received and accepted by respondent on May 2, 1984.

5. Respondent has remitted a total of $3,207.50 in payment for these potatoes.

6. The formal complaint was filed on March 4, 1985. An informal complaint was filed on November 2, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over the price term in the contract. Respondent claims that its agreement was that it was to be protected as to price through sale, that is that price was to be determined after sale. Complainant asserts, however, that the agreement was to protect respondent as to price only until arrival of the commodity. The invoice in question contains a notation "price protected on arrival." Respondent claims, however, that this was error and that it corrected the original of the invoice and returned it to complainant. Complainant, however, filed the affidavit of Paul Brown, its salesman at the time, in which he states that he agreed only to a protection of the price until arrival and specifically denies that he agreed to give protection of the entire load or to any other price adjustment. Significantly, respondent has not submitted the corrected invoice.

We are faced with two sworn statements asserting diametrically opposite stories. Whether there was a misunderstanding, or one party's statement is erroneous cannot be determined. An examination of the entire record, however, reveals several factors helpful to the resolution of this matter. First, there is no contention that the price of potatoes dropped while they were in transit. The $6.00 per carton, therefore, seems to be consistent with the prevailing market price. Second, respondent's real complaint seems to be that the potatoes were of only "fair" size and quality. However, respondent has offered neither a U.S.D.A. inspection nor any other evidence to demonstrate that the potatoes were of lesser quality than warranted. Finally, respondent has not submitted accountings showing what it received upon resale of the potatoes.

Having accepted the potatoes, respondent is liable for the contract price less any damages sustained. See *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Rydell California Potato Co.* v. *The Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957). As noted above, the evidence indicates that the market price was $6.00 per carton at the time the potatoes were accepted. Respondent is liable to pay this amount unless it can prove damages. Respondent, however, has submitted no evidence to

support a contention that the potatoes were worth less than $6.00 per carton. A mere statement as to amount of money received upon the resale of the potatoes without the accountings and without evidence demonstrating prompt and proper resale is not sufficient to meet respondent's burden to prove damages.

Therefore, complainant is entitled to receive the value of the goods shipped plus the cost of the temperature recorder. It is entitled to receive $5,482.50, of which is has received $3,207.50, leaving a total of $2,275.00 still due and owing. Respondent's failure to pay that amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within 30 days of the date of this decision, respondent Metro Produce, Inc., shall pay complainant Nick Delis Company, Inc., the amount of $2,275.00 as reparation, plus interest at 13 per cent per annum from June 1, 1984, until paid.

Copies of this Order shall be served upon the parties.

BELRIDGE PACKING CO., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7111. Decided May 5, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $29,534.50 in connection with two shipments of carrots in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Belridge Packing Co., is a corporation whose address is P. O. Box 1852, Bakersfield, California 93303. Respondent,

Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $29,534.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $29,534.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ROGER HARLOFF PACKING, INC., *v.* JOHN LIVACICH PRODUCE, INC., a/t/a VISTA SALES, PACA Docket No. 2-6829. Decided May 15, 1986.

F.o.b. sale and acceptance—authority of broker to negotiate protection agreement not established—protection agreement voided by failure to keep records of resales and losses—reparation awarded.

Respondent accepted two loads of tomatoes and alleged that protection was granted after acceptance. Evidence was insufficient to show whether protection was granted by complainant or by broker acting on his own. In either event, respondent did not furnish records of resales and losses. Consequently, any protection agreement would be voided.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $972.00 in connection with the shipment in interstate commerce of two truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was

served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Roger Harloff Packing, Inc., is a corporation whose address is P.O. Box 1787, Bradenton, Florida.

2. Respondent, John Livacich Produce, Inc., is a corporation also trading as Vista Sales, whose address is 2231 Willow Brook Drive, Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about December 2, 1983, complainant sold to respondent 1,008 25 pound boxes of Palmetto Beauty U.S. No. 2 5 ×6 cartons of tomatoes at $3.00 per carton, and 504 2 5 pound cartons of Palmetto Beauty U.S. No. 2 6 ×6 cartons of tomatoes at $2.00 per carton, plus $226.80 for palletizing, and $22.50 for a temperature recorder. Complainant later granted respondent a reduction in price of $1.00 per carton on 360 cartons of the 5 ×6 tomatoes, reducing the total price for the truckload to $3,921.30.

4. The tomatoes covered by Finding of Fact 3 were federally inspected at Palmetto, Florida on November 26, 27, and 28, 1983, and found to grade U.S. No. 2 with no decay. Complainant shipped the tomatoes from loading point in Palmetto, Florida to respondent in Vista, California on December 2, 1983.

5. On December 2, 1983, complainant sold to respondent 1368 25 pound boxes of Palmetto Beauty U.S. No. 2 6 ×6 tomatoes at $3.00 per carton 72 25 pound boxes of Palmetto Beauty U.S. No. 2 6 ×7 tomatoes at $2.00 per carton, and 144 25 pound boxes of Palmetto Pride U.S. Combination grade tomatoes at $2.00 per carton, plus palletizing in the amount of $237.60; and a temperature recorder in the amount of $22.50, for a total f.o.b. price of $4,796.10.

6. The tomatoes covered by Finding of Fact 5 were federally inspected at Palmetto, Florida on November 28, and 29, 1983, and the 1368 cartons of 6 ×6 tomatoes and 72 cartons of 6 ×7 tomatoes were found to grade U.S. No. 2 with no decay. The 144 cartons of 6 ×7 tomatoes were found to grade U.S. Combination with no decay. Complainant shipped the tomatoes covered by Finding of Fact 5

from Palmetto, Florida to respondent in Vista, California on December 2, 1983.

7. Respondent received and accepted the two truckloads of tomatoes and has paid complainant only $7,745.40 leaving a balance still due and owing of $972.00.

8. An informal complaint was filed on March 5, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent took possession of the two truckloads of tomatoes on arrival at destination and is therefore deemed to have accepted such tomatoes. However, respondent maintains that a protection agreement was entered into in regard to both loads of tomatoes after their arrival. This allegation by respondent seems to be confirmed by a letter contained in the report of investigation from the broker who negotiated the sale of the two truckloads of tomatoes. Such letter indicates that protection was granted in regard to both loads due to "excessive color". However the wording of the broker's letter does not make it clear whether the protection was granted by complainant or by the broker acting on his own.

Whether or not complainant authorized the protection agreement alleged by respondent, we have held that it is incumbent upon a receiver who has such an agreement to keep records which substantiate its resales and losses. See *Dave Walsh Co.* v. *Liberty Fruit Co.*, 38 Agric. Dec. 533 (1979). Respondent did not supply any records which would adequately substantiate the resales, and losses resulting from such resales. As a consequence of such failure we must view any protection agreement as voided. See *Demarco Produce Co., Inc.* v. *J. R. Cortes & Co.*, 39 Agric. Dec. 1256 (1980).

Since respondent accepted the tomatoes it became liable to complainant for the full purchase price thereof, less any damages resulting from any breach of contract on the part of complainant. Although it was alleged that the tomatoes arrived with excessive color, respondent supplied us with no arrival inspections which would substantiate this claim. Accordingly we find that respondent has failed to show any breach on the part of complainant. Respondent is liable to complainant for the full purchase price of the tomatoes less the adjustment in price which complainant has admitted it granted, or a total of $8,717.40. Respondent has already paid complainant $7,745.40 of this amount, which leaves a balance still-due and owing $972.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $972.00, with interest thereon at the rate of 13% per annum from January 1, 1984, until paid.

Copies of this order shall be served upon the parties.

I. R. JEROME COMPANY, LTD., *v.* CORGAN & SON, INC., PACA Docket No. 2-6861. Decided May 15, 1986.

Contract terms contained in broker's confirmations of sale—breach of warranty not proven by respondent buyer—reparation awarded.

Where the parties disagreed about the contract terms, the most convincing evidence was the broker's confirmations of sale, to which neither party objected. Respondent buyer failed to sustain its burden of proving a breach of warranty by the complainant seller.

Andrew N. Stanton, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,234.80, in connection with the sale and consignment of two truckloads of melons to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, I. R. Jerome Company, Ltd., is a corporation whose address is P. O. Box 1030, Parker, Arizona.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately July 9, 1984, complainant sold to respondent a truckload of melons consisting of 540 cartons of honeydews and 714 cartons of cantaloupes. The honeydews were composed of 180 cartons of number 4's at $3.00 per carton, 180 cartons of number 5's at $3.60 per carton, and 180 cartons of number 6's at $3.60 per carton, plus $.40 per carton for palletizing, or $2,052.00, f.o.b. The cantaloupes were composed of 336 cartons of 15's at $4.50 per carton, and 378 cartons of 18's at $5.00 per carton, plus $.80 per carton for palletization, or $3,973.20, f.o.b. The contract price also included a brokerage fee of $.20 per carton, or $250.80, and $22.50 for a temperature recorder, for a total of $6,298.50. Frank Minardo, Yuma, Arizona, acted as the broker, and issued a confirmation of sale setting forth the contract terms, which he sent to both parties. The confirmation clearly stated that complainant was the seller and respondent the buyer. Neither party objected to this confirmation.

4. The July 9, 1984, load was shipped in interstate commerce to respondent, which received and accepted it upon arrival.

5. Respondent has paid complainant $5,098.50 for the July 9, 1984, load, but has failed to make any additional payments to complainant.

6. On approximately July 13, 1984, complainant sold to respondent a truckload of melons consisting of 96 cartons of casabas at $4.75 per carton, 96 cartons of crenshaws at $5.75 per carton, 420 cartons of cantaloupes at $2.50 per carton plus $.80 per carton cooling, and 480 cartons of honeydews at $3.50 per carton, plus $.20 per carton brokerage, for a total of $4,292.40, f.o.b. Frank Minardo acted as the broker in this transaction as well. The broker issued a confirmation of sale setting forth the contract terms and sent it to both parties. The confirmation clearly stated that complainant was the seller and respondent the buyer. Neither party objected to the confirmation.

7. On December 20, the broker wrote to the Department about the loads of melons in dispute, stating as follows:

> Please be informed that these loads were bought on a brokerage basis. We sent the normal and proper broker's con-

firmation to the shipper and our invoice for 20¢ brokerage. We reported the results of the federal inspection that Corgan relayed to us, and went on record with there [sic] sales man Mr. Ed Senini and sent a copy to the shipper.

8. The July 13, 1984, load of melons was shipped in interstate commerce to respondent, which received and accepted it. Respondent secured a federal inspection of the cantaloupes only.

9. Respondent has paid complainant $3,126.00 for the 1,092 cartons of melons, but has failed to make any additional payments to complainant.

10. A formal complaint was filed on January 19, 1985, which was within nine months from when the causes of action herein accrued.

CONCLUSIONS

Complainant's assertions that it sold respondent the July 9, 1984, load and consigned to respondent the July 13, 1984, load are denied by respondent. Respondent claims that it purchased both loads on an f.o.b. basis from the broker, assuming he was the seller. Respondent also asserts that the melons were in bad condition on arrival and, consequently, the broker agreed to certain price adjustments.

While the record contains evidence supporting the positions of both parties, the most convincing evidence consists of statements and documents issued by the broker, who is presumed to be without bias. The broker's December 20, 1984, letter (Finding of Fact 7) and the enclosed confirmations of sale make it clear that he was engaged only as a broker between complainant, the seller, and respondent, the buyer. The letter says further that both loads were sold on an f.o.b. basis, and this is supported by his confirmations, to which neither party objected. According to these confirmations, the contract price was $6,298.50 for the July 9, 1984, load and $4,292.40 for the July 13, 1984, load. We believe the broker's confirmations reflect the agreed upon contract terms.

In respondent's unsworn answer, it does not deny receiving or accepting the two loads of melons and, therefore, is liable for the agreed upon contract prices therefor, less damages resulting from any breach of warranty by complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983).

Respondent has not presented any credible evidence to support its claim that it owes less than the full contract price of $6,298.50 to complainant for the July 9, 1984, load and is thus liable for that amount.

With respect to the July 13, 1984, load, respondent contends that the melons were in poor condition and, therefore, it agreed with the broker to adjust the prices to $3.50 per carton for the cantaloupes, $2.25 per carton for the honeydews, $4.00 per carton for the crenshaws, and $2.00 per carton for the casabas. The record does indicate that a federal inspection was taken on July 19, 1984, of the 420 cartons of cantaloupes contained in the July 13, 1984, load. Since respondent's claim that the adjusted price resulting from this inspection was $3.50 per carton, which is greater than the $3.30 per carton set forth in the broker's confirmation, we will accept respondent's admission of liability. There is no evidence whatsoever that any of the other melons comprising the July 13, 1984, load were in anything but good condition, and thus we will apply the price set forth in the broker's confirmation for all commodities except the cantaloupes. We, therefore, find the adjusted purchase price to have been $4,376.40.

Respondent incurred liability of $6,298.50 for the July 9, 1984, load and $4,376.40 for the July 13, 1984, load, for a total of $10,674.90. Having paid complainant $8,224.50, respondent owes an additional $2,450.40, and its failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,450.40, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

FOUR STAR TOMATO, INC., *v.* TOMATOES, INC., PACA Docket No. 2-6834. Decided May 15, 1986.

Burden of proof—special agreement as to price—reparation awarded.

In f.o.b. sale of tomatoes respondent alleged that the invoice prices were incorrect, and that instead the parties had a special agreement that price was to be based on the prices which respondent was paying to other packing houses for tomatoes. Respondent was found to have failed to prove its contentions by a prepondereance of the evidence.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,124.00 in connection with the shipment in interstate commerce of two truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which failed to file a timely answer, and was found to be in default. A default order was issued on March 20, 1985, and on April 1, 1985, respondent filed a petition to reopen this proceeding after default. On April 16, 1985, the default order of March 20, 1985, was stayed, and complainant was served with a copy of respondent's petition, and given 15 days in which to file an answer thereto. On May 24, 1985, after receipt of complainant's answer to respondent's petition, respondent's default was set aside, and respondent's answer which had been previously submitted was ordered filed. In its answer respondent denied any liability to complainant on the two tomato transactions.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Four Star Tomato, Inc., is a corporation whose address is P.O. Box 470, Ellenton, Florida.

2. Respondent, Tomatoes, Inc., is a corporation whose address is New York City Terminal Market, 400-402 Room D, Bronx, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 11, 1984, complainant sold to respondent 504 25 pound cartons of 5×6 and larger tomatoes at $9.00 per carton, and 1,080 25 pound cartons of 6×6 tomatoes at $7.00 per carton, plus $.15 per carton for palletizing, or a total of $12,333.60, f.o.b. The tomatoes were federally inspected at shipping point in Palmetto, Florida on May 11, 1984, and found to grade U.S. combination with at least 85% U.S. No. 1 quality, and no decay. Complainant shipped the tomatoes to respondent on May 12, 1984, and issued its invoice for such tomatoes on May 18, 1984.

4. On May 12, 1984, complainant sold to respondent 504 25 pound cartons of 5×6 and larger tomatoes at $9.00 per carton, 360 25 pound cartons of 6×6 tomatoes at $6.00 per carton, 216 25 pound cartons of 5×6 and larger U.S. No. 2 tomatoes at $7.50 per carton, 72 25 pound cartons of 6×6 U.S. No. 2 tomatoes at $4.50 per carton, 360 25 pound cartons of 5×6 and larger U.S. No. 3 tomatoes at $4.50 per carton, and 72 25 pound cartons of 6×6 U.S. No. 3 tomatoes at $3.50 per carton, plus $.15 per carton for palletizing, or a total of $10,749.60, f.o.b. On May 12, 1984, the tomatoes were federally inspected at Palmetto, Florida, and the 504 5×6 and larger tomatoes, and the 360 6×6 tomatoes were found to grade U.S. combination with at least 80% U.S. No. 1 quality, and no decay. The remaining tomatoes were found to grade in accord with the contract specifications with no decay. Complainant shipped the tomatoes from loading point in Florida to respondent on May 14, 1984, and issued its invoice covering such tomatoes on May 19, 1984.

5. Respondent accepted both shipments of tomatoes upon arrival at destination, and has paid complainant only $11,253.60 toward the shipment of May 12, and $9,705.60 toward the shipment of May 14, 1984. There remains due and owing from respondent to complainant a balance of $2,124.00.

6. The formal complaint was filed on October 15, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price of two shipments of tomatoes. Respondent alleges that complainant is charging the wrong prices for the tomatoes, and that "the prices were to be based on the Market price that was sold to us by other packing houses at that time." Respondent submitted copies of two invoices from another Florida packer in support of this contention. However, the two invoices are dated May 17, 1984, and May 18, 1984, and these dates do not correspond to the sale dates of the two loads of tomatoes in question here. Furthermore, the invoices submitted by respondent do not disclose the grade of

the tomatoes that are listed thereon. Later in the proceeding respondent submitted one additional invoice dated May 11, 1985, but covering a shipment of May 9, 1985. This invoice shows 5×6 tomatoes selling at $4.50 per container, and 6×7 tomatoes selling at $2.00 per container. Again this invoice fails to show the grade of the tomatoes in question.

Complainant denied respondent's allegations in regard to the pricing method applicable to the two loads of tomatoes, and submitted a copy of a May 11, 1984, Market News Report covering f.o.b. prices of tomatoes in South and Central Florida which shows that the prices charged by complainant were in accord with the market prices disclosed thereon. Although respondent states that upon receiving the invoices sent by complainant, it called complainant on the telephone and complained, respondent did not object to such invoices in writing. On the basis of all of the evidence herein we conclude that respondent has failed to prove its contention in regard to the pricing of the tomatoes by a preponderance of the evidence. We also conclude that complainant has proven by a preponderance of the evidence that the prices listed in its invoices were the contract prices agreed upon by the parties. Respondent is liable to complainant for a balance of $2,124.00 on the two loads of tomatoes. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $2,124.00, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

LYN-DE FARMS, INC., *v.* MIDWEST PRODUCE BROKERAGE, INC., P&S Docket No. 2-6925. Decided May 16, 1986.

With acceptance burden shifts to respondent to show breach and damages—reparation awarded.

Respondent claimed that complainant had authorized deductions off the purchase invoice which complainant denied. A letter from complainant's salesman instructing respondent to pay the invoice price and he would make it up to him at some other time established that there was no agreement as to a price adjustment. Respondent therefore was required to pay invoice price unless it proved damages for which contention it offered no evidence. Respondent was ordered to pay invoice price less amount already remitted.

Peter V. Train, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $307.88 in connection with the sale of two loads of lettuce in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer in which it denied liability. It admitted the purchase of the lettuce, but alleged that with respect to the first load it was authorized a deduction off the invoice price because the lettuce was not of the size warranted. With respect to the second load, respondent alleged that complainant agreed to a $.25 per carton adjustment.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Neither party submitted additional evidence, but complainant did file a brief. Respondent did not file a brief.

FINDINGS OF FACT

1. Complainant Lyn-De Farms, Inc., hereinafter referred to as complainant, is and at all times material herein was, a corporation whose mailing address is P.O. Box Drawer 1119, Blythe, California 92226.

2. Respondent Midwest Produce Brokerage, Inc., hereinafter referred to as respondent, is, and at all times material herein was, a corporation whose mailing address is P.O. Box 768, Meeker, Oklahoma 74855.

3. Both parties are, and at the time of the transactions involved herein were, licensed to do business under the Act.

4. On November 28, 1984, and on December 7, 1984, complainant sold to respondent two truckloads of lettuce, f.o.b. On November 28,

1984, complainant shipped 711 cartons of lettuce at a price of $2.50 per carton plus $.65 for cooling or a total contract price of $2,239.65. On December 7, 1984, complainant shipped 328 cartons at a per carton price of $2.75 plus $.65 for cooling or a total price of $1,115.20 for this transaction. The total contract price for the two loads was $3,354.85.

5. Respondent has remitted a total of $3,046.97 for these purchases.

6. The formal complaint was filed May 21, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over whether there was an agreement as to a price adjustment on each of the two shipments. Respondent contends that the size of lettuce in the first shipment was not as warranted, and that complainant authorized respondent to make an appropriate deduction. Respondent further alleges that it was given a $.25 per carton adjustment by complainant on the day of arrival of the second load. In support of its claim respondent attaches a letter from complainant's salesman. A review of the letter, however, demonstrates that Mr. Zinno, complainant's salesman, denied agreeing to any deductions or adjustments.

Having accepted the goods, respondent must pay contract price less any provable damages. The invoices are the best evidence of the contract price. Respondent has the burden of proving that an adjustment to the invoice price was agreed to. The letter from Mr. Zinno contains the following sentence: "In our last conversation I told him [respondent] to pay the invoices as they were billed and I would make it up to him at some other time." What Mr. Zinno might have agreed to do at some future time is unclear. However, the letter specifically states that Zinno expected respondent to pay full contract price. Respondent's own evidence demonstrates that no agreement as to an adjustment of the invoice price was reached. Respondent offers no evidence to support its claim that the lettuce on the first load was not of the size warranted. It has, therefore, failed to show any damages as to either load.

Respondent is liable to pay the entire contract price of $3,354.85. It has remitted only $3,046.97, leaving a deficiency of $307.88.

The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act. Reparation should be awarded to complainant in the amount of $307.88, with interest.

Within 30 days from the date of this order, respondent shall pay to complainant $307.88 as reparation with interest thereon at the rate of 13 percent per annum from January 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

DEW-GRO, INC., a/t/a CENTRAL WEST PRODUCE, *v.* BEACON PRODUCE CO., PACA Docket No. 2-7108. Decided May 16, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,150.50 in connection with a shipment of broccoli in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dew-Gro, Inc., a/t/a Central West Produce, is a corporation whose address is 1284 West Main Street, Santa Maria, California 93454. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $6,150.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation $6,150.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

DELAWARE PRODUCE GROWERS, INC., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7113. Decided May 16, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *Pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,644.60 in connection with three shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Delaware Produce Growers, Inc., is a corporation whose address is Route 4, Box 127, Dover, Delaware 19901. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33069. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $4,644.60. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,644.60, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

Copies of this order shall be served upon the parties.

BLUE ANCHOR, INC., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7106. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $27,880.50 in connection with six shipments of mixed fruit in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Blue Anchor, Inc., is a corporation whose address is P. O. Box 15498, Sacramento, California 95851. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $27,880.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $27,880.50, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

PECOS CANTALOUPES CO., INC. *v.* BEACON PRODUCE CO., PACA Docket No. 2-7107. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $8,064.00 in connection with a shipment of cantaloupes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Pecos Cantaloupes Co., Inc., is a corporation whose address is P. O. Box 1389, Pecos, Texas 79772. Respondent, Beacon Produce Company, is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $8,064.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $8,064.00, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

DICK BARRETT PRODUCE, INC., a/t/a BARRETT-FISHER CO., INC., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7109. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $5,612.50 in connection with a shipment of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dick Barrett Produce, Inc. a/t/a Barrett-Fisher Company, is a corporation whose address is P. O. Box 750, Hereford, Texas 79045. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33069. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $5,612.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,612.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

DYNASTY FARMS, INC., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7110. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,981.60 in connection with a shipment of cantaloupes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issurance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dynasty Farms, Inc., is a corporation whose address is 9123 North Cave Creek, Phoenix, Arizona 85020. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under theAct.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,981.60. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,981.60, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ROBERT L. MEYER, d/b/a MEYER TOMATOES, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7125. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,920.00 in connection with three truckloads of tomatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Robert L. Meyer, d/b/a Meyer Tomatoes, is an individual whose address is P. O. Box 606, King City, California 93930. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $6,920.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $6,920.00, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ACTION PRODUCE, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7126. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,989.50 in connection with three truckloads of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Action Produce, is a partnership composed of Rala Singh, Pat H. Hodges, Davis Packing Co., and John Kai. The partnership's mailing address is P. O. Box 1712, Glendale, Arizona 85311. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,989.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,989.50, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

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MENDELSON-ZELLER CO., INC., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7112. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $16,798.50 in connection with two shipments of grapes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Mendelson-Zeller Co., Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California 94111. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $16,798.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $16,798.50, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

RONALD J. BALL and ALFRED V. BALL, d/b/a BALL BROS. PRODUCE, COMPANY *v.* BEACON PRODUCE Co., PACA Docket No. 2-7115. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $18,737.50 in connection with the shipment of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant is a partnership composed of Ronald J. Ball and Alfred V. Ball, d/b/a Ball Brother Produce Company whose address is P. O. Box 69, Lewisville, Idaho 83431. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33069. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $18,737.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $18,737.50, with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

J. A. WOOD CO. - VISTA, INC., *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7123. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,336.50 in connection with shipments of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, J. A. Wood Co. - Vista, Inc., is a corporation whose address is P. O. Box 9069, Phoenix, Arizona 85068. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,336.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,336.50, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC., *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7124. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,125.00 in connection with two truckloads of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Nick Delis Company, Inc., is a corporation whose address is P. O. Box 1089, Millbrae, California 94030. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $2,125.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,125.00, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

J. A. WOOD CO. - VISTA, INC., a/t/a J. A. WOOD CO., *v.* BEACON PRODUCE CO., PACA Docket No. 2-6860. Decided June 2, 1986.

Contract terms changed—protection for labor and shrinkage—deductions reasonable—reparation awarded.

The evidence is clear that complainant granted respondent protection for labor and shrinkage after the cantaloupes arrived in a deteriorated condition. Respondent

thus sustained its burden of proving that the original contract terms were changed to reflect this grant of protection. Respondent's deductions for labor and shrinkage were reasonable considering the condition of the cantaloupes. Respondent, therefore, held without liability to complainant.

Andrew N. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Michael Paul Shienvold, Esquire, Fort Lauderdale, FL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,910.35 in connection of the sale and shipment of a trucklot of cantaloupes and green onions to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be a part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement and respondent submitted an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, J. A. Wood Co. - Vista, Inc. a/t/a J. A. Wood Co., is a corporation whose address is P. O. Box 9069, Phoenix, Arizona.

2. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately October 30, 1984, complainant sold to respondent a trucklot of cantaloupes and green onions. The contract price for the 756 cartons of cantaloupes was $7.00 per carton, plus $.80 per carton for cooling and palletizing. The contract price for the 75 cartons of green onions was $5.95 per carton, plus $.65 per carton for hydrocooling, and $8.00 for top ice. An additional $124.65

was charged for brokerage, for a total contract price of $6,524.45 f.o.b. for both commodities. John M. Baum, Atlantic Beach, Florida, acted as the broker in the proceeding, and both parties communicated through him.

4. The truckload of cantaloupes and green onions was shipped by complainant in interstate commerce to respondent, where it arrived on November 5, 1984, and was subjected to a federal inspection. The inspection found no condition problems with the green onions, but with respect to the cantaloupes found as follows:

> VARIOUS CONTAINERS Range 38° *To 42°*
>
> SHIPPER: J. A. Wood
>
> Cantaloupes—"Copperhead Brand" marked to denote count (15's 18's and 23's noted).
>
> Applicant States 210 ctns 15, 420 ctns 18's, 126 ctns 23's.
>
> CONDITION: Firm. Green color. Decay in most cartons 1 to 5 melons (6 to 22%) in some none, average 10% mostly Cladosporium Rot, some Fusarium Rot.

5. After receiving the inspection results, respondent contacted the broker and complained about the condition of the cantaloupes. The broker contacted complainant's employee, Jake McManus, and informed him of the condition problems. Mr. McManus agreed to grant respondent protection for labor and shrinkage on the cantaloupes. That same day, the broker sent a letter to complainant, with a courtesy copy to respondent, stating as follows:

> This will confirm our conversation with Mr. Jake McManus on 11/5/84, in which it was agreed that you are granting Beacon Produce Company, Pompano Beach, FL, protection for labor and shrinkage on 756 cantaloupes, shipped 10/31/84, via Jim McDonald Truck. Account USDA inspection 11/5/84, Pompano Beach, FL, shows temperatures 40–42°; *range 1–5 melons per carton in most samples (6–22%) some more, average 10% damage by cladisporium [sic] and fusarium rot.*

6. Respondent eventually paid complainant $2,614.10 for the green onions and cantaloupes. Along with its payment, respondent sent copies of the November 5, 1984, inspection and subsequent November 29, 1984, federal inspection of 297 cartons of cantaloupes showing 100% decay. Respondent also sent a statement explaining its deductions. The statement indicated that respondent had deducted $1.00 per carton, or $756, for handling, $3,133.35 for the

value of 297 cartons of cantaloupes dumped at $10.55 per carton, and $21.00 for a dump certificate.

7. Respondent has failed to make any additional payment to complainant for the cantaloupes.

8. A formal complaint was filed on April 15, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Respondent contends that after the truckload of cantaloupes and green onions arrived, and the cantaloupes were found to be in a deteriorated condition, complainant agreed to grant protection and handling. Complainant denies ever changing the original contract terms, claiming that when it received notice of the November 5, 1984, inspection results, the parties mutually agreed that at a later date, following sales, a settlement would be made if determined to be necessary. Complainant also alleges that the cantaloupes were mishandled, evidenced by the fact that 297 cartons were still on hand and needed to be dumped over three weeks after they arrived at respondent's place of business.

The first issue to be determined is whether the contract terms were changed to allow respondent protection for labor and shrinkage, as respondent claims. It is respondent's burden to prove that the contract terms were altered. *American Banana Co. Inc.* v. *Marvin Gray*, 41 Agric. Dec. 539 (1981). The record contains a letter to complainant from the broker dated November 5, 1984, stating that on that same date, pursuant to a discussion with complainant's Jake McManus, complainant granted respondent protection for labor and shrinkage on the cantaloupes (Findings of Fact 5). That letter also related that the November 5, 1984, inspection showed temperatures of from 40 to 42°F, and decay in the melons from six to 22%, average 10%. Complainant's salesman, Bryan Sakata, asserts in the opening statement that no such allowance was granted. However, Mr. McManus, not Mr. Sakata, was the person who the broker claims granted the allowance. The credibility of the broker's statement is buttressed by the results of the inspection. Although complainant claims in its opening statement that the condition factors found by the inspection were "minimal", it is apparent that a level of 10% decay in cantaloupes when transportation conditions are normal, as here, constitutes severe condition problems. Therefore, having learned of this, it was quite reasonable for complainant's Mr. McManus to have granted respondent protection for labor and shrinkage. Therefore, in the absence of any statement from Mr. McManus disputing the broker's account,

or any other significant evidence in this regard, we conclude that respondent has sustained its burden of proving it was granted protection for labor and shrinkage.

Respondent claims that it incurred expenses of $776.00 for resorting the cantaloupes, damages of $3,133.35 consisting of the contract price plus freight of the 297 cartons it had to dump, plus $21.00 for the cost of a dump certificate, totaling $3,910.35. Complainant argues that since 297 cartons of melons were not sold after three weeks and dumped, it is evident that respondent did not properly handle them. We believe that since the cantaloupes had been resorted, no more than 150 cartons should have been unsaleable. Respondent's damages are thus $3,910.35, less the contract price plus freight of $10.55 per carton for the 147 cartons it should have been able to resell, or $2,359.50, plus the charges for resorting and a dump certificate, totaling $3,156.50. Accordingly, complainant was entitled to receive the difference between the contract price of $6,524.45 and its damages of $3,156.50, or $3,367.95. Since respondent has already paid $2,614.10, it remains liable for an additional $753.85, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $753.85, with interest thereon at the rate of 13% per annum from December 1, 1984, until paid.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC., *v.* EARLES J. SCHMUCKER, and WAYNE A. SCHMUCKER d/b/a SCHMUCKER'S POTATO STORAGE, PACA Docket No. 2-6907. Decided June 2, 1986.

Effect of broker's statements—meaning of f.o.b. prices, delivered sale as to grade and condition—modification of contract by consent of parties—liability for freight—reparation awarded.

Where parties disagreed as to terms of contract the broker's statements were determinative of the actual terms. Since contract was f.o.b. as to price and delivered as to grade and condition; respondent/receiver was liable for freight, but seller was responsible for deterioration while goods were in transit. Where complainant agreed to a modification of the contract without conditions, but asked for an inspection which it did not receive, it was still held to the terms of the modified contract.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $6,329.89 in conjunction with a shipment of a rail car of potatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto in which it denied the allegations contained in the complaint. Because the amount claimed as damages is less than $15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and respondent filed an answering statement. Although given an opportunity to do so neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Nick Delis Company, Inc., is a corporation with an address at P.O. Box 1089, Millbrae, California 94030.

2. Respondent, Earles J. Schmucker, and Wayne A. Schmucker, d/b/a Schmucker's Potato Storage is a partnership with an address at Route 2, West Unity, Ohio 43570. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On May 15, 1984, complainant sold to respondent a rail car of potatoes, free on board as to price with a delivered sale as to grade and condition. The load of potatoes consisted of 665 sacks of U.S. No. 1 White rose potatoes and 435 sacks of U.S. No. 2 White rose potatoes. A temperature recorder was also placed upon the rail car.

4. William Schaub & Company, Indianapolis, Indiana, acted as the broker with respect to this transaction. The broker issued an initial memorandum of sale which stated that the contract was "Price Arrival". The corrected memorandum showed that the price of the 665 sacks of U.S. No. 1 potatoes was $7.00 per sack and the

price of the 435 sacks of U.S. No. 2 potatoes was $6.00 per sack. Both memorandums showed "Fob prices, delivered sale as to grade and condition at destination."

5. The potatoes were shipped in interstate commerce, and arrived at respondent's place of business on or about May 25, 1984, where they were received and accepted by respondent. Upon receipt of the potatoes respondent complained that they were not in good condition. Such complaint was conveyed to the broker, which conveyed the complaint directly to the complainant along with respondent's request for protection for shrinkage and labor as a result of decay. Complainant agreed with the request of respondent for protection for shrinkage and labor, and asked for a Railroad Perishable Inspection Agency (RPIA) inspection.

6. Respondent sorted and repacked the potatoes, and provided to complainant an accounting which showed that there were 8,475 pounds of culls, which should have been No. 1 potatoes, but which it valued at half price, claiming a credit of $448.00; that extra labor incurred over and above normal labor for sorting was $188.00; that 345 hundredweight at an average price of $6.40 per hundredweight of potatoes were dumped for a total cost of $2,208.00; that the freight for those potatoes which were dumped deducted from the total freight charge was $1,225.00; that it took a price adjustment of $1,765.00; and that pursuant to a separate agreement between itself and complainant it was deducting $500.00 for additional freight, for a total deduction of $6,334.00. Respondent paid complainant $2,722.61 as the difference between the total claimed as a credit and the invoice price of $9,052.50 of complainant.

7. A formal complaint was filed in this proceeding on March 4, 1985. An informal complaint was filed on November 9, 1984, which was within nine months of the time the cause of action herein accrued.

CONCLUSIONS

This proceeding involves a dispute as to several aspects of the contract, as originally entered, and subsequently as modified by the parties. Complainant contends that the contract was free on board as to price, and delivered as to grade and condition. It contends that the price charged for the potatoes was $9.00 per sack for 665 sacks of U.S. No. 1 potatoes and $7.00 per sack for 435 sacks of U.S. No. 2 potatoes, plus $22.50 for a temperature recorder, for a total contract price of $9,052.50. Respondent, on the other hand, contends that the price to be charged by complainant was $7.00 per sack for the U.S. No. 1 potatoes and $6.00 per sack for the U.S. No. 2 potatoes. Complainant also contends that although it accepted re-

spondent's assertions upon its receipt of the potatoes that there was considerable decay, it only agreed to provide respondent protection for shrinkage because respondent is a repacker, and would have to repack the potatoes in any event. Respondent contends that it asked for and received protection both for shrinkage and labor. Complainant also claims that respondent deducted $500.00 more for freight than it should have from its final accounting, which $500.00 was not authorized as a deduction by complainant. Finaily, complainant contends that it asked for a Railroad Perishable Inspection Agency inspection, and that respondent failed to provide it sufficient evidence as to the condition of the potatoes based upon such asserted inspection, as a result of which respondent has not proved its damages.

Insofar as the terms of the contract are concerned we accept the statement of William Schaub & Company, the broker for this transaction, because as an ostensibly neutral third party its testimony must be given great weight. *Homestead Tomato Packing Co.* v. *Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers* v. *T.J. Power & Co.*, 48 Agric. Dec. 425 (1981). The broker issued two broker's memoranda for this transaction. The first memorandum did not contain any prices, and stated the contract was "Price Arrival". The second memorandum, which contained the notation "CORRECTED COPY", stated that the prices for the potatoes were $7.00 per sack for the U.S. No. 1 potatoes and $6.00 per sack for the U.S. No. 2 potatoes. It also stated that the freight charge was $3,413.00. Both memoranda also stated that the terms of sale were "Fob prices, delivered sale as to grade a condition at destination". We accept the corrected memorandum of the broker as properly reflecting the terms of sale for the transaction in issue herein. Therefore, we conclude that the price for the U.S. No. 1 potatoes was $7.00 per sack and the price for the U.S. No. 2 potatoes was $6.00 per sack. We also conclude that the original freight charge was $3,413.00.

7 CFR 46.43(dd) is important to a resolution of the meaning of the terms "fob prices, delivered sale as to grade and condition at destination". That provision states:

> "F.O.B. inspection and acceptance arrival" means that the produce quoted or sold is to be placed by the seller free on board car or other agency of through transportation at shipping point, *the cost of transportation to be borne by the buyer,* but the seller to assume all risks of loss and damage in transit not caused by the buyer, who has the right to inspect the goods upon arrival and to reject them if, upon

such inspection, they are found not to meet the specifications of the contract of sale at destination. The buyer may not reject without reasonable cause. *Such a sale is f.o.b. only as to price and is on a delivered basis as to grade, quality, and condition.*" (Emphasis added)

Although the language contained in 7 CFR 46.43(dd) is not exactly the same as the language contained in the broker's memorandum we are drawn to the conclusion that this is what the broker meant because the language "f.o.b. inspection and acceptance arrival" plus the emphasized statements contained thereafter are so close in meaning to the language "f.o.b. prices, delivered sale as to grade and condition at destination." Therefore, we find that the respondent is liable for payment of the transportation costs, and that the prices set forth by the broker are the prices agreed upon between the parties. We further find that the complainant was responsible for any deterioration in grade, quality or condition during the period of transit. As a result respondent had a right to reject the goods on arrival if it found that they did not meet the specifications in the contract of sale. Respondent did not do so. Rather, as shown by the broker's statement, the respondent asked for protection as to both shrinkage and labor. According to the broker complainant agreed to grant such protection. Therefore, it is liable for any costs incurred by respondent with respect to shrinkage or labor.

Although complainant asked for a Railroad Perishable Inspection Agency inspection, and respondent gave it a handwritten piece of paper without date which purported to contain to results of such an inspection, we cannot give credence to that document because it lacks a date, and was not otherwise properly identified as being and actual Railroad Perishable Inspection Agency report. This, however, makes no difference since complainant accepted respondent's request for a modification of the contract, and guaranteed it protection with respect to labor and shrinkage. Insofar as complainant's argument that it would never grant protection with respect to labor is concerned because respondent is a repacker, we reject the claim. Respondent made it clear that it did not claim for normal repacking. Rather it claimed for extra labor charges incurred in the amount of $188.00 above and beyond those which were usual for repacking.

The 665 sacks of No. 1 potatoes at $7.00 per sack came to a total price of $4,655.00. The 435 sacks of U.S. No. 2 potatoes at $6.00 per sack came to a total price of $2,610.00. To those prices should be added $22.50 for a temperature recorder for a total contract price for the potatoes of $7,287.50. As stated above respondent is respon-

sible for the payment of the freight. Therefore, respondent may not deduct the freight costs from the total contract price. Respondent had the burden to show that there was an agreement with respect to an adjustment for freight, and because there was no evidence other than its bald statement that complainant and respondent had such an agreement, we find it did not sustain that burden. We find that respondent's deduction of $448.00 for 8,475 pounds of culls which should have been No. 1 potatoes, but which it valued at half price, warranted a credit in that amount. We find that respondent did incur extra labor in the amount of $188.00 for sorting the potatoes. We also find that its accounting with respect to 345 hundredweight of potatoes which were dumped at $6.40 per hundred weight for $2,208.00 was reasonable. As damages respondent is also entitled to deduct the cost of freight with respect to the dumped potatoes. It computed this cost $1,225.00. However, that calculation was based upon a total freight charge or $3,913.00. We find that the total freight charge in this case which has been proved was $3,413.00. 435 hundredweight is 31.4 percent of 1,100 hundredweight. 31.4 percent of $3,413.00 is $1,071.68. That is the total amount of freight which may be deducted as damages for the dumped potatoes. Therefore, from the total contract price of $7,287.50 there should be deducted $448.00 for culls, $188.00 for labor, $2,208.00 for dumping, and $1,071.68 for freight, for a total deduction of $3,915.68, leaving $3,371.82 as respondent's total obligation with respect to this load of potatoes. Respondent has paid complainant $2,722.61 previously, leaving $649.21 which respondent has not paid complainant. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded, with interest thereon.

ORDER

Within thirty days from the date of this order respondent shall pay to complainant $649.21 with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING, INC., *v.* CORGAN & SON, INC., PACA Docket No. 2-6885. Decided June 5, 1986.

Contract terms—f.o.b. terms supported by evidence rather than open price, price after sale, consignment—burden of proof on buyer to show breach of warranty and damages—breach of warranty not proven by buyer—reparation awarded.

Where the evidence supported the seller's contention that f.o.b. terms were in effect for all six loads of lettuce, and respondent failed to sustain its burden of proving a breach of warranty regarding these loads, respondent is liable for the unpaid contract price.

Andrew N. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $13,958.28 in connection with the sale and shipment of six truckloads of lettuce to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which failed to file an answer thereto, and was held in default. The default was subsequently set aside and respondent filed an answer to the complaint, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Neither party submitted any additional evidence. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Fresh Western Marketing, Inc., is a corporation whose address is P.O. Box 5275, Salinas, California.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. From October 12, 1983, through December 24, 1983, complainant sold and shipped to respondent, in interstate commerce, six truckloads of lettuce on an f.o.b. basis. Bills of lading were prepared for each load, reflecting the quantity, truck number (except for the October 12, 1983, sale), and desired temperature range of 33°F to 36°F. The terms of sale and shipment for each load were as follows:

Date of Sale	Number of Cartons	F.O.B. Price	Truck Number
October 12, 1983	324	1,863.00	Not Listed
November 11, 1983	875	11,068.75	CABT03628
November 16, 1983	900	6,097.50	CRSZ550011
November 26, 1983	902	6,683.82	VA132012
November 30, 1983	1250	9,585.00	SFRC56002
December 24, 1983	825	8,916.25	CRAZ520629
	Total	$44,214.32	

4. All six truckloads were accepted by respondent upon their arrival at its place of business.

5. On October 20, 1983, respondent had the October 12, 1983, load federally inspected, which resulted as follows:

Products Inspected:	LETTUCE, Iceberg type in cartons branded "Green Crest 2 doz. heads, California Coastal Farms, Inc., Salinas, California". Applicant States: 324 cartons.
. . .	
Temperature of Product:	Ranges 37 to 38F.
Condition:	Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper Leaves:* No decay. *Head Leaves:* 1 to 3 heads per carton, average 9% damage by discoloration following bruising scattered throughout pack. 2 to 4 heads per carton, average 13% Bacterial Soft Rot in various stages affecting 1 to 2 leaves.

Remarks:	Applicant states stock unloaded from AT-91328CA.

6. On November 15, 1983, respondent secured a federal inspection of what it claims to be the November 11, 1983, load. The inspection found as follows, in relevant part:

INITIAL & NO. IMSZ560123

VARIOUS CONTAINERS Range 38° *To 39°F.*

Lettuce Iceberg type in cartons branded "King O' Hearts Lettuce 2 Doz. Heads CA".

Applicant states 875 cartons.

Wrapper Leaves:	Average 2% Decay.
Head Leaves:	1 to 2 heads in most cartons none in some average 5% damage by discoloration following bruising. 1 to 4 decayed heads in most cartons, none in many average 8% Bacterial Soft Rot in various stages affecting from 1 to 2 leaves.

REMARKS Inspection restricted to initial 100 cartons being unloaded and in 2 incomplete stacks nearest rear doors.

7. On November 22, 1983, complainant had the November 16, 1983, load federally inspected. The inspection revealed as follows, in relevant part:

INITIAL & NO. CRSZ550011

VARIOUS CONTAINERS Range 40 To 43°*F.*

LETTUCE, Iceberg type "King O' Hearts, 2 dozen heads."

Applicant states: Approximately 500 cartons remaining on van.

Condition: 1 to 5 heads in most cartons, none in some, average 9% damage by Tipburn. 2 to 8 heads per carton average 20% Bacterial Soft Rot in various stages affecting 1 to 4 leaves mostly following Tipburn.

REMARKS Restricted to approximately 300 cartons being unloaded at time of inspection and 5 stacks nearest rear doors.

8. On December 12, 1983, respondent had the November 30, 1983, load federally inspected. The inspection revealed as follows, in relevant part:

INITIAL & NO. SFRC56002

VARIOUS CONTAINERS Range 38° *To 39°F.*

Lettuce, Iceberg type in cartons branded "King O' Hearts 2 Dozen Calif."

Applicant states approx. 700 cartons.

Condition: *Wrapper Leaves:* No decay. *Head Leaves:* 1 to 3 heads in most cartons none in some average 6% damage by Russet Spotting. 1 to 7 heads per carton average 15% damage by tipburn. 1 to 4 decayed heads in most cartons none in many average 7% Bacterial Soft Rot in various stages affecting 1 to 2 leaves.

* * * * * * *

REMARKS Inspection restricted to approximately 125 cartons being unloaded at time of inspection and in 2 incomplete stacks each end of car in that portion of load remaining at time of inspection.

9. On January 4, 1983, complainant had the December 24, 1983, load federally inspected. The inspection found as follows, in relevant part:

NUMBER CRAZ570629

* * * * * * *

"Big Chief" 2 doz.

Wrapper Leaves No decay. *Head Leaves* 1 to 3 heads per carton, average 10% damage by Tipburn. 1 to 5 decayed heads per carton, average 16% decay affecting 1 to 3 leaves.

Restricted to approximately 100 cartons being unloaded at time of inspection and in 2 incomplete stacks nearest rear doors.

* * * * * * *

TEMPERATURES 42 to 44°*F.*

10. Respondent has paid complainant a total of $30,256.04 for the six loads, consisting of $624.54 for the October 12, 1983, load, $7,568.75 for the November 11, 1983, load, $4,297.50 for the November 16, 1983, load, $6,314.00 for the November 26, 1983, load $5,835.00 for the November 30, 1983, load, and $5,616.25 for the December 24, 1983, load. Respondent has failed to pay any part of the $13,958.28 which complainant claims is still due and owing for the six truckloads.

11. An informal complaint was filed on April 23, 1984, which was within nine months from when the causes of action herein accrued. A formal complaint was filed on December 4, 1984.

CONCLUSIONS

Respondent denies liability, claiming that the six loads of lettuce it admittedly received and accepted were severely deteriorated, and respondent was thus justified in remitting to complainant only the net proceeds obtained on resale. Respondent contends that after it informed complainant of the condition problems, complainant agreed to allow it to handle the November 11, 1983, and November 16, 1983, loads on consignment. Further, respondent contends that the November 13, 1983, load was sold on an open price basis, and the November 26, 1983, load had price after sale terms in effect.

The first issue to be resolved is that of the contract terms agreed to by the parties. In its sworn complaint, complainant asserts that f.o.b. terms were in effect for all six loads. Respondent's allegations that certain transactions had open price or price after sale terms are made in unsworn letters to the Department, which can be given little weight as evidence. We thus conclude that all six loads were sold on a f.o.b. basis. Respondent's contention that complainant agreed to a consignment for two loads after learning of the condition problems is set forth in an unsworn letter to the Department in which respondent states it was told to "do the best we could." As respondent's allegations are unsworn, they cannot be given significant weight. Further, we have stated in previous cases that language such as "do the best you can with it" does not constitute authorization for handling on consignment. *Relan Produce Farms* v. *Rushton & Co., Inc.,* 38 Agric. Dec. 1636 (1979).

Since respondent admittedly received and accepted the six loads of lettuce, it became liable for the contract price minus damages resulting from any breach of warranty, which respondent has the burden of proving by a preponderance of the evidence. *Growers Exchange, Inc.* v. *Central Carolina Grocers, Inc.*, 42 Agric. Dec. 666 (1983). As we have determined that these were f.o.b. sales, complainant gave the implied warranty of suitable shipping condition, which, as stated in 7 CFR 46.43(j), "in relation to direct shipments, means that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." Respondent has submitted inspection reports which it contends prove that complainant breached its warranty with respect to five out of the six truckloads of lettuce. However, examination of these inspection reports does not bear out respondent's contentions.

The October 20, 1983, inspection of the October 12, 1983, shipment shows nine percent damage by discoloration following bruising and 13 percent decay, but was taken eight days after shipment. This is two to three days longer than the normal transportation time from complainant's location in Salinas, California, to respondent in Bronx, New York. We find that transportation conditions in this load were therefore abnormal, which voided the suitable shipping condition warranty.

The record contains a November 15, 1983, inspection, which respondent claims covers the November 11, 1983, shipment. However, the bill of lading for the 875 cartons shipped on November 11, 1983, shows that they were loaded onto truck number CABT03628, and the November 15, 1983, inspection submitted by respondent shows the 875 cartons inspected on truck number IMSZ560123. This casts doubt as to whether the lettuce inspected was the same as was loaded onto the truck by complainant. In any event, the inspection report make clear that the inspection was restricted to only 100 cartons being unloaded and two incomplete stacks nearest the rear doors. This is a small percentage of the 875 cartons contained in the load and cannot be considered to reflect the condition of the entire load. Therefore, no breach of warranty has been established by respondent for the November 11, 1983, load.

The November 22, 1983, inspection, which respondent secured on the November 16, 1983, shipment, was also restricted, as only 500 of the 900 cartons remained in the truck at the time of inspection, and the report states that the inspection was limited to only 300 cartons being unloaded and five stacks nearest the rear doors. Further, the pulp temperature was 40 to 43°F, which is too high and

evidences improper handling by respondent. We thus do not accept the November 22, 1983, inspection as an accurate representation of the condition of the lettuce when it arrived at respondent's place of business, and find no breach of warranty by complainant.

There is no evidence of any inspection having been taken on the November 26, 1983, truckload, and we have held that this was an f.o.b. sale rather than a price after sale, as respondent contends. Therefore, respondent is liable for the contract price.

The record contains an inspection report dated December 12, 1983, covering the November 30, 1983, truckload. The 12 day span of time between the shipping date and the date of inspection is much too long and renders the inspection results completely without evidentiary value. Even if the inspection had been timely, the report makes clear that it was restricted to 125 cartons and two incomplete stacks out of the 1,250 cartons shipped, an insignificant percentage. There is no credible evidence of any breach of warranty in this transaction.

The January 4, 1984, federal inspection took place 11 days after shipment of the December 24, 1983, truckload, which is also an excessive period of time. Further, the inspection was restricted to only 100 cartons being unloaded at the time of inspection and two incomplete stacks nearest the rear doors, a small percentage of the 825 cartons contained in the December 24, 1983, truckload. Therefore, respondent has not proven a breach of warranty regarding this transaction as well.

We have concluded that respondent has failed to sustain its burden of proving a breach of warranty by complainant regarding any of the six shipments of lettuce at issue. Therefore, respondent was obligated to pay the entire contract price of $44,214.32 but paid only $30,256.04, leaving a balance due and owing of $13,958.28. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $13,958.28, with interest thereon at the rate of 13 percent per annum from February 1, 1984, until paid.

Copies of this order shall be served upon the parties.

KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING, *v.* GEORGE VILLALOBOS d/b/a TEKSUN BRAND INTERNATIONAL, PACA Docket No. 2-6824. Decided June 12, 1986.

F.o.b. sale and acceptance following arrival—affirmative defenses not proven by a preponderance of the evidence—condition of produce on arrival must be proven by neutral inspection—damages not awarded on basis of speculative profits—reparation awarded.

Complainant sold and shipped to respondent several loads of produce on an f.o.b. basis. Respondent raised several affirmative defenses which were not proven by a preponderance of the evidence. In particular, respondent's claim that the produce arrived in poor condition was not supported by neutral inspections. Respondent's counterclaim was based on the alleged destruction of respondent's business by complainant's shipment of inferior product, and was found to be not proven. In addition the damages sought for the alleged destruction of respondent's business were stated to be speculative and therefore were not recoverable in any event.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $51,425.26 in connection with the shipment in interstate commerce of six truckloads of tomatoes, one partial truckload of bell peppers and pickling cucumbers, and one partial truckload of red bell peppers.

A copy of the formal complaint was served upon respondent which defaulted in the filing of an answer. Later respondent filed a motion to reopen after default, and such motion was served upon complainant. Complainant did not object to reopening, and on May 8, 1985, this proceeding was reopened, and a proposed answer previously submitted by respondent was ordered filed. Respondent's answer denied liability to complainant, and also included a counterclaim in the amount of $548,070 based in part on previous transactions with complainant. Complainant filed a reply to the counterclaim denying any liability thereunder. The Department did not file a report of investigation.

Although the amount claimed in the formal complaint and counterclaim exceeds $15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this pro-

cedure, the verified pleadings of the parties are considered a part of the evidence in the case. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and Respondent filed an answering statement. Complainant did not file a statement in reply. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Kent W. Northcross, is an individual doing business as Northcross Distributing, whose address is Rio Rico Industrial Park, Nogales, Arizona. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, George Villalobos, is an individual doing business as Teksun Brand International, whose address is 1865 Decatur Drive, San Jose, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between February 23, and March 12, 1984, complainant sold to respondent and shipped from Nogales, Arizona to respondent in San Jose, California, six truckloads of tomatoes, one partial truckload of red bell peppers, and one partial truckload of mixed bell peppers and pickling cucumbers, for invoice prices totalling $73,981.25, f.o.b.

4. Respondent accepted all of the subject produce and has paid complainant a total of $12,997.59 therefor. In addition complainant has granted respondent allowances on the produce in the total amount of $14,216.40. There remains due and owing from respondent to complainant the sum of $46,767.26.

5. The formal complaint was filed on September 4, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent does not dispute the quantities of perishable produce which complainant alleges were sold to respondent, nor does respondent dispute the original invoice prices applicable to such produce. However, respondent set forth several affirmative defenses which he had the burden of proving by a preponderance of the evidence. See *NewMiller Farms* v. *Nicolls,* 36 Agric. Dec. 1230 (1977) and *Walker & Hagen Packing House* v. *Amato Bros. Tomato Distributors, Inc.,* 27 Agric. Dec. 1543 (1968). Respondent alleges that on arrival the produce did not conform to the quality agreed upon between the parties when the contracts for the produce were entered. Respondent alleges that it agreed to purchase "number one product" but that complainant shipped inferior product. Respondent further alleges that it refused to accept the commodities

as shipped, but at complainant's insistence agreed to receive the product "without obligation and without price." Respondent further alleges that it has "refused to pay for said balance, because of the devastating consequences, complainant's product had upon my business." Respondent then sets forth a counterclaim based upon complainant's alleged destruction of its business, and the speculative profits which respondent alleges its business would have realized over the next three years. This claim is easily resolved since it was established many years ago that damages cannot be awarded based on speculative profits. *Heller Bros. Co. Inc.* v. *Associated Fruit Distributors of California,* 4 Agric. Dec. 1002 (1945).

The documentation relative to the eight shipments of produce nowhere indicates that there was an agreement between the parties that the produce was to be U.S. No. 1, or any other specified quality. Respondent has presented us with no credible evidence that any such quality was agreed to. Furthermore respondent did not submit any federal inspection reports covering the produce, and has therefore failed to substantiate its allegations in regard to the poor condition or quality of the produce on arrival. See *Mutual Vegetable Sales* v. *Select Distributors,* 38 Agric. Dec. 1359 (1979). We find that respondent has failed to substantiate its allegations in regard to an agreement subsequent to arrival that the produce was received "without obligation and without price". In addition we find that respondent accepted the produce and has not proven any breach of contract on the part of complainant. Accordingly, respondent is liable to complainant for the full purchase price of the produce, less the amounts already paid and the amounts of the adjustments allowed by complainant, or a total of $46,767.26.

Respondent's counterclaim failed to demonstrate that complainant was responsible for the destruction of respondent's business. Neither did such counterclaim establish that any amount is due from complainant to respondent on the earlier transactions referred to in such counterclaim. We find that the counterclaim should be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $46,767.26, with interest thereon at the rate of 13% per annum from April 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

SUNNYSIDE PACKING COMPANY, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7141. Decided June 12, 1986.

Admission—Reparation awarded.

Kenneth H. Vail, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $804.00 in connection with a truckload of plums in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Sunnyside Packing Company, is a corporation whose mailing address is P. O. Box 828, Selma, California 93662. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $804.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $804.00 with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

D'ARRIGO BROS. CO. OF CALIFORNIA, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7142. Decided June 12, 1986.

Admission—Reparation.

Kenneth H. Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,576.00 in connection with two shipments of mixed produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, D'Arrigo Bros. Co. of California, is a corporation whose mailing address is P. O. Box 850, Salinas, California 93902. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,576.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,576.00 with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SONORA RANCHES, INC., *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7143. Decided June 12, 1986.

Admission—Reparation.

Kenneth H. Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,062.50 in connection with two truckloads of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Sonora Ranches, Inc., is a corporation whose mailing address is 9123 North Cave Creek, Phoenix, Arizona 85020. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,062.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,062.50 with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MERRILL FARMS, *v.* J. CARUSO PRODUCE, INC., PACA Docket No. 2-6371. Decided June 23, 1986.

F.o.b. sale—acceptance—suitable shipping condition—transportation conditions normal—damages for violation of seller's warranty—counterclaim granted.

Where all evidence showed that lettuce was not in suitable shipping condition when loaded on board van, damages awarded to buyer which accepted lettuce on arrival.

Andrew W. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of $3,004.50 in connection with one transaction, in interstate commerce, involving lettuce, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any further liability to complainant. In addition, respondent counterclaimed against respondent in the amount of $2,336.00.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) has been followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement, and respondent filed a verified answering statement. Also, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Merrill Farms, is a corporation whose mailing address is P.O. Box 659, Salinas, California 93902.

2. Respondent, J. Caruso Produce, Inc., is a corporation whose mailing address is 14 South Water Market, Chicago, Illinois 60608.

3. At all material times, each party was licensed under the Act.

4. On or about February 17, 1983, in the course of interstate commerce, complainant, by oral contract, sold to respondent 840 cartons of lettuce at an f.o.b. price of $2.75 per carton plus 65 cents per carton cooling, 15 cents per carton brokerage, and $22.50 for a

Ryan recorder, for a total agreed f.o.b. price of $3,004.50. The contract was negotiated through Fry Distributing Co., Inc., 2840 South Ashland, Chicago, Illinois 60608. The lettuce was shipped on that same date from a loading point in Arizona to respondent in Chicago on board van No. AXXZ 595754 which is owned and operated by Agricultural Express of America, 3409 West Pershing Road, Chicago, Illinois 60632. The van arrived in Chicago on Sunday, February 20, 1983, at 4:15 p.m. CST. As Monday, February 21, 1983, was observed as a legal holiday by the merchants on the South Water Market in Chicago, respondent did not open for business until 3:00 a.m. CST, February 22, 1983. At that time, it received notification of the van's arrival from the Flash Delivery Co. which had picked up the trailer from the unloading ramp of the Agricultural Express of America, and was further notified that the van would be delivered to respondent's location as soon as the South Water Market Association's rules permitted.

5. An employee of respondent was sent to check the van prior to its being delivered to respondent's loading dock. Upon arrival, the employee was advised that the refrigeration motor on the van was not running, and that the motor was out of fuel. The Flash Delivery Co. was contacted concerning this matter and advised respondent that the refrigeration unit had been operating when the van was delivered to the South Water Market Association lot at 1:00 a.m. on the morning of February 22, 1983.

6. The Ryan recording tape indicates that the instrument operated for about 108 hours. Since the bill of lading indicates that the loading was completed at 4:55 p.m. on February 17, 1983, this would indicate that the Ryan operated until about 6:00 a.m. on February 22, 1983. The tape further indicated that the temperature on board van No. AXXZ 595754 started at 75°F., quickly rose to 95°F. within the first two hours, dropped to about 42°F. two hours thereafter, dropped to 40°F. eight hours after that, and dropped to 35°F. at the end of the first 24 hour period. For the next 82 hours, the temperature was maintained in a 35°F. to 37°F. range and, for the last two hours in which the Ryan recording thermometer was operating, the temperature slowly rose to around 41°F. or 42°F. The company which supplied the Ryan recorder, Ryan Instruments, Inc., P.O. Box 599, Kirkland, Washington 98033, subsequent to this trip, recalibrated it and notified respondent as follows:

> Ryan #342656 returned to our Kirkland plant on Feb. 24, 1983. Upon testing, it was determined that the temperature sensor was reading 3 to 4° *low throughout the entire*

temperature range. The chartdrive mechanism was accurate as to time. The hinge on the outer case was cracked.

I'd like to direct your attention to the 108 hour point of chart 82361. The dark markings at this point indicate the instrument sustained an impact, apparently while being removed from the vehicle. This impact appears to be responsible for the error factor noted in our testing. In view of this, the recording prior to the point of impact is an accurate reflection of temperatures encountered on the trip. If we may be a further assistance, please advise.

7. On February 22, 1983, at 8:50 a.m. CST, the lettuce on board van No. AXXZ 595754 was inspected while still on board the van which was located in the truck lot at the South Water Market in Chicago, Illinois. The inspection certificate issued thereafter (F 010523) indicates that the temperature control unit was not operating, that respondent had unloaded approximately 150 cartons of the total 840 cartons shipped, and that the pulp temperature of the lettuce was as follows: "Near ⅔ length of trailer: Top 70°F, 3rd layer 68°F, 4th layer 88°F, floor 63°F." The inspection certificate further indicates that the condition of the lettuce was as follows:

Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper leaves only;* [sic] Serious damage by decay, in most samples 2 to 12 heads, in many none, average 17%. *Head leaves;* [sic] Decay ranges from 12 to 24 heads per cartons [sic], average 83%, Bacterial Soft Rot, in advanced stages.

8. The load of lettuce was the subject of a second Federal inspection on February 24, 1983, at 1:05 p.m. CST. The inspection certificate issued thereafter (F 010668) indicates that the lettuce was inspected while on board the van which was located in the truck lot of the South Water Market in Chicago, Illinois, and that the temperature control unit on the truck was not running. The temperature of the lettuce is recorded as follows: "Rear doors: Top 78°F, 3rd layer 63°F., 4th layer 65°F., Floor 58°F. Rear ½ length: Top 59°, 3rd layer 68°, floor 55°F. Rear ¼ length: Top 54°, 3rd layer 64°, floor 60°F." In addition, the inspection certificate notes the condition of the lettuce as follows:

Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper leaves only:* Serious damages by decay, in most samples 2 to 16 heads, in some none, average 33%. *Head leaves:* Decay ranges from 3 to 24

heads per carton, average 57%, Bacterial Soft Rot, in advanced stages.

9. On February 24, 1983, the lettuce on board van No. AXXZ 595754 was dumped by the C Post Disposal Service, 1439 South 58th Court, Cicero, Illinois 60650, at a cost of $300 to the respondent.

10. On February 24, 1983, the respondent sent complainant the following telegram at 1:09 p.m. EST:

> BE ADVISED AXXZ595754 ARRIVED IN DETERIORATED CONDITION PER USDA INSPECTION WE HAVE ATTEMPTED TO HAVE FUEL PUT IN REFRIGERATED UNIT WITHOUT SUCCESS. WE BELIEVE THE CONDITION OF THIS LETTUCE REQUIRES IT TO BE DUMPED AS IT HAS NO COMMERCIAL VALUE WE HAVE BEEN ATTEMPTING TO OBTAIN A DISPOSAL COMPANY TO TAKE THE LETTUCE TO DUMP BUT HAVE BEEN UNSUCCESSFUL SO FAR WE ACCEPT NO RESPONSIBILITY FOR THIS LETTUCE AND WILL HANDLE IT ONLY FOR THE ACCOUNT FOR WHOM IT CONCERNS FOR THE PURPOSE OF HAVING IT DUMPED AS SOON AS POSSIBLE FOR THE PURPOSE OF MINIMIZING THE LOSS. PLEASE BE GOVERNED ACCORDINGLY WE WILL KEEP YOU ADVISED.

11. The complainant sent the respondent the following telegram at 6:03 p.m. EST on February 24, 1983:

> RECEIPT IS ACKNOWLEDGED OF YOUR FEBRUARY 24, 1983 TELEGRAM IN REFERENCE TO VAN AXXZ 595754 SHIPPED FEBRUARY 17, 1983. PLEASE TAKE NOTICE THAT AT THIS TIME MERRILL FARMS DOES NOT CONSIDER CARUSO RELEASED FROM ITS RESPONSIBILITY OF THIS F.O.B. CONTRACT. FURTHER THE CONTRACT WILL STAY IN FORCE UNTIL DETERMINATION CAN BE FOR THE HIGH PULP TEMPERATURE AT DESTINATION. AS THIS WAS AN F.O.B. SHIPMENT ALL DOCUMENTS MUST BE RECEIVED TO DETERMINE WHERE LIABILITY SHOULD BE PLACED. UPON RECEIPT OF DOCUMENTS WE WILL REVIEW THIS MATTER SO IT CAN BE CONCLUDED PROPERLY.

12. The United States Department of Agriculture Market News Report for February 22, 1983, covering the Chicago wholesale

market indicates that the lettuce had a minimum value of $6 per carton, and that the prices were steady.

13. The formal complaint was filed on June 13, 1983, which was within nine months of when the cause of action herein accrued.

CONCLUSIONS

There is no dispute in this case about certain material facts, *viz*, that the parties entered into an agreement whereby complainant would sell respondent 840 cartons of lettuce for a total f.o.b. price of $3,004.50, that the lettuce was shipped by complainant, and that the lettuce was received and accepted by respondent. Accordingly, having accepted the lettuce, respondent became obligated to complainant for the full contract price less any provable damages. *Rocky Ford Dist. Co.* v. *Angel Produce*, 29 Agric. Dec. 93 (1970). The respondent has the burden of proof as to such matters. *The Growers-Shipper Pot. Co.* v. *Southw. Pro. Co.*, 28 Agric. Dec. 571 (1969). In this case, therefore, the respondent must prove that the complainant breached the parties' contract, and that it was damaged as a consequence thereof.

The respondent has alleged that the lettuce which complainant shipped was not of the quality called for by their contract. As this was an f.o.b. sale, the lettuce was to be placed on board the van by complainant, at the shipping point, in suitable shipping condition. 7 CFR § 46.43(i). This means that the complainant was obligated to load lettuce on board the van which would arrive at the contract destination without abnormal deterioration if the shipment was handled under normal transportation service and conditions. 7 CFR § 46.43(i). *R. C. Walter & Son* v. *Gatz*, 31 Agric. Dec. 655 (1972). Respondent has alleged that the complainant failed in this regard, and that the complainant breached its warranty of suitable shipping condition. As noted above, respondent has the burden of proof on this issue, *i.e.*, it must show that the lettuce showed abnormal deterioration upon arrival and that transportation conditions were normal. *Valley Packing Co.* v. *Nicholas J. Zerillo, Inc.*, 28 Agric. Dec. 1352 (1969). There is no dispute between the parties about whether the lettuce was abnormally deteriorated; the first Federal inspection, on February 22, 1984, makes that clear. Thus, the dispositive issue in this case is whether or not there were abnormal shipping conditions as was alleged by the complainant.

The only substantive evidence on transportation service and condition is the tape from the Ryan recording device.[1] However, the

[1] The record also contains the affidavit of complainant's salesperson who is based in California, and who claims the load was properly pre-cooled. Since the load was

Continued

efficacy of this evidence is in dispute. Respondent argues the tape proves that the temperature on board the van was normal; complainant argues that the device was damaged and it therefore proves nothing. However, substantial evidence in the record indicates that this device operated properly throughout the entire trip. There is evidence that it was damaged after having operated for 108 hours. Considering the indication, on the bill of lading, that the loading was completed on February 17, 1983, at 4:55 p.m., the Ryan device operated until about 6:00 a.m. on February 22, 1983. Since this was about the time when respondent's employees opened the van, we concluded that the damage to the device did not occur until an attempt was made to remove it from the van. Such a conclusion is consistent with that made by the Ryan Instruments, Inc., personnel who inspected the device shortly thereafter.

In view of the above, we conclude that the tape from the Ryan device properly recorded the temperature on the van. The tape showed that the temperature in the van was normal throughout the trip, *i.e.*, after the first few hours, the tape shows the temperature on board the truck to be about 36°F. This is exactly the temperature which the bill of lading required the air temperature to be.

In spite of this evidence to the contrary, complainant maintains, however, that the carrying temperature on the van was too high. However, since we conclude that the Ryan recording device was operating correctly throughout the trip, and the tape from the trip indicates that the temperatures were maintained in a proper order throughout it, we conclude that complainant's allegation is unsupported by any record evidence. The complainant is apparently relying on the result of the recalibration of the recording device subsequent to the trip to support its claim that the temperatures on the van were too high. However, Ryan Instruments, Inc., which recalibrated its device after the trip, indicated that, while at the time of the recalibration the device was recording temperatures 4°F. lower than the actual temperature, it was expected this fault was not in effect during the trip, but rather resulted from some damage which

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shipped from Arizona, it is difficult to understand how this person was in a position to attest to this fact. Moreover, the evidence he points to, a sheet titled "Operator's Daily Report," which ostensibly is a report from the complainant's pre-cooler in inconclusive at best. In the worst light for complainant, the "Operator's Daily Report" supports respondent's contention that the lettuce was not properly pre-cooled since it only reflects that 600 cartons of "Merrill Farms" lettuce were cooled, while complainant shipped 840 cartons. The Ryan tape, *see* below, shows a sharp temperature rise after the lettuce was loaded. Such a rise could have occurred if complainant only pre-cooled 600 of the 840 cartons loaded on the van.

occurred in removing the device from the van at the 108 hour point. Even had the temperature range been 4°F. higher than was reported on the Ryan tape, this temperature of about 40°F. would not have been the primary cause for the pulp temperature of the lettuce to rise to a temperature range of 63°F. to 88°F. as is reflected on the first Federal inspection certificate issued on February 22, 1983. Even had the cooling device not been properly functioning for several hours before the lettuce was inspected, since the temperature in mid-February in Chicago is not likely to be very high, such a failure would not account for the high temperature of the lettuce (63°F–88°F) reflected at 8:50 a.m., February 22, 1983, federal inspection. On the basis of all of the evidence in the record, we find that there were no abnormal shipping conditions in effect during the trip. *James Macchiaroli Fruit Co.* v. *Thos. Caito Sons,* 21 Agric. Dec. 525 (1962).

Since we have found that there were no abnormal shipping conditions, the complainant's warranty of suitable shipping conditions is maintained in effect. Inasmuch as the condition of the lettuce upon arrival was so poor as to indicate that the lettuce which complainant loaded in the van was in unsuitable shipping condition, we must hold that complainant breached its contract with respondent. As a result thereof, respondent is entitled to damages. The measure of damages for breach of warranty as to accepted goods is the difference at the time and place of delivery between the value of the goods delivered and the value they would have had if they had been as warranted, together with incidental damages. U.C.C. section 2–714; *Ritepak Produce* v. *Green Grove Markets,* 29 Agric. Dec. 165 (1970). We may accept the market news price for lettuce on the date of delivery as the value of the lettuce if delivered as warranted. *Anaya Farms* v. *Produce Distributors,* 20 Agric. Dec. 58 (1961). That price was $6.00 per carton, or a total of $5,040.00 for the 840 cartons. The goods delivered, in the instant case, had no value inasmuch as the whole lot of lettuce had to be dumped. Respondent's damage is thus $5,040.00. The contract price for the 840 cartons of lettuce was $3,004.50. Respondent is thus due $2,035.50 ($5,040.00 less $3,004.50) plus the $300 cost of dumping the lettuce, or $2,335.50, from the complainant. Complainant's failure to pay respondent this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days of the date of this order, complainant shall pay respondent $2,335.50, as reparation, with interest thereon at the rate of 13 percent per annum from April 1, 1983, until paid.

Copies of this order shall be served upon the parties.

THOMAS G. VALENZUELA d/b/a T. G. VALENZUELA PRODUCE, *v.* TEDDY BERTUCA d/b/a TEDDY BERTUCA COMPANY, PACA Docket No. 2-6710. Decided June 23, 1986.

Consignment—breach of duty by respondent consignee—reparation awarded.

Where respondent accepted seven lots of cantaloupes on consignment from complainant, he breached his duty as a consignee by failing to provide accounts of sale and remit the net proceeds of the sales. Respondent's liability does not extend to loads where the evidence supports his claim that the cantaloupes were in very poor condition upon arrival at his place of business.

Andrew N. Stanton, Presiding Officer.
Complainant, *pro se*.
Barry Kirschner, Esquire, Tucson, AZ, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $26,178.19 in connection with the consignment of seven lots of cantaloupes to respondent in interstate and foreign commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. Respondent subsequently amended its answer and asserted a counterclaim in the amount of $6,321.39 in connection with the subject matter of the complaint. Complainant filed a reply, denying liability.

The amount claimed as damages exceeds $15,000.00 and respondent requested an oral hearing. Therefore, an oral hearing took place in Tuscon, Arizona, on November 19, 1985. At the hearing, only respondent was represented by legal counsel, as complainant elected to proceed without counsel. Three witnesses testified for complainant and six witnesses testified for respondent. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Thomas G. Valenzuela, d/b/a T. G. Valenzuela Produce, is an individual whose address is P.O. Box 2280, Nogales, Arizona. At the times of the transactions alleged in the counterclaim, complainant was licensed under the Act.

2. Teddy Bertuca d/b/a Teddy Bertuca Produce, is an individual whose address is P.O. Box 2896, Nogales, Arizona. At the times of the transactions alleged in the complaint, respondent was licensed under the Act.

3. On approximately January 22, 25, 28, 30, and 31, 1984, complainant, by oral contract, consigned to respondent seven loads of cantaloupes consisting of sizes 15, 18, 23, 30, 36 and 42. The contract provided that respondent was to receive a 10% commission after sale. Respondent also gave complainant a $20,000.00 cash advance.

4. The cantaloupes comprising the seven loads were shipped from Mazatlan, Sinaloa, Mexico, to the Mexican/American border on January 20, 1984 (hereinafter "transaction 1"), January 22, 1984 (hereinafter "transaction 2"), January 25, 1984 (hereinafter "transaction 3"), January 26, 1984 (hereinafter "transaction 4"), January 28, 1984 (hereinafter "transaction 5"), January 28, 1984 (hereinafter "transaction 6"), and January 29, 1984 (hereinafter "transaction 7"). Upon their arrival at the border, four of the loads were subjected to a federal inspection. Transaction 3 was inspected on January 28, 1984, and found to contain "1136 half crate . . . defects 22 to 50%, average 35%, including from 11 to 39%, average 26% decay. Pulp temperature 60 F." Transaction 5 was inspected on January 30, 1984, and found to contain "1088 half crate . . . defects 13 to 39%, average 22%, including 9 to 39%, average 19% decay. Pulp temperature 45 F." Transaction 6 was inspected on January 30, 1984, and found to contain "598 half crate . . . defects 4 to 22%, average 14%, including from 4 to 22%, average 11% decay. Pulp temperature 48 F." Transaction 7 was inspected on January 31, 1984, and found to contain "992 half crate . . . defects 11 to 28%, average 16%, including 3% bruises, 3% sunburn, 3% scars and in most samples none, in many from 6 to 11% average 3% decay. Pulp temperature 40 F."

5. The cantaloupes arrived at respondent's place of business, and were found to contain the following numbers of crates for each size of cantaloupe:

Date Received	Transaction No.	15's	18's	23's	30's	36's	42's	Total
1/22/84	1	0	78	285	64	120	1	548
1/25/84	2	0	113	564	96	218	0	991
1/28/84	3	0	203	671	87	175	0	1136
1/28/84	4	32	224	633	57	187	0	1133
1/30/84	5	0	0	597	0	0	0	597
1/30/84	6	24	367	356	60	281	0	1088
1/31/84	7	0	252	546	15	169	0	982

6. Respondent accepted the cantaloupes for handling on consignment and disposed of them, but never provided complainant with accounts of sale or returns from the sale of the consigned cantaloupes.

7. A formal complaint was filed on August 22, 1984, which was within nine months from when the causes of action herein accrued. A counterclaim was filed on June 5, 1985, in connection with the subject matter of the complaint.

CONCLUSIONS

The complaint concerns seven loads of cantaloupes which respondent agreed to handle on consignment for complainant's account. Complainant complains that he never received any accounts of sale or notice of problems, and has not been paid anything by respondent. It is respondent's position that the cantaloupes were defective and difficult to sell. Respondent contends that his net proceeds were less than the $20,000.00 it advanced to complainant and has filed a counterclaim for the difference.

Since respondent was handling the cantaloupes on consignment, he was obliged to adhere to the requirements of section 46.29(a) of the Department's regulations (7 CFR § 46.29(a)), which states as follows, in pertinent part:

> It is a violation of section 2 of the Act to fail to render true and correct accountings in connection with consignments or produce handled on joint account. Charges which cannot be supported by proper evidence in the records of the commission merchant or joint account partner shall not be deducted. The commission merchant or joint account partner may be held liable for any financial loss and for other penalties provided by the Act, due to his negligence or failure to perform any specification or duty, ex-

press or implied, arising out of any transaction subject to the Act.

Complainant, as the party alleging that respondent was in breach of duty as a consignee, has the burden of proving his allegations by a preponderance of the evidence. *John Livacich Produce, Inc. a/t/a Vista Sales* v. *Auster Company, Inc.*, 42 Agric. Dec. 657 (1983).

Complainant bases his case on a report of personal investigation prepared by two Department of Agriculture investigators, which is in evidence in this proceeding. The report states that between May 10 and 16, 1984, the investigators examined respondent's records, and found that he had received 6,475 crates of cantaloupes from complainant. The investigators found that respondent had prepared recaps of sale for each load, but discovered that respondent's records of sales did not fully support his recaps. The investigators prepared an audit accounting, accepting only those sales supported by respondent's records. Where the sales evidenced by the records differed from the sales set forth in respondent's recap, the investigators raised or lowered the total number of crates to correspond with the quantity received by adding or subtracting crates at the average sales price for the crates for which there existed evidence of sales. The investigators reviewed all adjustments and credit memos to determine whether there was justification for any allowances granted. Adjustments granted due to condition problems were not allowed unless supporting evidence was found. All prices at less than one dollar per crate which respondent claimed to have received were eliminated from the audit accounting as unjustified. The investigators found that respondent's claimed gross proceeds were $37,061.23, but the actual gross proceeds totaled $71,469.81. The investigators deducted $2,639.82 from the gross proceeds as permissible adjustments, leaving adjusted gross proceeds of $68,829.99. Another $15,768.80 was deducted for legitimate expenses and $6,883.00 (10% of the adjusted gross proceeds) were deducted for commission, for net proceeds of $46,178.19. After subtracting respondent's advance of $20,000.00, respondent was found to owe complainant an additional $26,178.19.

Respondent claims that although he did not have inspection reports in his possession when the Department's investigators conducted their audit, he was subsequently able to secure copies of such reports showing the poor condition of the melons, therefore establishing that respondent's disposition of them was proper. The record contains several inspections taken at the Mexican/American border. Respondent's salesman, Dan Mandel, testified to a January 28, 1984, inspection which allegedly covered transaction 3.

That inspection (respondent's exhibit 22) revealed an average of 26% decay and a pulp temperature of 60°F. (Finding of Fact 4). Mr. Mandel also testified to an inspection that allegedly occurred at the border on transaction 4, but the inspection report upon which he based his testimony, respondent's exhibit 23, on close examination is merely a photocopy of respondent's exhibit 22, the inspection pertaining to transaction 3. Mr. Mandel testified concerning inspections of transaction 5, which found an average of 11% decay and a pulp temperature of 48°F., and transaction 6, showing an average of 19% decay and a 45°F. pulp temperature (Finding of Fact 4). These three inspection reports clearly indicate that the cantaloupes were severely decayed at the border. Transaction 7 was inspected at the border on January 30, 1984, which found a total of 16% damage including 3% decay, with a pulp temperature of 40°F. (Finding of Fact 4). Mr. Mandel explained (transcript at 172–173) that this inspection was much more restricted than the other border inspections and, therefore, the actual decay experienced by the load was much greater than that revealed by the inspection. However, there is nothing in the record to support this claim and we, therefore, will accept the inspection at face value.

The inspection reports provided to the Department after the investigators prepared their audit accounting establish that the cantaloupes in transactions 3, 5 and 6 were in extremely poor condition before respondent ever received them. We ordinarily consider the findings of the Department's investigators to be extremely strong evidence. However, the investigators were not shown any inspection reports by respondent at the time of their investigation. We are sure that the investigators would have taken these reports into account if they had been informed of their existence. Accordingly, we have considered these reports in our evaluation of the reasonableness of respondent's returns, and made appropriate adjustments in the audit accounting. The remaining transactions do not affect the audit accounting, as there is no evidence of border inspections of transactions 1, 2 and 4, and the inspection of transaction 7 does not show sufficient deterioration to warrant any alteration of the conclusions of the Department's investigators.

Respondent has also placed into evidence federal inspections allegedly taken at the places of business of respondent's customers. None of these inspections will be given any significant weight. Respondent's Mr. Mandel testified (transcript at 141) that with respect to transaction 2, a January 26, 1984, inspection was taken on 84 crates of melons at the place of business of Buttke-Klahr, Inc., Phoenix, Arizona, one of respondent's purchasers. However, respondent's returns from the sales to Buttke-Klahr, Inc., $1.80 per

crate for 42 crates of 18's and 42 crates of 23's, were accepted by the Department's investigators and are not disputed by complainant. Mr. Mandel testified (transcript at 163–164) that a February 2, 1984, inspection of 966 crates of melons at West Coast Produce Co., Inc., San Antonio, Texas (respondent's exhibit 20) which showed decay, covered melons from transaction 5. However, the February 2, 1984, inspection was of both 23's and 18's, and transaction 5 contained only 597 crates of 23's. Therefore, even assuming the 966 crates inspected included the 597 crates of transaction 5, we cannot determine from the inspection the degree of deterioration exhibited by the melons from transaction 5 alone. With respect to the February 2, 1984, inspection of 79 crates at Solari-Aliaga Co., San Francisco, California (respondent's exhibit 18), which Mr. Mandel testified covered melons from transaction 6 (transcript at 162), it is not necessary to subject that inspection to any substantial analysis, as it is evident from the border inspection of transaction 6 that the cantaloupes were in such poor condition that any reasonable disposition by respondent would be consistent with his broker's duty. With regard to the February 6, 1984, inspection taken at Serra Brothers Inc., Detroit, Michigan, Mr. Mandel claims that such inspection covered melons from transactions 3 through 7 (transcript at 163). We believe this inspection to be unnecessary to justify respondent's handling of cantaloupes from transactions 3 and 6, as the border inspections show they were substantially decayed before they arrived at respondent's place of business. We do not believe the February 6, 1984, inspection should be given any significant weight regarding transactions 4, 5 and 7 for several reasons. First, the identity of the cantaloupes inspected is called into question by the fact that the inspection covered 335 crates, and respondent's recaps of sales show that respondent received only 314 crates. In addition, the date of the inspection, February 6, 1984, is nine days after delivery of transaction 4 on January 28, 1984, eight days after delivery of transaction 5 on January 29, 1984, and seven days after delivery of transaction 7 on January 30, 1984. These time periods are too long for the inspection to be considered an accurate reflection of the condition of the melons on the delivery dates. Further, the temperature of the cantaloupes inspected, 45 to 46°F., was high, which also detracts from the validity of the inspection results.

Respondent claims that his rejection of an eighth load of cantaloupes at the border on February 1, 1984, is evidence of the poor condition of the seven loads at issue. However, this claim is completely without merit, as the condition of each of the seven loads of cantaloupes must stand on its own.

We have not found any significant evidence of problems regarding transactions 1, 2, 4 and 7. We, therefore, accept the findings of the audit accounting as representing what respondent should have remitted to complainant for these transactions. However, we have concluded that the cantaloupes from transactions 3, 5, and 6 were in very poor condition upon arrival at respondent's place of business and we thus will analyze the audit accounting with this in mind.

The audit accounting for transaction 3 did not accept respondent's claim that eight crates of 18's and 164 crates of 23's were sold to Serra Brothers, Inc., for $.75 each, or $129.00; 42 crates of 23's, 72 crates of 30's, and 175 crates of 36's were sold to Solari-Aliaga for $.50 per crate, or $144.50; and 420 crates of 23's were sold to W. W. Rogers for $.75 per crate, or $315.00. The audit also did not accept respondent's claim that one crate of 23's was lost to General Produce on repacking and one was given to W. Fay as a sample. In view of the obvious poor condition of the melons from transaction 3, we accept all these claims as valid except for the one crate given as a sample, which is not associated with condition problems. For transaction 5, the audit accounting did not accept respondent's claim that he had to pay $.015 per crate on 547 crates of 23's sold to West Coast Produce, for a charge of $8.20, and received $.75 per crate for 41 crates sold to Serra Brothers Inc. for $30.75. While we accept respondent's returns of $30.75 for the crates sold to Serra Brothers, Inc., we cannot accept that the 547 cartons sold to West Coast Produce were completely without value. It is stated in section 46.22 of the Department's regulations (7 CFR § 46.22) that a dump certificate or other adequate evidence must be provided to prove that produce is without commercial value when more than 5% of a consigned load is dumped. While the January 30, 1984, border inspection shows that transaction 5 experienced severe condition problems, the degree of deterioration, 11% decay, was not so great to permit a conclusion that virtually the entire load of 597 cartons was completely without commercial value. Since the melons of transaction 6 were so greaty decayed at the border, we will accept respondent's returns for the sale to W. W. Rogers of two crates of 18's at $.75 per crate, or $1.50, 84 crates of 18's, 138 crates of 23's, 31 crates of 30's and 65 crates of 36's to Solari-Aliaga at $.50 per crate, or $159.00, and 24 crates of 15's and 5 crates of 23's to Serra Brothers, Inc., for $.75 per crate, or $21.75. Respondent also claims that he incurred a loss of $.015 per crate for 239 crates *sold to West Coast Produce, for an indebtedness of $3.59, and had* to dump an additional 64 crates of 23's and 55 crates of 36's. We will accept the returns alleged in transaction 6 from sales to Solari-

Aliaga and Serra Brothers, Inc. We will also accept the dumping in this load, as we believe the results of the border inspection, an average of 19% decay, are consistent with respondent's claim that 358 of the 1,088 crates in transaction 6 were completely without value. We will not allow respondent a claim of $3.59 for the 239 crates sold to West Coast Produce in the absence of any evidence explaining such a charge.

It is our conclusion that the audit account of sales prepared by the Department's investigators, as revised in accordance with the above analysis, is an accurate reflection of the obligations of the parties with respect to the seven loads of cantaloupes at issue. The audit account of sales found justification for the sale of only 22 crates of 15's for $374.00, with 34 crates unaccounted for. As we have accepted the $18.00 reported by respondent for the sale of 24 crates in transaction 6, we find that 46 crates sold for $392.00. This gives an average sales price of 8.5217391 for the ten remaining crates, or $85.22, for a total of $477.20. Regarding the 18's, the audit account of sales found sales of 657 crates for $9,173.54, but could not account for 580 crates. We have accepted respondent's claim that eight crates were sold for $6.00 in transaction 3, and that 239 crates were dumped and 86 crates sold for $43.50 in transaction 6. We thus find that 990 crates of 18's sold for $9,223.24. This gives an average sales price of $9.31640 for the 247 remaining crates, or $2,301.15, for a total of $11,524.39. Regarding the 23's, the audit account of sales found sales of 1,685 crates for $19,855.09, but could not account for 1,967 crates. We have accepted respondent's claims that in transaction 3, one crate was dumped, and 627 sold for $429.00; in transaction 5, 41 crates were sold for $20.75; and in transaction 6, 200 crates were sold for $72.75. We thus find that 2,560 crates sold for $20,417.59. This gives an average sales price of $7.975621 for the 1,092 remaining crates, or $8,709.38, for a total of $29,126.97. Concerning the 30's, the audit account of sales showed 358 crates sold for $3,535.50, but it could not account for 21 crates. It is not clear how the Department's investigators determined that only 21 crates were not accounted for, since the record indicates that 103 crates were reported sold at less than $1.00 per crate, which the investigators indicated they would not accept. We have accepted the validity of respondent's claims that in transaction 3, 72 crates sold for $36.00, and in transaction 6, 31 crates sold for $15.50, for a total of $51.50 for the 103 crates. Therefore, in order to determine what value to assign to the 21 crates, we will use the average sales price respondent obtained for the 103 crates of $.50 per crate, or $10.50. We thus find that the 379 crates of 30's sold for $3,535.50 plus $10.50, or $3,546.00. Regarding the 36's, the audit

account of sales accepted sales of only 446 crates for $2,500.60, but could not account for 704 crates. We have accepted respondent's claims that for transaction 3, 175 crates sold for $87.50 and for transaction 6, 55 crates were dumped while 65 crates sold for $32.50. We thus find that 741 crates sold for $2,628.60. This gives an average sales price of $3.5473684 for the 409 remaining crates, or $1,450.87, for a total of $4,079.47. There is no dispute over the $1.50 reported for the one crate of 42's. The revised audit accounting for all sizes of cantaloupes in the seven loads is thus $477.22 for the 15's, $11,524.39 for the 18's, $29,126.97 for the 23's, $3,546.00 for the 30's, $4,079.47 for the 36's, and $1.50 for the 42's, for total gross proceeds of $48,755.55. The Department's investigators allowed adjustments of $2,639.82, which leaves $46,115.73 as the adjusted gross proceeds. The investigators also found $15,768.80 in allowable expenses, which also should be deducted. In addition we must subtract a commission of 10% of the adjusted gross proceeds, or $4,611.57, which leaves net proceeds of $25,735.36. After deducting respondent's advance to complainant of $20,000.00 we are left with $5,735.36 as the net proceeds underreported and unpaid to complainant. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Respondent has filed a counterclaim which is based on the premise that the investigators' report was in error with respect to the seven transactions at issue, since all loads were in poor condition when they reached respondent. As we have determined, this is only the case with respect to transactions 3, 5 and 6 but not with respect to transactions 1, 2, 4 and 7. Therefore, respondent's counterclaim is dismissed.

Complainant is the prevailing party herein and is entitled to an award of fees and expenses in accordance with section 7(a) of the Act (7 U.S.C. § 499g(a)). Complainant has filed a claim for $1,650.00 to which respondent has objected. Complainant's claim consists of $900.00 for three trips to the Los Angeles, California, P.A.C.A. office, $600.00 for one trip to the Washington, D.C. P.A.C.A. office, and $150.00 for miscellaneous expenses. This claim will not be granted, as complainant has not shown that these expenses were "necessarily incurred in connection with the oral hearing." 7 CFR § 47.19(d)(2)(v). Further, complainant has not presented any receipts to support his claim.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,735.36, with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

F & J PRODUCE SALES, *v.* HDRLICKA DAIRY CATTLE INC., a/t/a HRDLICKA BROS. PRODUCE CO., PACA Docket No. 2-6900. Decided June 23, 1986.

Counterclaim not timely filed.

Respondent's counterclaim was found not to be derived from the subject matter of the complaint and, therefore, was not timely filed. Respondent has offered no other defense to the complaint and is thus liable for the amount alleged by complainant.

Andrew N. Stanton, Presiding Officer.
Charles M. Sanders, Tampa, FL, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award of $11,125.52, which has since been amended to $10,459.46, in connection with the sale and shipment of three truckloads of watermelons to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. Respondent also filed a counterclaim and set-off in the amount of $13,230.47. Complainant filed a reply, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answer-

ing statement and complainant submitted a statement in reply. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, F & J Produce Sales, is a corporation whose address is P.O. Box 545, Lake Hamilton, Florida. At the time of the transaction involved in the counterclaim, complainant was licensed under the Act.

2. Respondent, Hrdlicka Dairy Cattle Inc., a/t/a/ Hrdlicka Bros. Produce Co., is a corporation whose address is Route 7, Box 142, Chippewa Falls, Wisconsin. At the times of the transactions involved in the complaint, respondent was licensed under the Act.

3. On June 5, 1984, complainant sold to respondent a truckload of watermelons at $5.00 per hundredweight, f.o.b., consisting of 43,280 pounds, for a total of $2,164.00. Complainant prepared an invoice (number 2017) containing this information and sent it to respondent, who never objected to the fact that the invoice purported to represent one distinct transaction.

4. The June 5, 1984, truckload was shipped in interstate commerce to respondent, where it arrived on June 8, 1984. Upon arrival, only 43,060 pounds of melons were accepted by respondent. Respondent has failed to pay complainant any part of the contract price for this truckload.

5. On June 21, 1984, complainant sold to respondent two truckloads of watermelons at $9.15 per hundredweight, delivered, consisting of 50,910 pounds and 47,030 pounds, for contract prices of $4,658.27 and $4,303.25, respectively. Complainant prepared invoices H120 for the 50,910 pound load and H121 for the 47,030 pound load, reflecting the contract terms, and sent them to respondent, who never objected to the fact that they purported to represent distinct transactions.

6. The June 21, 1984, truckload represented by invoice H120 was shipped in interstate commerce to respondent. When it arrived on June 23, 1984, respondent paid an unloading fee of $100.00 and accepted 46,398 pounds. Respondent has failed to pay complainant any part of the contract price for this truckload.

7. The June 21, 1984, truckload represented by invoice H121 was shipped in interstate commerce to respondent. When it arrived on June 25, 1984, respondent paid an unloading fee of $50.00 and accepted 45,910 pounds. Respondent has failed to pay complainant any part of the contract price for this truckload.

8. An informal complaint was filed on February 11, 1985, which was within nine months from when the causes of action alleged in the complaint accrued.

9. Respondent filed a counterclaim and set-off on June 24, 1985, which did not involve the transactions alleged in the complaint. The counterclaim was filed in excess of nine months from when the cause of action therein accrued.

CONCLUSIONS

In this complaint, complainant alleges that respondent is liable for the unpaid purchase price of three loads of watermelons sold to respondent in the amount of $11,125.52. Complainant has since amended its complaint to $10,459.46, taking into consideration the weight of the watermelons accepted by respondent and deducting the unloading fees charged respondent for the June 21, 1984, loads. Respondent admits purchasing, receiving and accepting these three loads, but claims that they were installments of one purchase made on June 5, 1984. Respondent alleges in its counterclaim and set-off that on June 5, 1984, it ordered three loads of watermelons scheduled for shipment on June 5, June 12, and June 21, 1984, and that complainant's improper handling of the June 12, 1984, load caused respondent to incur a substantial loss.

Respondent's counterclaim and set-off were filed along with its answer on June 24, 1985. Complainant claims that the counterclaim is not timely, as it was filed more than nine months after the alleged cause of action accrued in June 1984. Counterclaims not based on the subject matter of a complaint must be filed within nine months from when the causes of action thereof accrued. 7 CFR 47.3(a); *Bianchi & Sons Packing Co.* v. *Kelvin S. Ng d/b/a Kin Yip Company*, 42 Agric. Dec. 292 (1983). It is apparently respondent's position that the June 12 load and the three loads alleged in the complaint, were all part of one transaction entered into on June 5, 1984. Therefore, according to respondent, its counterclaim was based on the subject matter of the complaint, and thus within the Department's jurisdiction. However, the only evidence offered by respondent to support this is a sworn statement by Joseph Hrdlicka, its president, which is directly refuted by an affidavit from complainant's agent, R. W. Snyder, who insists that the complaint concerns three separate purchases; one made on June 5, 1984, and two others on June 21, 1984. The report of investigation contains copies of three invoices relating to the loads alleged in the complaint which appear to represent three distinct transactions. Respondent received these invoices, as they state thereon "reinvoice 10 JAN. 85", which implies that respondent was sent them on two occasions. In addition, respondent has included in its answering statement a copy of complainant's invoice for the June 5, 1984, shipment. Respondent does not deny having received these in-

voices, or allege that it objected to their representation of the watermelon loads as distinct transactions. Therefore, we conclude that the invoices accurately reflect the agreement between the parties that the three loads of watermelons set forth in the complaint were sold to respondent in three distinct transactions, and that the June 12, 1984, transaction alleged in the counterclaim was not one of these three transactions. As the counterclaim was not filed until June 24, 1985, in excess of nine months from when the alleged cause of action therein accrued in June 1984, the counterclaim is not within the Department's jurisdiction and must be dismissed.

Other than the allegations of this counterclaim, respondent has offered no defense to complainant's amended claims for the transaction of June 5, 1984, and the two transactions of June 21, 1984, in the amount of $10,459.46. Respondent is, therefore, liable for this sum, and its failure to make payment is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $10,459.46, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

The counterclaim and set-off is hereby dismissed.

Copies of this order shall be served upon the parties.

CRISP COUNTY VEGETABLE PACKERS, INC., *v.* DIAMOND-T PRODUCE CORP., PACA Docket No. 2-6631. Decided June 23, 1986.

Evidence—failure to submit sworn statement with knowledge of facts—payment allegations not rebutted—accounting for produce billed on an open basis deemed adequate—complaint dismissed.

Complainant claimed that respondent failed to pay in full for 12 shipments of produce. Respondent adequately demonstrated that payment had been made or was not due as to each of the shipments. Complainant failed to submit evidence by a party with knowledge of the facts and failed to otherwise adequately rebut respondent's allegations.

George M. Whitten, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $22,294.62 in connection with the shipment in interstate commerce of numerous trucklots of mixed perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant in part, and admitting liability in connection with some of the transactions in the total amount of $5,583.62.

Although the amount claimed in the formal complaint exceeds $15,000, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Crisp County Vegetable Packers, Inc., is a corporation whose address is P.O. Box 352, Cordele, Georgia.

2. Respondent, Diamond-T Produce Corp., is a corporation whose address is P.O. Box 308, Pompano Beach, Florida. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about June 15, 1983, complainant sold to respondent, and shipped to respondent's customer, 78 cartons of small cucumbers at $6.65, and 752 cartons of super cucumbers at $8.25, or a total price of $6,722.70 f.o.b. Complainant billed respondent for this amount by its invoice number 624 dated June 22, 1983. Respondent has paid complainant $4,723.70 as an undisputed amount on this invoice.

4. On or about June 22, 1983, complainant sold to respondent, and shipped to respondent's customer, 850 cartons of super cucumbers at $5.00, or a total price of $4,250.00 f.o.b. Complainant billed respondent for this amount by its invoice number 810 dated June 22, 1983. This load was rejected by respondent on arrival, and such rejection was acquiesced in by complainant. Respondent does not owe any balance to complainant on this load.

5. On or about July 2, 1983, complainant sold to respondent, and shipped to respondent's customer, 200 cartons of super cucumbers at $6.25, or a total price of $1,250.00 f.o.b. Complainant billed respondent for this amount by its invoice number 821 dated July 2, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

6. On or about July 18, 1983, complainant sold to respondent, and shipped to respondent's customer, 200 cartons of medium Vidalia onions in 50 pound containers at $4.25, or a total price of $850.00 f.o.b. Complainant billed respondent for this amount by its invoice number 791 dated July 18, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

7. On or about July 25, 1983, complainant sold and shipped to respondent 296 cartons of fancy eggplants at $5.50; 9 containers of yellow squash at $8.50; 16 containers of zucchini squash at $4.00; and 8 containers of No. 2 yellow squash at $4.00; or a total of $1,800.50 f.o.b. Complainant billed respondent for this amount by its invoice number 794 on July 25, 1983. Respondent paid complainant in full for this load by check number 01251 on December 2, 1983.

8. On or about July 27, 1983, complainant sold and shipped to respondent 350 cartons of fancy eggplants at $5.00, or a total price of $1,750.00 f.o.b. Complainant billed respondent for this amount by its invoice number 797 dated July 27, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

9. On or about July 28, 1983, complainant sold and shipped to respondent, 350 cartons fancy eggplants at $4.00, or a total price of $1,400.00 f.o.b. Complainant billed respondent for this amount by its invoice number 808 dated July 29, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

10. On or about August 5, 1983, complainant sold and shipped to respondent 120 cartons of fancy eggplants at $2.00, or a total price of $240.00 f.o.b. Complainant billed respondent for this amount by its invoice number 813 dated August 18, 1983. Respondent paid

complainant in full for this load by its check number 01251 on December 2, 1983.

11. On or about August 10, 1983, complainant sold and shipped to respondent 25 cartons of fancy eggplants at $3.75, and 40 cartons of choice eggplants at $2.75, for a total price of $203.75 f.o.b. Complainant billed respondent for this amount by its invoice number 814 dated August 18, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

12. On or about November 24, 1983, complainant sold to respondent and shipped to respondent's customer, 158 cartons of super cucumbers; 77 cartons of select cucumbers; 188 cartons of fancy eggplants; and 55 cartons of small cucumbers; all on an open basis. Complainant billed respondent for this produce on an open basis by its invoice number 907 dated November 30, 1983. Respondent accounted to complainant for this load by showing total returns of $929.47, from which it deducted $119.50 commission, and $761.30 for freight, leaving a balance of $48.67 which it paid to complainant as an undisputed amount.

13. On or about November 30, 1983, complainant sold to respondent, and shipped to respondent's customer, 99 cartons of super cucumbers at $4.75, or a total of $470.25 delivered. Complainant billed respondent for this amount by its invoice number 908 on December 1, 1983. Respondent paid complainant in full for this load as an undisputed amount.

14. In connection with the shipment of a load of cucumbers by complainant to respondent on June 15, 1983, respondent secured complainant's permission to deduct $786.00 when making payment. However, respondent deducted the $786.00 amount twice. Respondent admitted making the double deduction, and has paid complainant the balance due as an undisputed amount.

15. The formal complaint was filed on February 24, 1984, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant's informal complaint concerns 12 invoices for product shipped between June 15, 1983, and September 29, 1983, having a total alleged value of $20,580.40. When complainant filed its formal complaint seven of the invoices which constituted part of the informal complaint were dropped, three were added, and nine remained the same. The formal complaint claimed a total of $22,294.62. However the transactions exclusive of the open invoice (see Finding of Fact 12) totalled only $19,723.20. Apparently complainant was claiming that the open invoice had a value of

$2,571.42. However, nowhere did complainant state how this figure was arrived at.

Complainant's formal complaint was subscribed and sworn to by H.E. Reynalds who signed himself as "Director" of complainant corporation. Respondent asserted in its answering statement that H.E. Reynalds was at no time involved in any of the negotiations or transactions between complainant and respondent, and that instead complainant was always represented by a Mr. James Oglesby. Complainant made no reply to this allegation, nor to any of respondent's other allegations in the answer or answering statement. Thus we are faced with a record which contains a sworn answer and a sworn answering statement by Glen C. Thomason, president of respondent, who claims to have been involved in all of the transactions, and no sworn statement by Mr. James Oglesby whom complainant apparently admits to have been the party that always represented complainant in the subject transactions.

In its sworn answer, respondent admitted liability to complainant in connection with several of the transactions, and subsequently paid complainant for these admitted amounts pursuant to an order of this Department. As to seven of the invoices (those covered by Findings of Fact 5 through 11) respondent claims that payment was made in full to complainant by its check number 01251 dated December 2, 1983. The copy of this check which was submitted as evidence in this proceeding shows that such check was in an amount more than adequate to cover the invoices which were the subject of Findings of Fact 5 through 11, and also shows that such invoices were specifically referenced on the face of the check. Since complainant has made no reply to respondent's allegation we have concluded that each of these invoices has been paid in full.

In regard to Finding of Fact 3 it is clear that respondent has paid complainant a balance of $4,723.70 after deducting a total of $1,999.00 for freight, storage, brokerage, and USDA inspections incurred in connection, not with invoice no. 624, but with invoice 810 which is covered by Finding of Fact 4. Respondent demonstrated that invoice 810 covered a load of cucumbers which was rejected by respondent on arrival. Respondent contends that the rejection was justified as shown by an USDA inspection, and that following rejection Mr. Oglesby asked respondent to help complainant place the load. Respondent maintains that it was unable to place the load, and that the original consignee, C.H. Robinson, in Dallas, Texas, stored the produce and subsequently dumped it. C.H. Robinson Co. charged back to respondent the storage fees, inspection fees, and freight charges. In addition to the invoice number 810 to respondent covering this load, the record also contains complainant's in-

voice number 683 to C.H. Robinson covering the same identical load of cucumbers. We conclude that respondent does not owe complainant any balance in connection with the produce covered by Finding of Fact 3 or Finding of Fact 4.

In connection with the produce covered by Finding of Fact 12, and complainant's invoice number 907, both parties agree that the produce covered by such invoice was billed on an open basis. Complainant did not submit any evidence concerning the fair market value of this produce. Although the accounting data which respondent has submitted in this proceeding in connection with this invoice is inadequate in that it does not give a per package breakdown of the gross sales of the produce, in view of complainant's failure to submit evidence of the fair market value of the produce, and in view of complainant's failure to respond to respondent's allegations, we find that respondent owes complainant no further balance in regard to this invoice.

In regard to the produce covered by Findings of Fact 13 and 14 respondent has admitted owing the amounts claimed by complainant, and has made payment in full pursuant to our order for payment of the undisputed amount.

We find that there is no balance remaining due by respondent to complainant on any of the produce covered by the complaint. Consequently, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

A.T.B. DISTRIBUTING CO., *v.* FRESHVILLE PRODUCE DISTRIBUTING, INC., PACA Docket No. 2-7149. Decided June 24, 1986.

Respondent claim of payment arrangement disputed.

Kenneth Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Louis C. Pulvermacher, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $35,815.20 in con-

nection with shipments of melons in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant, except that respondent claimed the amount it owed to complainant was $30,592.20. Respondent further stated in its answer that payment arrangements had been made. Complainant was given an opportunity to dispute the fact that payment arrangements had been made and that the amount owed to it by respondent was $30,592.20. By letter dated May 13, 1986, and received by the department on May 15, 1986, complainant agreed that the amount owed to it was $30,592.20, but denied that payment arrangements had been made. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, A.T.B. Distributing Co., is a corporation whose address is P. O. Box 2683, Turlock, California 95381. Respondent, Freshville Produce Distributing, Inc., is a corporation whose address is 1367 Viele Avenue, Bronx, New York 10474. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $30,592.20. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $30,592.20, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon with the parties.

O&E GROWERS, INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC., PACA Docket No. 2-7150. Decided June 24, 1986.

Liability admitted—payment arrangement claimed—disputed—Reparation.

Kenneth Vail, Presiding Officer.
Complainant, *pro se.*
Louis C. Pulvermacher, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $23,852.25 in connection with shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Respondent further indicated in its answer that payment arrangements were being made with the complainant. Complainant was given until May 22, 1986, to dispute the fact that payment arrangements had been made. Complainant, in a letter dated May 12, 1986, and received by the Department on May 16, 1986, denied that any agreement as to payment arrangements had been made. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, O&E Growers, Inc., is a corporation whose address is P. O. Box 215, Elba, New York 14058. Respondent, Freshville Produce Distributors, Inc., is a corporation whose address is 1367 Viele Street, Bronx, New York 10474. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $23,852.25. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $23,852.25, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

Copies of this order shall be served upon the parties.

WATSONVILLE PRODUCE, INC., *v.* WEINSTEIN PRODUCE SALES, INC.,
PACA Docket No. 2-7164. Decided June 24, 1986.

Admitted debt—Reparation.

Kenneth Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $5,727.65 in connection with two shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Watsonville Produce, Inc., is a corporation whose address is 38 Bluff Road, Watsonville, California 95076. Respondent, Weinstein Produce Sales, Inc., is a corporation whose address is P. O. Box 7364, Boise, Idaho 83707. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $5,727.65. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,727.65, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

AGRI-PAK FRUIT CO., *v.* NICHO PRODUCE CO., INC., and/or So. CENTRAL BROKERAGE, INC., PACA Docket No. 2-6723. Decided June 27, 1986.

Wrongful rejection—damages—duty of broker—reparation awarded.

Where truck arrived two days late and with high temperature, buyer in f.o.b. transaction did not have right to reject load of grapes. Complainant fails to prove that broker did not carry out his duties.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondents in the amount of $2,682.00 in connection with a transaction, in interstate commerce, involving grapes, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on all parties. Each respondent also was served a copy of the complaint, and each filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements. Complainant filed an opening statement, respondent So. Central Brokerage, Inc., filed an answering statement, and complainant also filed a statement in reply. In addition, respondent So. Central Brokerage, Inc., filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Don Davies, Charles Enoch, Dennis Vartan, and Lee Yeramian, doing business as Agri-Pak Food Company, whose mailing address is P.O. Box 399, Del Rey, California 93616.

2. Respondent Nicho Produce Co., Inc. ("Nicho") is a corporation whose mailing address is P.O. Box 1136, Edinburg, Texas 78539.

3. Respondent So. Central Brokerage, Inc., ("So. Central") is a corporation whose mailing address is 1500 South Zarzamora Street, San Antonio, Texas 78207.

4. At all material times, each respondent was licensed under the Act.

5. On or about October 25, 1983, in the course of interstate commerce, complainant by oral contract sold to Nicho 360 lugs, wrapped, U.S. No. 1, Thompson seedless grapes, labeled "WE-4," a perishable agricultural commodity, at an agreed f.o.b. price of $8.00 per lug, plus 70 cents per lug for precooling and palletization, for a total f.o.b price of $3,132.00. The transaction was brokered by So. Central. The grapes were shipped to Nicho as part of a truckload of grapes which the complainant had sold to three Texas buyers (including Nicho) through So. Central. On the same day as the sale of the grapes, October 25, 1983, So. Central issued a broker's memorandum, No. 6775-1083, which confirmed the multiple sales to the three Texas buyers and indicated that all three shipments were to be loaded on the same truck. The truckload of grapes was shipped by complainant to the three Texas buyers on October 25, 1983, the same day as the sales to them. The bill of lading required that the temperature in the truck be maintained at 36°F. There was no temperature recorder on the truck.

6. On October 31, 1983, or six days after they were shipped from California, Nicho received its partial truckload of grapes consisting of 360 lugs. As its employees unloaded the grapes, they noted that the grapes seemed to have problems and ceased unloading them. After speaking to employees of So. Central, Nicho called for a federal inspection. The inspection was conducted on October 31, 1983, at 3:35 p.m., at the location of Nicho. The inspection certificate issued thereafter, E 188251, indicates that, at the time of the inspection, the temperature controls on the truck were still in operation. It further indicates that the load was partially unloaded but that some of the grapes remained in the nose of the trailer. The temperature range of the grapes is noted as being 45°F to 46°F in the rear, and 44°F to 45°F for the grapes which were still loaded in the nose of the truck. The condition of the grapes was noted as follows:

> Berries mostly firm and firmly attached to capstems. In most lugs from 2 to 6%, in some 14%, average 6% shattered berries. Stems mostly turning brown, many brown and pliable. Average 2% sulfur dioxide injury. In most lugs from 2 to 6%, in some 13%, average 6% serious damage by discolored berries. Average 1% crushed and

leaking berries. Decay ranges from 1 to 4%, and 2% Gray Mold Rot in all stages.

7. Based on the inspection, Nicho told So. Central that it was rejecting the grapes. So. Central reported this to complainant, specifically to a Mr. Bob Stockton ("Stockton") with whom the broker had been dealing on these transactions. After being advised of the results of the inspection, and that the temperature of the grapes "was fine," Stockton accepted the rejection. Eventually, the grapes were handled on consignment by Boler Farms, Pharr, Texas. The latter company returned proceeds to complainant in the amount of $450.00 and also indicated that 200 of the 360 lugs were dumped.

8. The normal transit time between complainant's location and that of Nicho is four days.

9. An informal complaint was received by the Department on June 4, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issue in this case focuses on whether or not Nicho had the right to reject the load of grapes on arrival. The complainant's position is that, since this was a f.o.b. sale and Nicho undertook the risks of transportation, the high temperature of the grapes as shown on the federal inspection certificate indicates that it had lost this right. In an f.o.b. transaction, a buyer accepts the risk of abnormal transportation conditions. *J.J. Crosetti Co.* v. *Yeckes-Eichenbaum*, 30 Agric. Dec. 287 (1971); 7 CFR § 46.43(i). Thus, the existence of abnormal transportation conditions voids a shipper's warranty of suitable shipping condition. *Ventura* v. *Regan*, 31 Agric. Dec. 443 (1972).

In the instant case, there is evidence that the load of grapes was not handled under normal transportation service and conditions: first, it appears that the shipment took about 48 hours longer than normally expected to reach Nicho's location from that of complainant; [1] and second, the temperature of the grapes was higher than normal, *i.e.*, the bill of lading called for a temperature of 36°F. to be maintained en route, but the federal inspection reflected that the temperatures of the grapes ranged from 44°F to 46°F.[2] In view

[1] Pursuant to 7 CFR § 47.25(f), we take official notice of this fact which is a commercial fact of established character. *See* Finding of Fact 8.

[2] Respondents argue that the 44°–46°F. temperatures which the grapes showed upon Federal inspection occurred because the unloading of the grapes was stopped when their alleged deterioration was discovered, and the grapes sat for a considerable length of time awaiting the Federal inspector. This explanation does not satis-

Continued

of this, we hold that Nicho's rejection was without reasonable cause. *Ventura* v. *Regan, supra*, 31 Agric. Dec. 443. Cf. *R.C. Walter & Sons* v. *Gatz*, 31 Agric. Dec. 655 (1972), in which the rejection was determined not to be unreasonable where transit time was normal, and the low temperatures of the grapes indicated normal carrying temperatures.

The measure of damages where a shipment is rejected without reasonable cause is the difference between the contract price and the amount realized from resale, provided the resale is made in good faith and in a commercially reasonable manner. *See, C. J. Prettyman, Jr. Inc.* v. *J. K. Packing Co.*, 28 Agric. Dec. 1476 (1969); U.C.C. § 2-706. The contract price in the instant case was $2,682.00, and the complainant received $450.00 from the resale of the grapes. As there is no allegation or proof that this resale was not prompt or properly conducted, we hold the sale to have been made in good faith and in a commercially reasonable manner. Accordingly, we hold that Nicho is obligated to complainant in the amount of $2,232, or the contract price ($2,682.00) less the proceeds on resale ($450.00). Nicho's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

Complainant alleged that So. Central failed to carry out its duties as a broker, however, there are no facts alleged or proven by complainant by which we could so conclude. In view of that, the complaint is dismissed against So. Central.

ORDER

Within 30 days from the date of this order, Nicho Produce Co., Inc., shall pay to complainant, as reparation, $2,232.00 with interest thereon at the rate of 13 percent per annum from December 1, 1983, until paid.

The complaint against So. Central Brokerage, Inc., is dismissed.

Copies of this order shall be served upon the parties.

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factorily explain the high temperatures because the grapes which were still loaded on board the truck with the cooling unit operating registered virtually the same temperatures as the grapes which had been unloaded. Had there been a temperature recorder on board the truck, perhaps respondents could have been sustained their argument. However, apparently respondents chose not to use a recorder on the truck.

BODEGAS RANCHO SAN VALENTIN S. DE R.L., *v.* OTAY PACKING CO., PACA Docket No. 2-6809. Decided June 27, 1986.

Consignment sales—failure to keep adequate records—audit accounting by Department official basis for reparation award.

Respondent failed to keep adequate records of consignment sales. Department's audit revealed lack of documentation in form of federal inspections to support very low returns relative to current market price as to numerous sales. Audit accounting, which assigned price to these sales based upon average gross price or other sales, was made basis for award of reparation in complainant's favor. Respondent was given credit on two sales for which documentation was supplied after commencement of formal proceedings.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $11,060.66 in connection with the shipment in interstate commerce of 13 truckloads or partial truckloads of eggplants.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. However, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Bodegas Rancho San Valetin, S. de R.L., is a corporation whose address is 3566 Bentley Drive, Spring Valley, California.

2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about September 30, through November 5, 1983, complainant consigned to respondent to be sold for complainant's account 13 truckloads or partial truckloads of "Buty Hybrid" eggplants, of various sizes, all to grade U.S. No. 1. The eggplants were shipped from complainant's place of business in Mexico and were received by respondent at its receiving docks in Chula Vista, California.

4. Complainant's shipping manifests show a total of 10,574 cartons of eggplants shipped to respondent. Respondent's receiving records show receipt of a total of 10,572 cartons. Respondent rendered accountings to complainant showing the resale of 10,607 cartons of eggplants for gross proceeds of $48,128.95, and net proceeds of $34,990.50. Additional expenses in connection with the packing, transportation, and sale of the eggplants totaled $11,014.20. Respondent paid complainant total net proceeds, after all expenses, of $23,976.50.

5. A personal investigation was made by an employee of this Department at the place of business of respondent between September 24 and October 4, 1984. Such investigation disclosed that respondent had failed to keep adequate records in that "(1) the respondent's invoices did not indicate specific lots; (2) there was an overlapping of lots on hand; and (3) sizes shown shipped did not correspond with exact sizes received." The audit accounting found that the amount of $11,060.66 remained due to complainant as underreported and underpaid "due primarily to adjustments of the sales prices to eliminate prices which were unusually low without supporting papers to substantiate them, such as inspection certificates or dump certificates." The audit accounting disclosed that 3,815 cartons were sold at unusually low prices, below $2.25 per carton, and assigned to such cartons the average gross price of $5.604018, or a total of $21,379.33. The gross proceeds on the remaining 6,757 cartons were accepted as shown by respondent's records in the total amount of $37,866.35, for total gross proceeds of $59,245.68. Total expenses, including a 12% commission allowance, amounted to $24,208.72, leaving net proceeds of $35,036.96. Subtracting the amounts previously paid by respondent to complainant, a remainder was computed as still due in the amount of $11,060.66.

6. Respondent granted a credit to one of its customers, Horwath & Associates, Inc. of Rohnart Park, California on 420 cartons of eggplants shipped October 22, 1983, in the total amount of $2,029.00. This credit was not taken into account by the audit accounting, but was supported by a federal inspection. Respondent allowed an additional credit in the amount of $1,204.00 on 215 cartons of eggplants, also sold to Horwath & Associates Inc., and

shipped on October 24, 1983. This credit was also supported by a federal inspection.

7. The informal complaint was filed on December 7, 1983, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent maintains that it actually overreported to complainant the amounts which it realized from the resale of the eggplants. However, as disclosed by the audit of respondent's records by an investigator from this Department, respondent failed to keep adequate records, and in addition reported many sales which were far below market price levels without inspection certificates or dump certificates to support such sales. However, respondent, in its answer, supplied two inspection certificates to support credit allowances in the total amount of $3,233.00 in connection with the resale of 635 cartons of eggplants. Although these two inspections covered a smaller number of cartons than those on which respondent granted credits, the inspections disclosed quality defects averaging 12% in one case, and 14% in the other, with a high range in one case of 17%, and 22% in the other. The high range of defects in each case shows that the total lot of eggplants would be out of grade even though the inspection did not cover the total lot. We find that respondent has adequately supported the credits granted in the total amount of $3,233.00. We also find that due to respondent's general failure to support the extremely low sale prices with adequate documentation it is liable to complainant for the $11,060.66 balance which the audit accounting found due, less the $3,233.00 credit which we have found to be allowable, or a net amount of $7,827.66. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $7,827.66, with interest thereon at the rate of 13% per annum from December 1, 1983, until paid.

Copies of this order shall be served upon the parties.

FINUCANE GILSON & FOSTER, INC., *v.* DEARDORFF-JACKSON COMPANY, PACA Docket No. 2-6831. Decided June 27, 1986.

Settlement.

Where parties renegotiated the price provision of a contract after arrival of produce, buyer cannot claim reimbursement from seller after it allows its customer a further price adjustment.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se.*
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $1,157.65 in connection with a shipment of strawberries in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. The respondent filed a verified answering statement. It also filed a brief.

FINDINGS OF FACT

1. Complainant, Finucane Gilson & Foster, Inc., is a corporation whose mailing address is 3500 West 75th Street, Suite 100, Prairie Village, Kansas 66208.

2. Respondent, Deardorff-Jackson Co., is a corporation whose mailing address is 1120 Mountain View Avenue, Oxnard, California 93030. At all material times, respondent was licensed under the Act.

3. On or about April 4, 1984, respondent, by oral contract, sold to complainant 864 trays of strawberries at an agreed upon f.o.b. price of $4.50 per tray plus 60 cents per tray for cooling and palletizing,

$18.50 per unit for nine units of controlled atmosphere, and $11.25 for a recording thermometer, for a total f.o.b. price of $4,584.15. Respondent, in turn, sold the strawberries to the Fleming Companies, Inc. (Fleming), Topeka, Kansas 66601, for shipment to its establishment in Joplin, Missouri, for a price of $6.85 per tray plus $20.00 per unit for nine units of palletizing and artificial atmosphere, for a total f.o.b. price of $6,098.40.

4. Upon arrival in Joplin, Missouri, these strawberries were found, by a Federal inspector, to be somewhat deficient in quality. Respondent was contacted by the complainant and agreed to provide the complainant with protection against the handling of the strawberries by Fleming. Sometime thereafter, respondent's employees inquired of complainant as to the handling of the strawberries by Fleming. On or about May 1, 1984, complainant's employee, Earl Pearson, told respondent's salesman, David Cook, that Fleming was only seeking a $55.50 adjustment. Respondent agreed to permit complainant to deduct the same $55.50 from its invoice to complainant. Thereafter, complainant paid respondent's invoice less $55.50 or $4,528.65. Respondent accepted complainant's check in the amount of $4,528.65 as full and final settlement on the shipment of strawberries.

5. On or about May 8, 1984, complainant received notification from Fleming that it was deducting the cost of 169 trays of strawberries ($1,157.65) from its payment for an unrelated invoice.

6. The formal complaint was filed on November 26, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks reimbursement from respondent of $1,157.65 it allegedly overpaid respondent with respect to a transaction in interstate commerce involving a shipment of strawberries. The alleged overpayment occurred because Fleming, subsequent to an agreement between the parties limiting an adjustment on the shipment to $55.50, deducted a further $1,157.65 from an unrelated shipment claiming it as a further loss on the subject shipment of strawberries.

The evidence reflects that, on or about May 1, 1984, the parties renegotiated their contract, and that, at that time, they agreed to a new price which was $55.50 less than the original contract price. Complainant paid respondent the amount agreed upon ($4,528.65) at the time, and respondent accepted it in full settlement of the parties' contractual agreement. Accordingly, complainant is precluded from seeking further damages from respondent as to this

shipment. *Bell City Brands* v. *Western Tomato,* 25 Agric. Dec. 402 (1966). Thus, the complaint should be dismissed.

ORDER

The complaint is dismissed.
Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

S. STAMOULES, INC., a/t/a STAMOULES PRODUCE CO., *v.* SOL SALINS, INC., PACA Docket No. 2-6795. Decided May 1, 1986.

Reconsideration—denied.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Howard Silberberg, McLean, VA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on March 7, 1986, awarding reparation to complainant in the amount of $1,008.00, plus interest. On March 17, 1986, respondent filed a petition for reconsideration. Pursuant to section 47.24(a) of the Rules of Practice (7 CFR § 47.24(a)), the filing of the petition automatically operated to set aside the Decision and Order pending final action on the petition.

In its petition, respondent argues that the Decision and Order erroneously concluded that an accord and satisfaction did not occur because respondent's check did not indicate that it was being offered in full satisfaction of the transaction for which it was given in payment. Respondent asserts that the evidence shows that when respondent gave its $5,012.10 check to complainant, complainant was in possession of an invoice which complainant had sent to respondent, who had returned it with the notation "less allowance per Geo. Depaoli" and a deduction of $1,008.00. Respondent claims that complainant therefore was informed from sources other than the check itself that such check was being tendered in full payment.

Respondent's argument is completely without merit. We have often stated that "the mere fact that the creditor receives less than the amount of his claim, with knowledge that the debtor claims to

be indebted to him only to the extent of payment made, does not necessarily establish an accord and satisfaction. *Half Moon Fruit & Produce Company* v. *North American Produce Distributors, Inc.*, 40 Agric. Dec. 1610, 1613 (1981); *Louis Caric & Sons* v. *Ben Gatz Co.*, 38 Agric. Dec. 1486 (1979); *Mendelson-Zeller* v. *Season Produce*, 31 Agric. Dec. 1288 (1972). On two occasions, we held that an accord and satisfaction did not take place even though the creditor was informed in writing that the check was in settlement of the disputed transaction. *See, Half Moon Fruit & Produce Company* v. *North American Produce Distributors, Inc., supra; Horvitz Brothers* v. *David Goldsamt*, 20 Agric. Dec. 391 (1961). There was clearly no accord and satisfaction in this case.

ORDER

The reparation awarded in the March 7, 1986, Decision and Order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

ALFONSO CHECCHI, *v.* L&J PACKING, INC., PACA Docket No. 2-6813. Decided May 2, 1986.

Dismissal.

Allan R. Kahan, Presiding Officer.
Daniel L. Rudnick, Bakersfield, CA, for complainant.
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $73,408.77 in connection with a transaction involving the shipment of onions in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 4, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of April 4, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

LYN-DE FARMS, INC., *v.* TOM LANGE COMPANY, INC., PACA Docket No. 2-6986. Decided May 2, 1986.

Dismissal.

Ben Bruner, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $2,584.71 in connection with a transaction involving the shipment of cabbage in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 31, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 31, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PEMBERTON PRODUCE, INC., *v.* TOM LANGE COMPANY, INC., PACA Docket No. 2-7090. Decided May 2, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Matthew McInerney, Newport Beach, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $6,066.50 in connection with

transactions involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 31, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 31, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

DEW-GRO, INC., a/t/a CENTRAL WEST PRODUCE, v. SEE SUN HO KEE, INC., PACA Docket No. 2-7114. Decided May 5, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Constance L. Rudnick, Boston, MA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $6,952.50 in connection with a transaction involving the shipment of sugar peas in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 27, 1986, complainant notified the Department that it no longer wished to proceed with its complaint. Complainant, in its letter of March 27, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

BARTON WILLOUGHBY d/b/a WILLOUGHBY FARMS, *v.* FRITO-LAY, INC., PACA Docket No. 2-6614. Decided May 14, 1986.

Amendment of Order, counterclaim.

Decision by Donald A. Campbell, Judicial Officer.

AMENDMENT TO DECISION AND ORDER

On May 1, 1986, a Decision and Order was issued in this proceeding. Through inadvertence the "Order" portion of the Decision and Order did not set forth the statutory time periods within which the reparation award and attorney's fees must be paid. The Decision is not being changed. The Order is amended to provide the dates by which payment must be made, which is within 30 days of the issuance of this Amendment.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant as reparation $84,825.83, with interest thereon at the rate of 13 percent per annum from August 1, 1983, until paid.

Within 30 days from the date of this order respondent shall pay to complainant for attorney's fees and other expenses $8,473.39, with interest thereon at the rate of 13 percent per annum from the date of this order until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

HARDEN FARMS, INC., d/b/a HARDEN FARMS OF CALIFORNIA, *v.* C. H. ROBINSON COMPANY, PACA Docket No. 2-7035. Decided May 15, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Owen Gleason, Esquire, Eden Prairie, MN, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,871.80 in connection with a

transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 25, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 25, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GLOBAL BERRY SALES, INC., *v.* TOM LANGE COMPANY, INC., PACA Docket No. 2-7047. Decided May 15, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $3,717.55 in connection with a transaction involving the shipment of strawberries in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 27, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 27, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GOLD COAST PACKING, INC., *v.* H. SCHNELL & COMPANY, INC., and/or LLOYD MYERS CO., INC., PACA Docket No. 2-6414. Decided May 27, 1986.

Reconsideration—Stay.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), an Order Upon Rehearing was issued on April 9, 1986, awarding reparation to the complainant and against respondent Lloyd Myers Co., Inc., in the amount of $7,522.00 plus interest at the rate of 13 percent per annum from December 1, 1982, until paid. By petition received May 8, 1986, respondent Lloyd Myers Co., Inc., has moved that this matter be reconsidered.

Accordingly, the order of April 9, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant and respondent H. Schnell & Company, Inc.

SEALD SWEET GROWERS, INC., *v.* CREST FRUIT CO., a/t/a FRANK LEWIS FRUIT CO., PACA Docket No. 2-6949. Decided May 27, 1986.

Settlement—Dismissal.

George S. Whitten, Presiding Officer.
Charles M. Sanders, Jr., Tampa, FL, for complainant.
Scott Toothaker, McAllen, TX, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $143,367.00 in connection with transactions involving the shipment of grapefruit in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 29, 1986, complainant notified the Department

that the parties had come to a voluntary settlement of their dispute. Complainant, in its letter of April 29, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

CHIQUITA BRANDS, INC., *v.* AL NAGELBERG & CO., INC., PACA Docket No. 2-7094. Decided May 28, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Complainant, *pro se*.
Louis Pulvermacher, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $41,921.53 in connection with a transaction involving the shipment of mixed perishable agricultural commodities in interstate commerce.

A copy of the formal complaint was served on respondent. On or about April 1, 1986, complainant notified the Department by telephone that respondent tendered to complainant a check in full settlement of complainant's claim. A letter was sent to complainant on April 3, 1986, giving complainant 10 days in which to show cause why its complaint should not be dismissed. Complainant filed no response to this letter. Complainant, by its failure to respond to such letter, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

HENRY T. JACOBS, *v.* KOSTER ENTERPRISES PRODUCE PACKING DIVISION, INC., PACA Docket No. 2-6531. Decided June 5, 1986.

Reparation proceeding—stayed by bankruptcy—reopened.

Andrew Stanton, Presiding Officer.
Complainant, *pro se*.
Jay L. Michaelson, Esquire, Santa Barbara, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER VACATING STAY ORDER, REOPENING PROCEEDING

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent and California Marketing of Bakersfield, Inc., in the alternative, in the amount of $705.00 in connection with a transaction involving the shipment of carrots in interstate commerce.

A copy of the formal complaint was served on respondents, but respondent Koster Enterprises failed to file an answer thereto. However, the Department was notified that respondent Koster Enterprises had filed a petition in bankruptcy. Accordingly, on May 9, 1984, this matter was stayed pending completion of respondent Koster Enterprises' bankruptcy.

On January 22, 1985, a Decision and Order was issued dismissing the complaint against California Marketing. The Decision and Order stated that the complaint against Koster Enterprises was unaffected by this ruling. In March 1986, the Department received copies of orders of discharge supposedly affecting respondent Koster Enterprises. However, those orders were found to be applicable only to certain individuals, not the respondent corporation. In a letter dated March 19, 1986, the Department gave respondent Koster Enterprises 20 days from its receipt of such letter to show cause why the May 9, 1984, Stay Order should not be vacated and the reparation proceeding reopened. Koster Enterprises did not respond to this letter.

Accordingly, the May 9, 1984, Stay Order is hereby vacated and the reparation proceeding is reopened against respondent Koster Enterprises. Respondent shall have 20 days from its receipt of this Order to file in triplicate an answer to the complaint, a copy of which is attached to this Order.

Copies of this order shall be served upon the parties.

SIGMA PRODUCE CORP. INC., *v.* HARVEY C. HANSEN, d/b/a HARVEY'S, PACA Docket No. 2-6685. Decided June 5, 1986.

Reconsideration—reparations reconsidered.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER GRANTING PETITION FOR RECONSIDERATION AND AMENDING PRIOR ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on August 22, 1985, awarding reparation to complainant against respondent. On September 3, 1985, respondent filed a petition for reconsideration, and on October 1, 1985, the order of October 22, 1985, was stayed and complainant was served with a copy of respondent's petition and given 15 days from date of receipt thereof in which to file an answer to the petition. Complainant did not file an answer.

In its petition respondent contends that our order of August 22, 1985, was in error in the factual determination that the tomatoes were originally shipped to respondent in Visalia, California and then diverted by respondent following shipment, to respondent's customer in Norfolk, Virginia. Respondent contends that the shipping documents indicating that the original destination was Visalia, California, were in error, did not reflect the agreement between the parties, and were not in accord with what actually happened. In support of this contention respondent quotes from paragraph 6 of the complaint which refers to "arrival of said truck at destination", as proof that complainant knew of the Virginia destination prior to shipment. Of course, this statement by complainant, while it may be taken as indicative of the inference which respondent urges, does not have to be so understood. Complainant could be referring to the ultimate Virginia destination without any necessary inference that complainant knew of that destination prior to shipment. Indeed this is the way we interpreted the statement at the time our original order was written. However, we have carefully reviewed the record in this matter, and two considerations lead us to the conviction that respondent is correct, and that our order of August 22, 1985, is in error. First, in a letter to this Department dated April 12, 1984, complainant's Dan Delgado stated that he had a discussion with respondent's Jim Stewart prior to the truck being loaded, in which complainant was informed that respondent's "cus-

tomer was being quoted" a lower price by competitors. While the customer is not named, the statement does lend credence to respondent's position. Second, complainant has nowhere in this proceeding advanced the position that the tomatoes were originally destined for Visalia, California, and then diverted by respondent to the Virginia customer. We conclude that we were unduly swayed by the destination stated on the shipping documents, and that complainant did in fact know prior to shipment that the tomatoes were destined for Norfolk, Virginia.

Of course this determination necessitates additional and substantial alteration in the conclusions relative to this case. First, we must now conclude that the suitable shipping condition warranty was applicable to the shipment of the subject tomatoes. Under that warranty (see 7 CFR § 46.43(j)) complainant was required to ship tomatoes which would arrive at the contract destination without abnormal deterioration provided transportation services and conditions were normal. The pulp temperatures of 50 to 51 degrees shown by the federal inspection following arrival are not much higher than the 46 degree ambient air temperature specified by complainant for the truck, and are not excessive for tomatoes. The inspection was made on the fourth day following shipment. This is not indicative of an excessive period of time in transit. We conclude, therefore, that transportation services and conditions were normal. The inspection showed the condition of the tomatoes as "average approximately 80% light red and red. 8 to 52% in most cartons, none in some, average 19% soft. Average 2% decay." Tomatoes, to make good delivery at destination, should not contain more than approximately 8% soft and/or decayed tomatoes. See 7 CFR § 51.1861(a)(2)(i); (b)(2)(i); (c)(2)(i); and (d)(2)(i); see also *Denice & Filice Packing Co.* v. *Super Food Services,* 38 Agric. Dec. 744 at 746–747 (1979). The high percentage of soft tomatoes present in this load clearly shows that complainant breached the warranty of suitable shipping condition.

The measure of damages for breach of warranty in regard to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. See UCC § 2–714. In this case respondent's customer rejected following unloading of the tomatoes. This was an act of acceptance. See *Crown Orchards Co.* v. *Mid-Valley Prod. Corp.,* 34 Agric. Dec. 381 (1975). Complainant took back 660 cartons of the tomatoes which respondent's customer made available, and resold them in New York, but failed to submit any data in regard to the proceeds of the resale. This of course makes it impossible for us to compute damages in the normal

manner. The primary burden of proof in regard to damages would, in this situation, normally fall upon respondent, and respondent could, in theory have subpoenaed complainant's records in an effort to meet this burden. However, we feel that his would in fact be an extraordinary burden to place upon respondent in the context of a shortened procedure case, especially where, as here, respondent was not represented by counsel. On the other hand, complainant also was not represented by counsel, and much the same objection applies to penalizing complainant for failing to submit the necessary data for computation of damages. All in all, the most equitable solution to this problem, in our opinion, is to require that the cost of freight from Nogales, Arizona to Norfolk, Virginia be borne by complainant for those tomatoes which complainant repossessed and resold. Respondent paid this freight, but received no economic benefit from the tomatoes. Complainant did presumably receive economic benefit from the resale of the tomatoes, and it is therefore fitting, especially in view of complainant's breach, that complainant be made responsible for the freight. That freight amounted to $1.75 per flat, or $1,155.00 for the 660 flats which complainant took back. The reparation in the amount of $2,514.60 which we previously awarded should be reduced by this amount.

The order of August 22, 1985, insofar as it is in conflict with this order, is superseded. The stay order of October 1, 1985, is hereby vacated.

Within thirty days from the date of this order, respondent shall pay complainant, as reparation, $1,359.60, with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

Copies of this order shall be served upon the parties.

MISSION FRUIT & VEGETABLES DISTRIBUTORS, INC., *v.* CAL-MEX DISTRIBUTORS, INC., PACA Docket No. 2-6772. Decided June 5, 1986.

Reconsideration—denied.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (U.S.C. 499a *et seq.*), an order was issued on January 16, 1986, awarding reparation to complainant against respondent. On February 3, 1986, and within the time allowed by the Rules of Practice, respondent filed a petition for re-

consideration. The order of January 16, 1986, was automatically stayed pending issuance of a further order in this proceeding. See 7 CFR 47.24(a).

In its petition respondent contends that the order of January 16, 1986, is in error in several respects. We have reconsidered the order and find that respondent's contentions are without merit, and that the order is supported by the evidence and by the law applicable thereto. Accordingly, respondent's petition should be and hereby is dismissed without prior service upon complainant. The order of January 16, 1986, is hereby reinstated, and the reparation awarded to complainant in that order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

MIC BRUCE, INC., a/t/a SINGERS, *v.* CHIQUITA BRANDS, INC., PACA Docket No. 2-6608. Decided June 10, 1986.

May 1, 1986 Order stayed—Reconsideration.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on May 1, 1986, awarding reparation to the complainant in the amount of $17,134.63. By petition received May 13, 1986, complainant has moved that this matter be reconsidered.

Accordingly, the order of May 1, 1986, is hereby stayed. Respondent shall have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of complainant's petition shall be served upon the respondent.

CLARK & MCCORD SALES, INC., *v.* JOSEPH MERCURIO PRODUCE CORP., PACA Docket No. 2-6842. Decided June 10, 1986.

Dismissal.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $13,652.62 in connection with a transaction involving the shipment of cherry tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 21, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PANADOL BROS., INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7147. Decided June 10, 1986.

Dismissal.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $27,674.50 in connection with transactions involving the shipment of grapes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 12, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 12, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

JAMES C. ORR, Trustee in Bankruptcy for BRUCE C. LOFCHIE and ANITA J. LOFCHIE d/b/a BRUCE COMPANY, *v.* ANTHONY GAGLIANO & CO., INC., PACA Docket No. 2-6985. Decided June 11, 1986.

Complaint withdrawn.

John J. Casey, Presiding Officer.
Christine A. Goodrich, Fresno, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation case under the Perishable Agricultural Commodities Act, complainant's counsel of record informed the presiding officer on April 18, 1986 that the complainant had decided to withdraw the complaint. Accordingly the complaint is hereby dismissed.

Copies hereof shall be served on the parties.

WHIZPAC, INC., *v.* THOMAS COLACE COMPANY, PACA Docket No. 2-7030. Decided June 11, 1986.

Dismissal—full settlement.

Dennis Becker, Presiding Officer.
Complainant, *pro se*.
William J. Fair, Springfield, PA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $17,280.00 in connection with transactions involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 25, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement

of complainant's claim. Complainant, in its letter of April 25, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

ALTON H. ALLEN and JOHN M. COELHO d/b/a SUNSET STRAWBERRY GROWERS, *v.* V. F. LANASA, INC., PACA Docket No. 2-6686. Decided June 20, 1986.

Reconsideration—complainant's claim without merit—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on April 17, 1986, dismissing the complaint. On May 8, 1986, complainant petitioned for reconsideration of the April 17, 1986, order. In its petition, complainant asks us to rule that a buyer who receives produce in poor condition is required to have the temperature recording instrument, the tape of which shows acceptable in transit temperatures, recalibrated for accuracy. This burden has never been placed on a receiver, and should not be done so now. Had complainant wanted the instrument recalibrated, it should have taken the steps necessary to do so.

Upon review of the record, we are of the opinion that complainant's claims are without merit, and we conclude that our order of April 17, 1986, is amply supported by the evidence and by the law applicable thereto. Accordingly, complainant's petition for reconsideration is dismissed without prior service upon respondent.

The order of April 17, 1986, is reinstated.

Copies of this order shall be served upon the parties.

G.A.C. PRODUCE CO., INC. *v.* OTAY PACKING CO., PACA Docket No. 2-6872. Decided June 20, 1986.

Reconsideration—Petition without merit—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on May 5, 1986, dismissing the complaint. The dismissal had been preceeded, on August 26, 1985, by an order requiring respondent to pay complainant $50,574.00 plus interest which it had admitted it owed complainant. Dismissal of the complaint regarding the $2,592.00 remaining in dispute was ordered because complainant had failed to respond to respondent's sworn answer in which it alleged that complainant had granted it a $2,592.00 allowance. Thus, we concluded that respondent's assertion was a true statement of fact.

In its petition for reconsideration, complainant submits that it had not agreed to give respondent the $2,592.00 allowance. Complainant had sufficient opportunity to respond to this allegation before the record was closed and the May 5, 1986, decision was issued. Accordingly, its unsworn denial of the respondent's allegation at this time has no merit and, in any event, is untimely filed. 7 CFR § 47.24(b).

Upon review of the record, we are of the opinion that complainant's claims are without merit, and we conclude that our order of May 5, 1986, is amply supported by the evidence and by the law applicable thereto. Accordingly, complainant's petition for recommendation is dismissed without prior service upon respondent.

The order of May 5, 1986, is reinstated.

Copies of this order shall be served upon the parties.

PURE GOLD, INC., *v.* VICTOR'S PRODUCE, INC., PACA Docket No. 2-6944. Decided June 26, 1986.

Reopening—denied—untimely appeal.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR REOPENING

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Deci-

sion and Order was issued on April 24, 1986, requiring respondent to pay complainant $1,861.00, plus interest, as reparation. The order became final on May 24, 1986. *See* 7 U.S.C. § 499g. From that date forward, since respondent did not file a timely appeal of the order, neither the Secretary nor a court has jurisdiction to hear such an appeal. *American Fruit Growers* v. *Lewis D. Goldstein F&P Corp.*, 78 F. Supp. 309 (E.D. Pa. 1948).

On May 28, 1986, by a May 15, 1986, letter, respondent has requested reconsideration of the Decision and Order. In view of the above, we have no jurisdiction to consider the matter. Moreover, it should be noted that the filing of this untimely petition does not in any way stay the effective date of the April 24, 1986, Decision and Order, nor does it stay any sanction which may accrue to respondent for failing to satisfy the April 24, 1986, Decision and Order.

Respondent's petition is dismissed.

Copies of this order shall be served on the parties.

FRANK DONIO, INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC., PACA Docket No. 2-7148. Decided June 26, 1986.

Full settlement—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $27,528.95 in connection with a transaction involving shipments of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 21, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISION ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

TEXAS DISTRIBUTING CO. INC. *v.* BEST PRODUCE CO. INC. a/t/a NEW AIRLINE PRODUCE CO. PACA Docket No. RD-86-247. Decided May 1, 1986.

Respondent was ordered to pay complainant, as reparation, $48,558.25 plus 13 percent interest per annum from July 1, 1984, until paid.

BUSHMAN'S INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-239. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $25,615.50 plus 13 percent interest per annum from November 1, 1985, until paid.

INN FOODS INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-240. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $16,614.21 plus 13 percent interest per annum from October 1, 1985, until paid.

SUN WORLD INTERNATIONAL INC. *v.* SUN FRESH PRODUCE CO. INC. PACA Docket No. RD-86-241. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $3,105.55 plus 13 percent interest per annum from April 1, 1985, until paid.

C. H. ROBINSON COMPANY *v.* MIKE D. PERKINS d/b/a TRIANGLE PRODUCE. PACA Docket No. RD-86-242. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $2,950.60 plus 13 percent interest per annum from May 1, 1985, until paid.

WILLIAM Y. MURPHEY d/b/a NATIVE AMERICAN FARMS *v.* JOE PINTO & SON. PACA Docket No. RD-86-244. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $2,639.00 plus 13 percent interest per annum from August 1, 1985, until paid.

J-B DISTRIBUTING CO. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-245. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $5,584.40 plus 13 percent interest per annum from October 1, 1985, until paid.

PAYETTE VALLEY FRUIT INC. *v.* GILO'S PRODUCE CO. PACA Docket No. RD-86-246. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $2,388.00 plus 13 percent interest per annum from February 1, 1985, until paid.

LINDEMANN FARMS INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-248. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $19,725.44 plus 13 percent interest per annum from November 1, 1985, until paid.

BONITA PACKING CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-249. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $13,899.05 plus 13 percent interest per annum from September 1, 1985, until paid.

LULU PACKING CORPORATION *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-250. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $256.50 plus 13 percent interest per annum from October 1, 1985, until paid.

SUN VALLEY FOODS INC. *v.* BRUCE PRODUCE BROKERAGE CO. INC. PACA Docket No. RD-86-251. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $2,742.95 plus 13 percent interest per annum from April 1, 1985, until paid.

AMCLO INTERNATIONAL MARKETING 82 INC. *v.* THE JIM FAULKNER CO. INC. PACA Docket No. RD-86-252. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $3,405.40 plus 13 percent interest per annum from November 1, 1984, until paid.

C. RAKER & SONS *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-253. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $18,456.50 plus 13 percent interest per annum from October 1, 1985, until paid.

LOS MACHOS FARMS d/b/a BIG RIVER DEVELOPMENT CO. *v.* JOHN E. REYNA d/b/a REYNA BROTHERS. PACA Docket No. RD-86-254. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $6,642.15 plus 13 percent interest per annum from July 1, 1985, until paid.

SUN WORLD INTERNATIONAL INC. *v.* KEVIN LYNN LUTHER d/b/a LUTHER PRODUCE. PACA Docket No. RD-86-255. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $18,068.45 plus 13 percent interest per annum from June 1, 1985, until paid.

TEIXEIRA FARMS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-257. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $3,489.50 plus 13 percent interest per annum from October 1, 1985, until paid.

DANNA & DANNA INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-258. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $510.00 plus 13 percent interest per annum from September 1, 1985, until paid.

OREGON ONIONS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-259. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $6,269.25 plus 13 percent interest per annum from October 1, 1985, until paid.

LINDEMANN FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-260. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $4,535.28 plus 13 percent interest per annum from September 1, 1985, until paid.

VENIDA PACKING INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-261. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $2,419.50 plus 13 percent interest per annum from August 1, 1985, until paid.

REYNOLDS PACKING COMPANY a/t/a M & R COMPANY *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-262. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $8,022.65 plus 13 percent interest per annum from September 1, 1985, until paid.

J. L. BRANCH PACKING CO. *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-264. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $42,303.78 plus 13 percent interest per annum from December 1, 1984, until paid.

SUNKIST GROWERS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-265. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $2,790.00 plus 13 percent interest per annum from November 1, 1985, until paid.

SAHARA PACKING COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-266. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $1,772.00 plus 13 percent interest per annum from October 1, 1985, until paid.

ACTION PRODUCE *v.* V & A PRODUCE. PACA Docket No. RD-86-267. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $1,327.50 plus 13 percent interest per annum from September 1, 1985, until paid.

M L. GALLOWAY INTERNATIONAL INC. a/t/a GALLOWAY FARMS INTERNATIONAL *v.* TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-268. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $11,532.25 plus 13 percent interest per annum from May 1, 1985, until paid.

BAKER BROKERAGE INC. a/t/a RUDY BROKERAGE CO. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-276. Decided May 30, 1986.

Respondent was ordered to pay complainant, as reparation, $4,608.85 plus 13 percent interest per annum from April 1, 1985, until paid.

GROWERS MARKETING SERVICE INC. *v.* BUONPASTORE & CO. INC. PACA Docket No. RD-86-277. Decided May 30, 1986.

Respondent was ordered to pay complainant, as reparation, $57,715.26 plus 13 percent interest per annum from August 1, 1985, until paid.

LESLIE J. BRINGINO d/b/a L. B. ENTERPRISES *v.* JOSE A. GOMEZ d/b/a FUERTE DISTRIBUTORS CO. PACA Docket No. RD-86-278. Decided May 30, 1986.

Respondent was ordered to pay complainant, as reparation, $2,697.20 plus 13 percent interest per annum from August 1, 1985, until paid.

R & W FARMS INC. *v.* EVERYBODY'S PRODUCE. PACA Docket No. RD-86-202. Decided June 3, 1986.

Respondent was ordered to pay complainant, as reparation, $8,362.50 plus 13 percent interest per annum from April 1, 1985, until paid.

PAPPAS & CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-274. Decided June 3, 1986.

Respondent was ordered to pay complainant, as reparation, $18,045.78 plus 13 percent interest per annum from September 1, 1985, until paid.

RIO VISTA LIMITED a/t/a GIUMARRA OF ESCONDIDO *v.* LA HACIENDA BRANDS INC. PACA Docket No. RD-86-279. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $27,298.50 plus 13 percent interest per annum from August 1, 1985, until paid.

VEG-A-MIX *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-280. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $4,221.25 plus 13 percent interest per annum from October 1, 1985, until paid.

TEIXEIRA FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-281. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $4,608.85 plus 13 percent interest per annum from September 1, 1985, until paid

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V. H. AZHDERIAN & CO. INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-282. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $4,785.96 plus 13 percent interest per annum from September 1, 1985, until paid.

BONITA PACKING CO. a/t/a BETTERAVIA FARMS *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-283. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $1,129.95 plus 13 percent interest per annum from September 1, 1985, until paid.

THE GARIN COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-284. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,770.10 plus 13 percent interest per annum from November 1, 1985, until paid.

GARNAND MARKETING INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-285. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $10,112.25 plus 13 percent interest per annum from January 1, 1986, until paid.

LOUIS J. CARIC and STEVEN L. CARIC d/b/a LOUIS CARIC & SONS *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-286. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,736.00 plus 13 percent interest per annum from September 1, 1985, until paid.

CHIQUITA BRANDS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-287. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $10,621.28 plus 13 percent interest per annum from December 1, 1985, until paid.

STEVCO INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-288. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $1,026.00 plus 13 percent interest per annum from October 1, 1985, until paid.

PHELAN & TAYLOR PRODUCE COMPANY INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-289. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,514.50 plus 13 percent interest per annum from October 1, 1985, until paid.

GOLD DIGGER APPLES INC. *v.* JORGE L. RIVAS d/b/a PANCHO'S PRODUCE CO. PACA Docket No. RD-86-290. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $1,176.00 plus 13 percent interest per annum from August 1, 1985, until paid.

BEEF STAKE TOMATO GROWERS INC. *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-291. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $9,120.00 plus 13 percent interest per annum from November 1, 1985, until paid.

S. STAMOULES INC. a/t/a STAMOULES PRODUCE CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-292. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $21,916.44 plus 13 percent interest per annum from September 1, 1985, until paid.

NATURIPE BERRY GROWERS *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-293. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $37,155.00 plus 13 percent interest per annum from September 1, 1985, until paid.

NIKADEMOS DISTRIBUTING COMPANY INC. *v.* BOLIVAR G. GAMEZ d/b/a ROBIL INTERNATIONAL. PACA Docket No. RD-86-295. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $2,327.75 plus 13 percent interest per annum from April 1, 1985, until paid.

A.T.B. DISTRIBUTING CO. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-296. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $5,460.90 plus 13 percent interest per annum from October 1, 1985, until paid.

JACKIE M. JORDAN *v.* STEVEN K. CHUNG d/b/a LEE'S MARKET PRODUCE. PACA Docket No. RD-86-297. Decided June 19, 1986.

Respondent was ordered to pay complainant, as reparation, $21,103.00 plus 13 percent interest per annum from July 1, 1985, until paid.

SNOKIST GROWERS *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-298. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $2,282.00 plus 13 percent interest per annum from June 1, 1985, until paid.

SCOTT FINKS CO. INC. *v.* OLYMPIC WHOLESALE PRODUCE & FOODS INC. PACA Docket No. RD-86-299. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $830.00 plus 13 percent interest per annum from July 1, 1985, until paid.

ROYAL FRUIT COMPANY *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-300. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $1,894.25 plus 13 percent interest per annum from November 1, 1985, until paid.

DOLE FRESH FRUIT COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-301. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $14,544.50 plus 13 percent interest per annum from January 1, 1986, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS

SUNRISE PRODUCE, INC., *v.* RUSS ELLIS, d/b/a EVERYBODY'S PRODUCE, PACA Docket No. RD-86-201. Decided May 2, 1986.

Bankruptcy—Automatic Stay—Continuance.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $10,618.75 against respondent in connection with transactions in

interstate commerce involving shipments of onions. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, Sunrise Produce, Inc., is a corporation whose address is P. O. Box 306, Quincy, Washington 98848. Respondent, Russ Ellis, doing business as Everybody's Produce, is an individual whose address is P. O. Box 1170, Clearlake Park, California. Respondent was licensed or was subject to license under the Act at the time of the transactions involved herein.

Prior to the default in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Northern District of California, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101–1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

KERMIT CHAPMAN & SONS, INC., *v.* AL NAGELBERG & CO., INC., PACA Docket No. RD–86–219. Decided May 2, 1986.

Full settlement—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $37,045.08 in connection with transactions involving the shipment of perishable agricultural commodities in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 28, 1986, complainant notified the Department

that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 28, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

VALERIO'S PRODUCE, *v.* F. BOGON COMPANY, PACA Docket No. RD-86-222. Decided May 15, 1986.

Full settlement—dismissed.

Dennis Becker, Presiding Officer.
William J. Fair, Springfield, PA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *eq seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,664.60 in connection with transactions involving the shipment of perishable agricultural commodities in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 11, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of April 11, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FOUR STAR TOMATO, INC., *v.* REM BROKERAGE CO., INC., PACA Docket No. RD-86-129. Decided May 27, 1986.

Complaint improperly served—Complaint reopened.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance

of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Respondent's claim that the complaint was signed for by someone from L. R. Clark Company, which has an office in respondent's building, and not respondent, is borne out by the signature on the return receipt card. Therefore, the complaint was not properly served. Accordingly, respondent's default in the filing of an answer is set aside. Respondent will have 10 days from receipt of this order to file an answer.

Copies of this order shall be served upon the parties.

SARGENT PRODUCE COMPANY *v.* BOLER FARMS, PACA Docket No. RD-86-275. Decided May 27, 1986.

Full settlement—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $3,565.25 in connection with a transaction involving the shipment of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 7, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 7, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FLANAGAN & JONES, INC., *v.* RUSS ELLIS, d/b/a EVERYBODY'S PRODUCE, PACA Docket No. RD-86-243. Decided June 10, 1986.

Bankruptcy discharged—Continuance.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $4,937.50 against respondent in connection with transactions in interstate commerce involving shipments of onions. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, Flanagan & Jones, Inc., is a corporation whose address is P. O. Box 487, Quincy, Washington 98848. Respondent, Russ Ellis, doing business as Everybody's Produce, is an individual whose address is P. O. Box 1170, Clearlake Park, California. Respondent was licensed or was subject to license under the Act at the time of the transactions involved herein.

Prior to the default in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Northern District of California, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC., *v.* J. V. CAMPISI, INC., PACA Docket No. RD-86-185. Decided June 11, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be gran'ed. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent shall be given 10 days from its receipt of this order in which to file its answer.

Copies of this order shall be served upon the parties.

C. H. ROBINSON COMPANY, *v.* ED SCHWARTZ, d/b/a ED'S FARMERS MARKET, PACA Docket No. RD-86-192. Decided June 11, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent shall have 10 days from its date of this order in which to file its answer.

Copies of this order shall be served upon the parties.

THE PRODUCE PLACE, *v.* THE GUY C. PANNO COMPANY, INC. a/t/a PRODUCE PLUS, PACA Docket No. RD–86–191. Decided June 20, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Respondent will have 10 days from its receipt of this order to file an answer. If a timely answer is not filed, in triplicate, the Default Order will be reinstated.

Copies of this order shall be served upon the parties.

JOS. CIMINO FOODS, INC., *v.* CONTINENTAL PRODUCE, INC., PACA Docket No. RD–86–227. Decided June 20, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

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The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent shall be given twenty days from its receipt of this order in which to file an answer to the complaint.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY, INC., *v.* DIXIELAND PRODUCE INC., PACA Docket No. RD-86-256. Decided June 25, 1986.

Petition to reopen—claim untimely filing due to paperwork—denied—Reparation awarded.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON PETITION TO REOPEN, AND DEFAULT ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in connection with a transaction involving vegetables, all being perishable agricultural commodities, in interstate commerce. A copy of the formal complaint was served upon respondent and respondent has not filed an answer thereto. By letter dated April 23, 1986, received by the Department on April 29, 1986, respondent petitioned for reopening of its default. In support of its petition, respondent claimed that, although it had received the complaint, due to a "paper-work [back] up" the complaint was not located until after it received the Department's April 15, 1986, notice that it was in default. The record reflects that respondent was served with a copy of the complaint on February 26, 1986, by certified mail. We cannot accept its claim that a "paper-work [back] up" caused it to misplace official correspondence received by certified mail until it received the April 15, 1986, letter. While these matters are handled in a somewhat less formal manner than court proceedings, nevertheless the members of the produce industry cannot choose to ignore them. Some modicum of formality must be followed. It appears that respondent elected to deal with this matter in a cavalier fashion. Somewhat more is required of persons who get served with copies of formal reparation complaints by certified mail which are accompanied by a Departmental letter calling

for a response thereto within 20 day of receipt. In view of this, respondent's petition to reopen is denied. Accordingly, the issuance of an order without further procedure is appropriate pursuant to Section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complaint, Tom Lange Company, Inc., is a corporation whose mailing address is P.O. Box 4701, Springfield, Illinois 62708. Respondent, Dixieland Produce Inc., is a corporation whose mailing address is Box 5474, Birmingham, Alabama 35207.

Respondent was licensed under the Act at the time of the transaction involved herein. The facts alleged in the formal complaint are hereby adopted as the findings of fact of this order and constitute a violation or violations by respondent of Section 2 of the Act (& U.S.C. 499b). Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, the amount stated below, which we find to be the amount of damages to which complainant is entitled as a result of the violation found herein, with interest thereon at the rate of 13 percent per annum from the following date, until paid.

REPARATION AWARD: $4,402.60, with interest thereon from June 1, 1985, until paid.

Copies hereof shall be served upon the parties.

H. SCHNELL & COMPANY, INC., *v.* MEDINA FRUITS & VEGETABLES, INC., PACA Docket No. RD–86–169. Decided June 26, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer and a Default Order was issued on March 3, 1986. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Pursuant to 7 CFR 47.25(e), re-

spondent will have 10 days from receipt of this order to file an answer, in triplicate. If respondent fails to do so, the Default Order will be reinstated.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC., *v.* P. J. PRODUCE CO., PACA Docket No. RD-86-229. Decided June 26, 1986.

Denied—untimely.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR REOPENING

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a default order was issued on April 29, 1986, requiring respondent to pay complainant $726.00, plus interest, as reparation. The order became final on May 29, 1986. *See* 7 U.S.C. § 499g. From that date forward, since respondent did not file a timely appeal of the order, neither the Secretary nor a court has jurisdiction to hear such an appeal. *American Fruit Growers* v. *Lewis D. Goldstein F&P Corp.*, 78 F. Supp. 309 (E.D. Pa. 1948).

On June 2, 1986, by a May 30, 1986, telegram, respondent has requested reopening of its default. In view of the above, we have no jurisdiction to consider the matter. Moreover, it should be noted that the filing of this untimely petition does not in any way stay the effective date of the April 29, 1986, Default Order, nor does it stay any sanction which may accrue to respondent for failing to satisfy the April 29, 1986, Default Order.

Respondent's petition is dismissed.

Copies of this order shall be served on the parties.

SPADA DISTRIBUTING CO., INC., *v.* PATELLA & CO. INC., PACA Docket No. RD-86-263. Decided June 26, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent

failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: SUPER BROTHERS EXOTIC NURSERY, INC., PQ Docket No. 203. Decided May 2, 1986.

Shipment of nursery stock—not inspected—Civil Penalty—Consent.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

On March 4, 1986, this proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151 - 164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Acts and regulations promulgated thereunder (7 CFR §§ 301.75-301.75-8). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Super Brothers Exotic Nursery, Inc., respondent, is a corporation whose address is 17190 S.W. 216th Street, Goulds, Florida 33170.

2. On or about April 9, 1985, at Miami, Florida, the respondent offered to Eastern Airlines, for shipment to Puerto Rico, two cartons of Florida citrus nursery stock on airbill number 49-46-9792.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of this proceeding. Therefore, such order and decision will be issued.

ORDER

The respondent Super Brothers Exotic Nursery, Inc. is assessed a civil penalty of three hundred seventy-five dollars ($375). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day of this order is served upon the respondent.

In re: WESTERN AIRLINES, PQ Docket No. 96. Decided May 12, 1986.

Released infected flowers without inspection—Civil Penalty—Consent.

Clement McGovern, for complainant.
Robert Crane, Corporate Attorney, Los Angeles, CA, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.74 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Western Airlines, respondent, is a corporation doing business at Los Angeles International Airport, 10053 International Road, Los Angeles, California 90045.

2. On or about September 6, 1985, the respondent was in possession of cut flowers from the Netherlands which were infested with lepidopterous larvae, an actionable pest.

3. On or about January 19, 1985, the respondent released cut flowers from the Netherlands without proper inspection.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars ($1,000). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: PEGGY SAY, PQ Docket No. 178. Decided May 12, 1986.

Uninspected luggage—Civil Penalty—Consent.

Clement McGovern, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek the judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Peggy Say, respondent, is an individual whose address is 18542 Pueblo Circle, Huntington, California 92646.

2. On or about February 14, 1985, respondent was in possession of several pieces of luggage at Honolulu International Airport.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and Decision will be issued.

ORDER

The respondents is assessed a civil penalty of one hundred and twenty five dollars ($125.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: AERO MAYFLOWER TRANSIT COMPANY, INC., PQ Docket No. 211. Decided May 14, 1986.

Moved outdoor household articles interstate—no inspection—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7 U.S.C. §§ 151 *et seq.* and 150aa *et seq.*), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Aero Mayflower Transit Company, Inc., respondent, violated the Act and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. The respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Aero Mayflower Transit Company, Inc., respondent, is a corporation whose mailing address is Box 107B, Indianapolis, Indiana 46206-0107.

2. On or about October 10, 1985, the respondent moved interstate outdoor household articles from Ledyard, Connecticut, to Duluth, Minnesota.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred twenty-five dollars ($525.00). The respondent shall make payment by sending a certified check or money order, payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: THADDEA NAVIGATION CO., LTD., PQ Docket No. 204. Decided May 20, 1986.

Foreign-origin garbage not in proper containers—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act (7 U.S.C. § 150aa *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*) and the Act of February 2, 1903, as amended, (21 U.S.C. §§ 111 and 120) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Thaddea Navigation Co., Ltd, violated the Acts and regulations promulgated thereunder (7 CFR Part 330 and 9 CFR Part 94). Respondent Thaddea Navigation Co., Ltd., and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Thaddea Navigation Co., Ltd., admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure:

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Thaddea Navigation Co., Ltd., also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACTS

1. Thaddea Navigation Co., Ltd., respondent herein, is a company whose agent for purposes of service of process is, Eller and Co., Inc., Box 4304, Jacksonville, Florida 32001.

2. On or about May 1, 1985, the respondent's ship, the "Eftychis M", was within the territorial waters of the United States at Jacksonville, Florida, and the ship's foreign-origin garbage was not contained in tight, leak-proof covered receptacles.

CONCLUSION

Respondent, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order, in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Thaddea Navigation Co., Ltd, is assessed a civil penalty of two hundred fifty dollars ($250.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before May 15, 1986.

This Order shall become effective upon service of the respondent.

In re: SOUTHERN STAR, PQ Docket No. 214. Decided May 20, 1986.

Stored regulated garbage aboard ship—Civil Penalty—Consent.

Clement McGovern, for complainant.
Daniel L. Smith, Jr., for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

this proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Southern Star, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 93.1 and 7 CFR § 380.1 and 7 CFR § 1.130 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining

allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Southern Star, respondent, is a corporation whose principle place of business is 245 Park Avenue, New York, New York 10167.

2. On or about November 29, 1985, the respondent stored regulated garbage aboard the vessel M/V EUGENIE-C, at Wilmington Maine Terminal, Wilmington, Delaware.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred fifty dollars ($450.00). The respondent shall send a certified check or money order for $450.00 payable to the "Treasurer of the United States," to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: HERBERT HAYNES and H. C. HAYNES, INC. PQ Docket No. 172. Decided May 23, 1986.

Moved logs from moth high risk area through unregulated areas—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Kevin Cuddy, Bangor, ME, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7 U.S.C. §§ 151 *et seq.* and 150aa *et seq.*), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Herbert Haynes and H. C. Haynes, Inc., respondents, violated the Act and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. The respondent, Herbert Haynes, is dismissed from this proceeding.

2. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, H. C. Haynes, Inc., specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits for the purpose of compromise only to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

3. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. H. C. Haynes, Inc., respondent, is a corporation doing business at Route 2, Box 96, Winn, Maine 04495.

2. On or about September 24, 1985, the respondent caused to move interstate regulated articles, specifically 3,000 board feet of

pine logs with bark, from Brimfield, Massachusetts, a gypsy moth high risk area, through a nonregulated area in Maine, to Armstrong, Quebec, Canada.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order ahd decision will be issued.

ORDER

The respondent, Herbert Haynes, is dismissed from this proceeding. The respondent, H. C. Haynes, Inc., is assessed a civil penalty of seven hundred fifty dollars ($750.00). The respondent shall make payment by sending a certified check or money order, payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: EASTERN AIR LINES, INC., EGBERT HERNANDEZ, JOSE PADIN, and TONY RIVERA, PQ Docket No. 216. Decided May 29, 1986.

Uninspected luggage—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Francisco Ponsa-Flores, San Juan, PR, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Eastern Air Lines, Inc., Egbert Hernández, José Padín and Tony Rivera, violated the PQA and regulations promulgated thereunder (7 CFR Subpart 318.58). Respondents Eastern Air Lines, Inc., Egbert Hernández, José Padín, Tony Rivera and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents Eastern Air Lines, Inc., Egbert Hernández, José Padín, and Tony Rivera, admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision, and;

2. Respondents Eastern Air Lines, Inc., Egbert Hernández, José Padín, and Tony Rivera, also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by them in connection with this proceeding.

FINDINGS OF FACTS

1. Eastern Air Lines, Inc., respondent, herein, is a company, whose address for purposes of service of process is, Eastern Air Lines, Inc., Legal Affairs Department, Miami International Airport, Miami, Florida 33148.

2. Egbert Hernández, respondent herein, is an individual and at all times material, an employee of Eastern Air Lines, Inc., whose place of business address is c/o Eastern Airlines, Inc., Luis Muñoz Marín International Airport, San Juan, Puerto Rico 00913.

3. José Padín, respondent herein, is an individual and at all times material, an employee of Eastern Air Lines, Inc., whose place of business address is c/o Eastern Air Lines, Inc., Luis Muñoz Marín International Airport, San Juan, Puerto Rico 00913.

4. Tony Rivera, respondent herein, is an individual and at all times material, an employee of Eastern Air Lines, Inc., whose place of business address is c/o Eastern Air Lines, Inc., Luis Muñoz Marín International Airport, San Juan, Puerto Rico 00913.

5. On or about September 22, 1985, respondent Eastern Air Lines, Inc., and respondent Egbert Hernández possessed three pieces of baggage at Luis Muñoz Marín International Airport, San Juan, Puerto Rico destined for Hartsfield International Airport, Atlanta, Georgia.

6. On or about October 6, 1985, respondent Eastern Air Lines, Inc., and respondent José Padín possessed two pieces of baggage at

Luis Muñoz Marín International Airport, San Juan, Puerto Rico, destined for John F. Kennedy International Airport, Jamaica, New York.

7. On or about October 19, 1985, respondent Eastern Air Lines, Inc., and respondent Tony Rivera possessed one piece of baggage at Luis Muñoz Marín International Airport, San Juan, Puerto Rico, destined for John F. Kennedy International Airport, Jamaica, New York.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Eastern Air Lines, Inc., is assessed a civil penalty of two thousand three hundred and fifty dollars ($2,350); and

Respondent Egbert Hernández is assessed a civil penalty of one hundred twenty five dollars ($125); and

Respondent José Padín is assessed a civil penalty of one hundred twenty five dollars ($125); and

Respondent Tony Rivera is assessed a civil penalty of one hundred twenty five dollars ($125), said civil penalties shall be paid by certified checks or money orders, payable to, "The Treasurer of the United States" and they shall be sent to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Bldg., U. S. Department of Agriculture, Washington, D. C. 20250-1400, on or before May 30, 1986.

This Order shall become effective upon filing with the Hearing Clerk by the Administrative Law Judge.

In re: REBECCA MIRANDA, PQ Docket No. 208. Decided May 30, 1986.

Complainant filed to dismiss—Dismissed.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING THE COMPLAINT

Complainant filed a motion to dismiss the complaint without prejudice on the ground of newly discovered evidence.

IT SHOULD BE AND HERE BY IS ORDERED that the complaint is dismissed without prejudice.

In re: JOSETTE RATON, PQ Docket No. 245. Decided May 30, 1986.

Complainant's motion to dismiss—Dismissal.

Clement McGovern, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING THE COMPLAINT

Complainant filed a motion to dismiss the complaint on the grounds that prosecution is no longer warranted to effect the purposes of the program.

IT SHOULD BE AND HERE BY IS ORDERED that the complaint is dismissed without prejudice.

In re: BAO CHAN d/b/a HAWAII TROPICAL PRODUCTS, PQ Docket No. 20. Decided June 2, 1986.

Offered uninspected plants for shipment—Civil Penalty—Consent.

Terry Medley, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7

U.S.C. §§ 151–164a and 167, and 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Bao Chan d/b/a Hawaii Tropical Products, respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bao Chan d/b/a Hawaii Tropical Products, respondent, is a company whose address is P. O. Box 618, Kurtistown, Hawaii 96760.

2. On or about February 14, 1984, the respondent offered for shipped to a common carrier from Hilo, Hawaii, to San Francisco, California 240 pounds of breadfruit and 140 pounds of green jackfruit.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred and fifty dollars ($250.00) which shall be payable to the "Treasurer of

the United States" by certified check or money order, and which shall be forwarded to Terry L. Medley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S.W., Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: IBERIA AIRLINES, PQ Docket No. 236. Decided June 2, 1986.

Uninspected meat products brought to Puerto Rico—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Iberia Airlines, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 94.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Iberia Airlines, respondent, is a business having its principal place of business at Luis Munoz Marin International Airport, Isle Verde, Puerto Rico 00913.

2. On or about May 23, 1985, the respondent brought a shipment of meat products within the territorial limits of the United States at San Juan, Puerto Rico.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500.00). The respondent shall send a certified check or money order for $500.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: MALONE & HYDE, INC., PQ Docket No. 235. Decided June 4, 1986.

Movement of uninspected fruit—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 161 and 162), and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Malone & Hyde, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR §§ 301.75 *et seq.*). The parties have agreed

that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Malone & Hyde, Inc., respondent, is a corporation whose mailing address is P. O. Box 520427, Miami, Florida 33152.

2. On or about May 1, 1985, the respondent moved a quantity of oranges from Florida, to Puerto Rico.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred fifty dollars ($750.00). The respondent shall send a certified check or money order for $750.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: WONG'S PRODUCE, PQ Docket No. 205. Decided June 6, 1986.

Offered uninspected produce for shipment—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Wong's Produce violated the PQA and regulations promulgated thereunder (7 CFR subpart 318). Respondent Wong's Produce and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Wong's Produce admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Wong's Produce also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

1. Wong's Produce, respondent, is a company whose address is 690 Halekauwila Street, Honolulu, Hawaii 96813.

2. On or about July 3, 1985, the respondent offered for shipment, to a common carrier, from Honolulu, Hawaii, to the continental

United States, approximately 110 pounds of litchi and 40 pounds of soursops.

CONCLUSIONS

Respondent Wong's Produce, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Wong's Produce, is assessed a civil penalty of six hundred dollars ($600.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before June 30, 1986.

This Order shall become effective on the day of service upon the respondent.

In re: RENE VALLALTA. PQ Docket No. 138. Decided June 17, 1986.

Importation of prohibited seed pod—Prohibition unknown—Civil penalty.

The Judicial Officer affirmed Judge Weber's decision and order assessing a civil penalty of $250 against respondent for importing one cacao pod from El Salvador into the United States in violation of the Plant Quarantine Act and regulations. Respondent's request for a hearing to show that a relative had placed the article in his bags without his knowledge was properly denied since a $250 civil penalty would still be appropriate.

Kris Ikejiri, for complainant.
Robert Bernstein, Fairfield, California, for respondent.
William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), in which Administrative Law Judge William J. Weber (ALJ) filed an initial Decision and Order on April 15, 1986, assessing a civil penalty of $250 against respondent for importing one cacao pod from El Salvador into the United States in violation of the Act and regulations.

On May 2, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR

§ 2.35).[1] The case was referred to the Judicial Officer for decision on June 9, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This proceeding was instituted by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged, *inter alia*, that Rene Vallalta, respondent, violated the Plant Quarantine Act, as amended (PQA) (7 U.S.C. § 151 *et seq.*), and regulations promulgated thereunder (7 CFR Part 319). Paragraph II of the complaint alleged that the respondent imported from El Salvador into New Orleans, Louisiana, approximately one (1) cacao seed pod in violation of section 319.56 of the regulations (7 CFR § 319.56), because the importation of cacao seeds is prohibited.

In his answer, the respondent admitted all of the material facts in the complaint. However, the respondent claimed that he did not know that he had the prohibited article. Respondent stated that a relative had placed the article in his bags without his knowledge. Respondent requested a hearing.

Complainant objected to respondent's request for a hearing because, by respondent's admission, there were no material issues of fact. Complainant further requested that the civil penalty of $250, as requested in the complaint, be imposed. In light of the Judicial Officer's decision in, *In re Richard Duran Lopez*, P. Q. Docket No. 59, I certified the following questions to the judicial officer:

1. Should respondent's motion for hearing be denied?

2. If no hearing is appropriate and if complainant files a motion for a decision on the pleadings, should that decision be entered finding a violation and assessing a $250.00 civil penalty against respondent Rene Vallalta?

The certification was necessary to determine if "unintentional" as used in the *Lopez* decision is to be construed to include "un-

[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

knowing". The Judicial Officer answered that respondent's motion for hearing should be denied and that the $250.00 civil penalty should be imposed.

WHEREFORE, in light of the Judicial Officer's answer and the complainant's motion for a decision on the pleadings, the following Findings of Fact, Conclusions, and Order shall be issued.

FINDINGS OF FACT

1. Rene Vallalta, respondent herein, is an individual whose mailing address is 2214 Burgundy Way, Fairfield, California 94533.

2. On or about August 26, 1985, the respondent imported from El Salvador into New Orleans, Louisiana, approximately one (1) cacao seed pod, in violation of section 319.56 of the regulations (7 CFR § 319.56) because the importation of cacao seed pods is prohibited.

CONCLUSIONS

By reasons of the facts alleged herein, respondent violated the PQA and regulations promulgated thereunder. Therefore, the following order shall be issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

This case is governed by the principles set forth in *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), a copy of which is attached as an appendix.

Respondent contends that this case is distinguishable from *Lopez* because in *Lopez*, the respondent knew that he had one piece of sugarcane in his possession, but did not know that it was unlawful to bring it into the United States, whereas here, respondent's relative placed the prohibited cacao pod in his luggage, without his knowledge. However, that distinction is not material. As explained in *Lopez*, in order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws. If that policy were not followed where forbidden items were placed in luggage by relatives or friends of the violator, a loophole would be created that could prove disastrous to American agriculture. Accordingly, the *Lopez* doctrine will be followed here.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Rene Vallalto is assessed a civil penalty of $250, which shall be payable to the "Treasurer of the United States," by certified check or money order, and it shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, U.S. Department of Agriculture, Washington, D.C. 20250-1400, within 30 days from the service of this order.

APPENDIX

In re Lopez, 44 Agric. Dec. ____ (Oct. 7, 1985).
[This decision is referenced only. Not printed.—Ed.]

In re. PAULINE ANGELA HUDSON, PQ Docket No. 141. Decided March 19, 1986.

Imported fruit without permit—Civil Penalty—Default.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-2(e) of the regulations promulgated thereunder (7 CFR § 319.56-2(e)). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 CFR § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time pro-

vided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Pauline Angela Hudson, respondent, is an individual whose address is 112-39 203rd Street, St. Albans, New York 11412.

2. On or about April 26, 1985, at John F. Kennedy International Airport, respondent imported ten mangoes from Jamaica into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By her silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Pauline Angela Hudson is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded toFronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal* to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and Order became final and effective on June 23, 1986.—Ed.]

In re: GLOBAL VAN LINES, PQ Docket No. 241. Decided June 25, 1986.

Movement of household articles interstate—Civil Penalty—Consent.

Clement McGovern, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912 as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Global Van Lines, respondent, is a corporation incorporated under the laws of the State of California and having its principle place of business at #1 Global Way, Anaheim, California 92803.

2. On or about September 4, 1985, respondent moved outdoor household articles from Stoney Brook, Suffolk County, New York to San Diego, California.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred and seventy-five dollars ($375.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: MANUEL NORIEGA, PQ Docket No. 143. Decided May 1, 1986.

Fruit imported without permit—Civil Penalty.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-2(e) of the regulations promulgated thereunder (7 CFR § 319.56-2(e)). The Office of the Hearing Clerk mailed to respondent, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act. The Postal Service returned the documents unclaimed. The Hearing Clerk then remailed the documents by regular mail. This constitutes service under section 1.147(b)(3) of the Rules of Practice applicable to this proceeding. (7 CFR § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136), respondent was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of

the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 CFR § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Manuel Noriega, respondent, is an individual whose address is 1840 Rockwood, Apt. 67, Calexico, California 92331.

2. On or about October 23, 1984, at Calexico, California, respondent imported 26 limes and two plums from Mexico into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Manuel Noriega is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after

service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and Order became final and effective on June 26, 1986.—Ed.]

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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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POULTRY PRODUCTS INSPECTION ACT

WALDMAN'S MEATS, INC. PPIA Docket No. 17. FMIA Docket No. 101. I&G Docket No. 81. Stipulation and Consent Decision 1451

In re: L. & L. STARTED PULLETS, INC., BARRY BATINKOFF, and HIRAM J. FRANK. I & G Docket No. 80. Decided on July 17, 1986.

Gregory Cooper, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

ORDER

For the reasons stated therein, complainant's motion to dismiss is granted. It is, therefore, ordered that the complaint in this proceeding is hereby dismissed without prejudice.

In re: WALDMAN'S MEATS, INC. FMIA Docket No. 101. PPIA Docket No. 17. I & G Docket No. 81. Decided on August 4, 1986.

Altering and forging USDA certificate—Denial of Services—Consent.

Harold Reuben, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

These are proceedings under Title I of the Federal Meat Inspection Act (FMIA) as amended (21 U.S.C. §§ 601 *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. §§ 451 *et seq.*) and the Agricultural Marketing Act of 1946 (AMA) as amended (7 U.S.C. 1621 *et seq.*) to withhold and deny inspection and grading services under the above Acts to respondent. These actions were initiated by complaints filed on July 10, 1986. Respondent has waived its right to answer the complaints.

The parties have agreed that these proceedings should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For purposes of this Stipulation and the provisions of the Consent Decision only, respondent admits all of the jurisdictional allegations set forth herein, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as, the reasons or bases thereof; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of this decision.

2. Respondent waives any action against the United States Department of Agriculture, under the Equal Access to Justice Act of 1980, Pub. L. 96-481, which went into effect October 1, 1981, for fees and other expenses incurred by Respondent in connection with this proceeding.

3. This Stipulation and Consent Decision are for settlement purpose in this proceeding only and do not otherwise constitute an admission by respondent that it has violated the regulations or statutes involved.

FINDINGS OF FACT

I

1. Waldman's Meats, Inc., ("Respondent") is, and at all times material herein, was, a corporation which operates a meat packing establishment at 809 Sampson Street, New Castle, Pennsylvania 16103.

2. At all times material herein, respondent has requested and received Federal meat inspection and Federal meat grading and acceptance services at its place of business in New Castle, Pennsylvania.

3. Joseph P. Milifried is, and at all times material herein was, employed by respondent as a production foreman and as such is "responsibly connected" with Waldman's Meats, Inc.

4. On October 11, 1985, Joseph P. Milifried was convicted, in the United States District Court for the Western District of Pennsylvania of two counts of willfully altering and forging an official United States Department of Agriculture certificate in violation of 7 U.S.C. § 1622(h).

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Order will be issued.

ORDER

Inspection services under FMIA and PPIA, and grading and acceptance Services under the AMA are withdrawn from and denied to respondent; its officers, directors, partners, affiliates, successors, assigns, directly or through any corporate device, for a period of one year. However, said withdrawals and denials, with the exception of a 120 day period of withdrawal of Federal meat grading and acceptance services, shall be held in abeyance and all inspection and grading services shall be provided to respondent so long as the

conditions set forth in paragraphs 1-9 below are met. During the period this Stipulation and Consent Decision is in effect, the Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth in paragraphs 1-9 below. The summary withdrawal of inspection service shall be effective pending final determination of a violation in accordance with the applicable Rules of Practice. Such summary withdrawal shall have no relevance with respect to the final determination in the proceeding and will not preclude the respondent from requesting an expedited hearing.

1. Joseph P. Milifried shall not have any responsibilities with regard to USDA Meat Grading and Acceptance Certificates nor shall he issue or sign any reports or documents which may be received by FSIS. Nor shall Joseph P. Milifried become an officer, director or shareholder of respondent during the period of this Stipulation and Consent Decision; and

2. Respondent shall not knowingly employ or hire any individual, with the exception of Joseph P. Milifried, who has been convicted, in any Federal or state court, of any felony or more than one violation of any law other than a felony, based upon the acquiring, handling, or distribution of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food; and

3. Respondent shall immediately terminate its connection with any such individual when that individual's conviction becomes known; and

4. Respondent shall not knowingly or willfully alter or forge any United States Department of Agriculture document or certificate issued by any program employee in the course of their duties at its establishment, and

5. Respondent shall not prepare, handle, or store custom exempt articles or game, whether for customers, employees, the owner, friends or relatives; and

6. Respondent shall not reprocess, recondition, or rework any returned or off-condition product without prior approval by, the assigned USDA inspector; and

7. Respondent shall maintain full, complete, and accurate written records of all business activities applicable to and required by the FMIA, PPIA and AMA, which are available for review by USDA personnel; and

8. Respondent shall make a detailed semiannual written report in a format approved by the Director, Evaluation and Enforcement Division, to the Meat and Inspection Office's Area Supervisor, spe-

cifically addressing its adherence to this Stipulation and Consent Decision with a copy to the assigned USDA inspector. The first such report is due December 1, 1986. All following semiannual written reports shall be submitted to the Area Supervisor on June 1 and December 1 of each calendar year that this Consent Decision and Order is effective; and

9. Respondent shall afford duly authorized personnel of the USDA an opportunity to examine and to copy all records, reports, and other documents required of the respondent in this Consent Decision and Order, at reasonable hours and upon reasonable notice.

This Order shall not preclude the USDA from taking any other actions available should repondent violate the FMIA, PPIA, AMA, or regulations promulgated thereunder.

This Consent Decision and Order shall become effective after being signed by an Administrative Law Judge and filed with the Hearing Clerk. Federal meat grading and acceptance services shall be withdrawn from and denied to respondent, for a 120 day period commencing, the first day of the month following the effective date of the Consent Decision and Order.

This Stipulation and Consent Decision shall expire 3 years after date of issuance below.

In re: DAKOTA CHEESE, INC. AMA Docket No. M76-4. Decided August 20, 1986.

E. Steeves Smith, for complainant.
M. Bradley Flynn, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

STIPULATION FOR DISMISSAL OF PETITION

Comes now Petitioner, Dakota Cheese, Inc., by and through its attorneys, Tinan, Smith & Taylor, and the United States Department of Agriculture through its office of General Counsel, who hereby stipulate and agree as follows:

1. That on or about April 25, 1986, the Honorable Edward H. McGrail, Administrative Law Judge, entered his Order of indefinite continuance in the above-entitled administration action pending completion of a settlement agreement between Petitioner and United States Department of Agriculture.

2. That items 1 through 5 of the Settlement Agreement filed in this administration action have been completed.

3. That insofar as the administrative action is concerned the only matter remaining to be completed is dismissal, with prejudice, of the Petition giving rise to this administrative action.

4. That the parties specificially agree that the Administrative Law Judge may enter, without further hearing or notice, his Order dismissing, with prejudice, the Petition of Dakota Cheese, Inc., filed herein.

In re: DR. DANE O. PETTY. V.A. Docket No. 21. Decided on July 3, 1986.

Decision by Donald A. Campbell, Judicial Officer.

REMOVAL OF STAY ORDER

The stay order previously issued in this proceeding pending the outcome of proceedings for judicial review is hereby lifted. The Decision and Order previously issued on October 31, 1984, shall become effective on the 30th day after service of this order on respondent.

In re: PATRICK L. MURPHY. A.Q. Docket No. 236. Decided on May 27, 1986.

Violation of regulation on importation and slaughtering swine—Civil penalty—Consent.

Respondent imported 94 Swine from Canada in violation of regulations and then failed to deliver the 94 swine to consigned slaughtering establishment and have the swine slaughtered within required 14 days. Civil penalty of $1,000 assessed.

Clement McGovern, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of swine from Canada (9 CFR §§ 92.22 and 92.23 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was initiated by a complaint filed on February 6, 1986, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about June 24, 1985, the respondent imported from Canada, ninety-four (94) swine, in violation of sections 92.22 and 92.23 of the regulations (9 CFR §§ 92.22 and 92.23). The respondent failed to deliver the swine to the consigned slaughtering establishment and also failed to have the swine slaughtered at the consigned slaughtering establishment within two (2) weeks from the date of importation, as required by the regulations. The respondent has failed to file an answer or otherwise respond to any

of the material allegations contained in the complaint, thereby, for the purposes of this proceeding, being deemed to have admitted the allegations and waive a hearing. (see 7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Patrick L. Murphy, is an individual whose address is Route 2, Newell, Iowa 50568.

2. On or about June 24, 1985, respondent imported ninety-four (94) swine from Canada, in violation of sections 92.22(b) and 92.23 of the regulations (9 CFR §§ 92.22(b) and 92.23), in that the swine were not directly delivered to the slaughter establishment as consigned from port of entry, as required.

3. On or about June 24, 1985, respondent imported 94 swine from Canada, in violation of section 92.23 of the regulations (9 CFR § 92.23), in that the swine were not slaughtered at the consigned slaughtering establishment within two weeks from date of entry, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 92.22(b) and 92.23 of the regulations (9 CFR §§ 92.22(b) and 92.23)).

Therefore, the following Order is issued.

ORDER

Respondent, Patrick L. Murphy, is hereby assessed a civil penalty of one thousand dollars ($500.00 per violation). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final on July 14, 1986.—ED.]

In re: JOHNNY DOBSON, SULPHUR SPRINGS LIVESTOCK COMMISSION COMPANY, O.L. COLLEY LIVESTOCK COMMISSION COMPANY and GREENVILLE LIVESTOCK COMMISSION COMPANY. A.Q. Docket No. 265. Decided July 15, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER AS TO GREENVILLE LIVESTOCK COMMISSION COMPANY

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Greenville Livestock Commission Company and others violated the Act and regulations promulgated thereunder (9 CFR Part 71 and Part 78). Respondent Greenville Livestock Commission Company and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Greenville Livestock Commission Company admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Greenville Livestock Commission Company also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

1. Greenville Livestock Commission Company, respondent, is a company whose address is Post Office Box 1043, Greenville, Texas 75401.

2. On or about June 25, 1985, the respondent moved interstate from Greenville, Texas to Omaha, Nebraska, approximately 33 cattle.

3. On or about July 16, 1985, the respondent moved interstate from Greenville, Texas to Omaha, Nebraska, approximately 48 cattle.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Greenville Livestock Commission Company is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to, "The Treasurer of the United States," by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, on or before June 30, 1986.

This Decision and Order shall become effective on the day of service upon the respondent.

In re: DR. DEAN CHRISTIANSON. A.Q. Docket No. 243. Decided on July 18, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Robert Broussard, for complainant.
Timothy Weber, Eureka, South Dakota, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regula-

tions promulgated thereunder (9 CFR § 71.1 *et seq.*). The parties have agreed that this proceeding should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Dr. Dean Christianson, respondent, is an individual whose address is Route 1, Box 57A, Eureka, South Dakota.

2. On or about May 31, 1985, the respondent, Dr. Dean Christianson, caused the interstate movement of thirty-six (36) cows from Herreid, South Dakota to Annawan, Illinois.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred and fifty dollars ($250). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Robert L. Broussard, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: ROY CARTER AND RUSSELL M. TRACEY, D.V.M. A.Q. Docket No. 271. Decided on July 18, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AS TO RUSSELL M. TRACEY, D.V.M.

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Jobe Whaley, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Russell M. Tracey, D.V.M., specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Russell M. Tracey, D.V.M., respondent is an individual whose address is 11718 Grant Road, Cypress, Texas 77429.

2. On or about December 4, 1984, the respondent caused the movement interstate of six (6) bulls from Crockett, Texas, to Oklahoma City, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Russell M. Tracey, D.V.M., such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred dollars ($200.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: DOMINICANA DE AVIACION AIRLINES. A.Q. Docket No. 96. Decided on June 11, 1986.

Operating without a license—Civil penalty.

Respondent imported 33 birds from the Dominican Republic to San Juan, Puerto Rico, without being licensed. Civil penalty of $1,000 was assessed.

Clement McGovern, for complainant.
Mr. Russo (In-house), for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent Dominicana de Aviacion Airlines, violated the Act and sections 92.2(a) and 92.4(a) of the regulations promulgated thereunder (9 CFR §§ 92.2(a) and 92.4(a)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certi-

fied mail, upon respondent Dominicana de Aviacion Airlines on September 17, 1984. Copies of the amended complaint and rules of practice governing proceedings under the Act were also served by the Hearing Clerk, by certified mail, upon respondent on December 7, 1984.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent, Dominicana de Aviacion Airlines, was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Dominicana de Aviacion Airlines was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Dominicana de Aviacion Airlines has not filed an answer to this date. Dominicana de Aviacion Airlines asked for and received two extensions in order to adequately answer the amended complaint. No answer has been filed since the deadline for the second extension, January 31, 1985. Dominicana de Aviacion Airlines' failure to file an answer within the time provided constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Dominicana de Aviacion Airlines' failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since Dominicana de Aviacion Airlines is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Dominicana de Aviacion Airlines is a corporation under the laws of the Dominican Republic, is doing business in the United States, including the Commonwealth of Puerto Rico, and whose agent in the United States is Mr. Celestino Pena, whose address is Iberia Airlines, 9777 Queens Boulevard, 11th Floor, Rego Park, New York 11374.

2. On or about May 5, 1984, respondent imported 33 birds (32 finches and 1 parrot) from the Dominican Republic to San Juan, Puerto Rico, in violation of sections 92.2(a) and 92.4(a) of the regulations (9 CFR §§ 92.2(a) and 92.4(a)) because no permit was applied for or obtained prior to the importation of the birds, as required.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent, Dominicana de Aviacion Airlines has violated the Act and regulations promulgated thereunder. Therefore the following order is issued.

ORDER

Respondent, Dominicana de Aviacion Airlines, is hereby assessed a civil penalty of one thousand ($1,000.00) dollars, which shall be payable by certified check or money order, made payable to "Treasurer of the United States," and sent to Clement J. McGovern, at the following address:

USDA

Office of the General Counsel

Room 2422 South Building

14th & Independence Avenue, S.W.

Washington, D.C. 20250-1400

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant within 30 days of service to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final on July 22, 1986—ED.]

In re: DR. KIRK S. KOTHMANN. A.Q. Docket No. 263. Decided on July 23, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Clement McGovern, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regu-

lations promulgated thereunder (9 CFR § 71 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Dr. Kirk S. Kothmann, respondent, is an individual whose address is 535 Greer Boulevard, Pittsburg, Texas 75686.

2. On or about October 25, 1985, the respondent caused the interstate movement of three cattle from Pittsburg, Texas, to Auburn, Georgia.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to the "Treasurer of the United States," by certified check or money order to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: JAMES S. YOUNG. A.Q. Docket No. 256. Decided on July 23, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that James S. Young violated the Act and regulations promulgated thereunder (9 CFR Part 78). Respondent James S. Young and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent James S. Young admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent James S. Young also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding

FINDINGS OF FACT

1. James S. Young, respondent, is an individual whose address is HC 50, Box 12, Kimball, Nebraska 69145.

2. On or about December 11, 1984, the respondent moved interstate from Banner County, Nebraska to Fountain, Colorado, approximately 42 cattle.

CONCLUSIONS

Respondent James S. Young having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent James S. Young is assessed a civil penalty of one thousand dollars ($1,000.00), which shall be payable to "The Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, on or before July 31, 1986.

This Order shall become effective upon service of the respondent.

In re: NORTHWEST ALABAMA LIVESTOCK AUCTION CO. A.Q. Docket No. 197. Decided on July 29, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Jaru Ruley, for complainant.
Bob Rogers, Russellville, Alabama, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining

allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as we!1 as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, Northwest Alabama Livestock Auction Co., also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Northwest Alabama Livestock Auction Co., respondent, is a business having its principal place of business at Highway 243, Russellville, Alabama 35653.

2. On or about September 11, 1984, the respondent moved interstate a number of cattle from Russellville, Alabama, to Hopkinsville, Kentucky.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of six hundred dollars ($600.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: JOHNNY DOBSON, SULPHUR SPRINGS LIVESTOCK COMMISSION COMPANY, O.L. COLLEY LIVESTOCK COMMISSION COMPANY and GREENVILLE LIVESTOCK COMMISSION COMPANY. A.Q. Docket No. 265. Decided on August 1, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER AS TO O.L. COLLEY LIVESTOCK COMMISSION COMPANY

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that O.L. Colley Livestock Commission Company and others violated the Act and regulations promulgated thereunder (9 CFR Part 71 and Part 78). Respondent O.L. Colley Livestock Commission Company and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, O.L. Colley livestock Commission Company admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. O.L. Colley Livestock Commission Company also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

1. O.L. Colley Livestock Commission Company, respondent, is a company whose address is Post Office Box 667, Mt. Pleasant, Texas 75455.

2. On or about June 25, 1985, the respondent moved interstate from Mt. Pleasant, Texas to Omaha, Nebraska, approximately 11 cattle.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent O.L. Colley Livestock Commission Company is assessed a civil penalty of two hundred fifty dollars ($250.00) which shall be payable to, "The Treasurer of the United States," by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, on or before August 15, 1986.

This Decision and Order shall become effective on the day of service upon the respondent.

In re: WARD L. STINE AND WESLEY BRATTON. A.Q. Docket No. 245. Decided on August 1, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AS TO WESLEY BRATTON

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allega-

tions in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Wesley Bratton, herein referred to as the respondent, is an individual whose mailing address is Route 1, Rochelle, Texas 76872.

2. On or about January 24, 1985, the respondent moved 16 postparturient cows interstate from Malaga, New Mexico, to Ringgold, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Wesley Bratton, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of twelve hundred dollars ($1,200.00). The respondent shall pay the civil penalty in four quarterly installments of $300.00 beginning September 1, 1986, with a final payment due June 1, 1987. The other two payments are due December 1, 1986, and March 1, 1987. Each payment shall be by certified check or money order payable to the "Treasurer of the United States," and sent to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: SAMMY R. CRIDER and BIG SPRINGS CATTLE COMPANY. A.Q. Docket No. 254. Decided on August 11, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AS TO BIG SPRINGS CATTLE COMPANY

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Big Springs Cattle Company, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Big Springs Cattle Company, herein referred to as the respondent, is a partnership whose business mailing address is Box 324, Picayune, Mississippi 39466.

2. On or about March 19, 1985, the respondent moved at least three (3) cattle, over twenty-four months of age, interstate from Picayune, Mississippi, to Powderly, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Big Springs Cattle Company, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred fifty dollars ($350.00). The respondent shall send a certified check or money order for $350.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: JEROME B. SCHWARTZ, D.V.M. V.A. Docket No. 38. Decided August 12, 1986.

Veterinarian—Violation of standards—Accreditation suspended.

The Judicial Officer affirmed Chief Administrative Law Judge Campbell's Default Decision and Order revoking respondent's accreditation as a Veterinarian authorized to perform official duties under State-Federal Disease Eradication Programs for a period of 6 months. Respondent's failure to file an answer constitutes an admission of the allegations in the complaint and a waiver of hearing. The requirement that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner.

Clement McGovern, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding instituted by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, under the regulations promulgated under the Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*). The Administrator (complainant) seeks to suspend respondent's accreditation as a veterinarian authorized to perform official

duties under State-Federal disease eradication programs for a period of 6 months.

On June 17, 1986, Chief Administrative Law Judge John A. Campbell (ALJ) issued an initial Default Decision and Order revoking respondent's accreditation as a veterinarian authorized to perform official duties under State-Federal disease eradication programs for a period of 6 months.

On June 11, 1986, respondent appealed to the Judicial Officer,[1] to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).[2] The case was referred to the Judicial Officer for decision on July 22, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial Default Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of such Accreditation (9 CFR § 160.1 *et seq.*), by a Complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint was filed with the Hearing Clerk on March 12, 1986. The Complaint alleged that Respondent violated the Standards for Accredited Veterinarians (Standards) (9 CFR § 161.2).

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[1] Respondent's appeal was filed after respondent received complainant's motion for adoption of the proposed decision that was not issued by the ALJ until 6 days after the appeal, but the premature appeal was accepted by the Judicial Officer as an appeal from the ALJ's decision.

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on March 24, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Respondent was informed in the Complaint and the letter of service that an Answer should be filed with the Hearing Clerk within twenty (20) days after service of the Complaint, and that failure to file an answer either denying or otherwise responding to the allegations in the Complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. On April 17, 1986, Respondent was sent, by regular mail, a notice that his Answer has not been received by the Hearing Clerk in the allotted time. More than twenty (20) days have elapsed since Respondent was served with the Complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an Answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Dr. Jerome H. Schwartz, Respondent, is an individual whose mailing address is 200 West Sherman Avenue, Fort Atkinson, Wisconsin 53538.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Wisconsin under the provisions of the regulations of Title 9, Code of Federal Regulations, Part 160–162.

3. On or about August 7, 1984, the Respondent violated paragraph (b) of the Standards (9 CFR § 161.2(b)) by failing to report the results of tuberculosis tests, read on or about April 12, 1984, for Larry Pint, Fort Atkinson, Wisconsin, to the Wisconsin Department of Agriculture within seven (7) days after the making of such tests, in accordance with instructions issued to the Respondent by the Veterinarian in Charge or the State Animal Health Official, or both.

4. On or about April 2, 1985, the Respondent violated paragraph (b) of the Standards (9 CFR § 161.2(b)) by failing to report the results of tuberculosis tests, read on or about January 26, 1985, for Maple Tree Farm, Johnson Creek, Wisconsin, to the Wisconsin Department of Agriculture within seven (7) days after the making of such tests, in accordance with instructions issued to the Respond-

ent by the Veterinarian in Charge or the State Animal Health Official, or both.

5. On or about May 21, 1985, the Respondent violated paragraph (b) of the Standards (9 CFR § 161.2(b)) by failing to report the results of Johne's calfhood vaccinations performed on or about November 12, 1984 (Report No. 14915), December 20, 1984 (Report No. 14916), January 18, 1985 (Report No. 14917), and March 21, 1985 (Report No. 14918) for Meyers Brothers, Fort Atkinson, Wisconsin, to the Wisconsin Department of Agriculture within fifteen (15) days after the date of making such vaccinations, in accordance with instructions issued to the Respondent by the Veterinarian in Charge or the State Animal Health Official, or both.

CONCLUSION

By reason of the facts in the findings of fact set forth above, Respondent has violated the Standards for Accredited Veterinarians. Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file an answer with the Hearing Clerk within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§1.136(a)–(c), 1.139):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or
>
> (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall he served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra,* and advised respondent that complainant was seeking a 6-month suspension order. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, as follows (Complaint at 2–3):

WHEREFORE, it is hereby ordered that for the purpose of determining whether the respondent has, in fact, violated the Standards, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250–1400, in accordance with sections 162.1 and 1.136 of the Rules of Practice applicable to this proceeding (9 CFR § 162.1 and 7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this

> complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer with the Hearing Clerk within 20 days. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *four* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

The return receipt card shows that respondent was served with a copy of the complaint on March 24, 1986. Respondent's answer was, therefore, required to be filed with the Hearing Clerk by April 14, 1986. However, respondent filed no answer or other document until his appeal was filed on June 11, 1986. Since respondent failed to file an answer, the Default Decision and Order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not

object,[3] respondent has shown no basis for setting aside the default decision here.[4]

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a $10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not file a timely answer and did not contest the allegations of the complaint in its untimely answer.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their

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[3] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[4] *See In re Midas Navigation, Ltd.*, 45 Agric. Dec.____ (July 9, 1986); *In re Gutman*, 45 Agric. Dec.____ (June 17, 1986); *In re Daul*, 45 Agric. Dec.____ (Mar. 6, 1986); *In Eastern Air Lines, Inc.*, 44 Agric. Dec.____ (Sept. 23, 1985); *In re Cuttone*, 44 Agric. Dec.____ (Aug. 20, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec.____ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec.____ (June 26, 1984); *In re Buzun*, 43 Agric. Dec.____ (June 13, 1984); *In re Mayer*, 43 Agric. Dec.____ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec.____ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal* 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

multitudinous duties.' "[5] If respondent were permitted to contest some of the allegations of fact at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present these matters at this time.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's veterinarian accreditation is hereby suspended for a period of 6 months, provided that, if the respondent performs any actions during such suspension for which veterinary accreditation is required, the respondent's veterinary accreditation shall be revoked. Before such action is taken, respondent will be afforded an opportunity for a hearing concerning the matter.

This order shall be effective 30 days after service on respondent.

In re: MARK A. GIBBS. A.Q. Docket No. 212. Decided on August 25, 1986.

Movement of cattle interstate—Civil penalty—Consent.

Sally Stratmoen, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§111, 120, and 122), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdic-

[5] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

tion in this matter, admits the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (9 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Mark A. Gibbs, respondent, is an individual whose mailing address is Route 1, Box 255, Ranburne, Alabama 36273.

2. On or about March 29, 1985, the respondent moved interstate three (3) cows from Carrollton, Georgia, within a Class B state, to Ranburne Livestock Sales, Inc. located in Ranburne, Alabama.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Decision and Order will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred and fifty dollars ($250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Sally Ogelby Stratmoen, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: JOHNNY J. WOOD and PAMELA S. WOOD, d/b/a PJ's PET FARM. AWA Docket No. 294. Decided on July 11, 1986.

Violation of the Act—License suspended—Civil penalty—Consent.

Respondents were delivering dogs under age for shipment in commerce. License suspended for forty-five (45) days. Civil penalty of $1,000.00 was assessed.

Robert Ertman, for complainant.
Philip Dale Barrett, Kirksville, Missouri, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("Act") by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, charging that respondents violated the regulations and standards issued under the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice spplicable to these proceedings (7 CFR § 1.138).

The respondents admit the jurisdictional allegations contained in the complaint, specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, and waive oral hearing and further procedure. Complainant and respondents agree for the purpose of settling this procedure to the entry of this decision.

FINDINGS OF FACT

1. Respondents are individuals whose mailing address is Route 2, Box 87, La Plata, Missouri 63549.

2. At all times material herein, respondents were licensed and doing business as dealers under the Act.

CONCLUSION

Respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision and order, this decision and order will be entered.

ORDER

1. Respondents shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) and the standards and regulations issued thereunder (9 CFR § 1.1 *et seq.*) and shall cease and desist from any violation thereof, and in particular shall not

deliver dogs eight weeks of age or under to intermediate handlers for shipment in commerce.

2. Respondents' license as a dealer under the Act is suspended for forty-five (45) days.

3. Respondents are assessed a civil penalty of $1,000.

This order shall have the same force and effect as if entered after full hearing and shall become effective on the first day after service of this Decision and Order on the respondents.

In re: BRYAN E. KING. AWA Docket No. 393. Decided on June 11, 1986.

Violation of regulations and standards—License suspended—Civil penalty—Default.

Dealer did not provide adequate and dry housing for dogs. Enclosures were unsanitary and debris on the premises. Proper medical care for dogs not provided. License was suspended for thirty (30) days until compliance with the Act and civil penalty of $1,000.00 was assessed.

Robert Frisby, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Animal Welfare Act, as amended, 7 U.S.C. §§2131-2156, herein referred to as the Act, instituted by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that the respondent willfully violated the Act and regulations and standards promulgated thereunder, 9 CFR §§1.1-3.142.

Copies of the complaint and Rules of Practice, 7 CFR §§1.130-1.151, governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 CFR § 1.139.

FINDINGS OF FACT

1. Bryan E. King, hereinafter referred to as the respondent, is an individual and his address is Rt. 1, Box 131, Quapaw, Oklahoma 74363.

2. The respondent, at all times material herein, was a dealer as defined in the Act and held a Class B license (No. 73-DM) under the Act.

3. At the time of respondent's application for a license, he received a copy of the regulations and standards promulgated under the Act and agreed in writing to comply with them.

4. Animal and Plant Health Inspection Service (APHIS) personnel inspected the respondent's facilities on May 17 and June 5, 1985. Each inspection revealed numerous violations of the regulations and standards issued under the Act. At the conclusion of each of these two inspections, APHIS inspectors explained to the respondent the requirements of the Act and the regulations and standards.

5. On June 12, 1985, an inspection conducted by APHIS officials of respondent's facilities disclosed that the respondent was in violation of section 2.100 of the regulations, 9 CFR § 2.100, and the standards specified below:

(a) Respondent failed to provide an indoor facility with adequate lighting and interior surfaces substantially impervious to moisture for dogs in violation of 9 CFR §§ 3.2 (c) and (d);

(b) Respondent failed to provide shelter against inclement weather for dogs in violation of 9 CFR § 3.3(b);

(c) Respondent failed to provide adequate space for dogs in violation of 9 CFR § 3.4(b);

(d) Respondent failed to provide adequate water and clean water receptacles for dogs in violation of 9 CFR § 3.6;

(e) Respondent failed to keep primary dog enclosures clean in violation of 9 CFR § 3.7(a) and to keep his premises free of debris in violation of 9 CFR § 3.7(c); and

(f) Respondent failed to provide veterinary care for two dogs with mange and a dog with a lesion and lame leg in violation of 9 CFR § 3.10(b).

CONCLUSIONS

By reason of the facts set forth in the Findings of Fact above, the respondent has willfully violated section 2.100 of the regulations, 9 CFR § 2.100, and the specified standards.

ORDER

Respondent Bryan E. King, his agents and employees, directly or through any corporate or other device, shall cease and desist from failing to:

(1) Provide an indoor facility with adequate lighting and interior surfaces substantially impervious to moisture for dogs in accordance with 9 CFR §§3.2 (c) and (d);

(2) Provide shelter against inclement weather for dogs in accordance with 9 CFR § 3.3(b);

(3) Provide adequate space for dogs in accordance with 9 CFR § 3.4(b);

(4) Provide adequate water and clean water receptacles for dogs in accordance with 9 CFR § 3.6;

(5) Keep primary dog enclosures clean in accordance with 9 CFR § 3.7(a);

(6) Keep premises free of debris in accordance with 9 CFR § 3.7(c); and

(7) Provide veterinary care for two dogs with mange and a dog with a lesion and lame leg in accordance with 9 CFR § 3.10(b).

Respondent Bryan E. King is assessed a civil penalty of $1,000 which shall be paid by a certified check or money order made payable to the Treasurer of the United States. The check or money order shall be mailed to Robert M. Frisby, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D. C. 20250-1400.

Respondent's license is hereby suspended for thirty (30) days and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that his operation is in compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 CFR §§1.142 and 1.145.

Copies hereof shall be served upon the parties.

[This Decision and Order Became Final on July 23, 1986—ED.]

In re: EFTON PENDERGRASS. AWA Docket No. 385. Decided on July 31, 1986.

Dealer—Failure to provide adequate facilities for dogs—License suspended—Civil penalty—Consent.

John Griffith, for complainant.
Joseph Woodcock, Aurora, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1–3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Efton Pendergrass is an individual doing business at Route 2, Box 176, Aurora, Missouri 65605.

2. Respondent at all times material herein was a dealer within the meaning of that term as defined in the Act and subject to the provisions of the Act and the regulations and standards issued thereunder.

3. The respondent at all times material herein was licensed as a Class A dealer under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Respondent Efton Pendergrass and his agents and employees shall comply with each and every provision of the Animal Welfare

Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. Specifically the respondent shall cease and desist from:

(a) Failing to maintain primary enclosures so as to protect dogs from injury as required by 9 CFR § 3.4.

(b) Failing to provide adequate lighting for inspection and cleaning as required by 9 CFR § 3.2.

(c) Failing to keep watering receptacles clean and sanitized as required by 9 CFR § 3.6.

(d) Failing to keep primary enclosures clean as required by 9 CFR § 3.7.

2. Respondent is hereby assessed a civil penalty of $250 to be paid by certified check or money order payable to the Treasurer of the United States.

3. Respondent's license (43-A047) is suspended for thirty (30) days and thereafter until respondent demonstrates to the Animal and Plant Health Inspection Service (APHIS) that his facilities comply with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued upon the motion of APHIS in this proceeding terminating this suspension.

The provisions of this order shall become effective on August 1, 1986.

Copies of this decision shall be served upon the parties.

In re: LEONARD KISER d/b/a KISER WILDLIFE RANCH. AWA Docket No. 374. Decided on August 6, 1986.

Failure to provide adequate sanitary conditions for animals—Civil penalty—Consent.

Howard B. Haas, for complainant.
David J. Flower, Somerset, Pennsylvania, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to

the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

The respondent, Leonard Kiser, is an individual doing business as Kiser Wildlife Ranch, RD #1, Box 117, Crainbrook, Pennsylvania 15924. The respondent, at all times material herein, was an exhibitor within the meaning of the Act, and was licensed thereunder (Class C, No. 23E34).

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The respondent, his agent and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Operating as a licensee under the Animal Welfare Act and the regulations issued thereunder without maintaining cages and fencing that meet the structural strength requirements for the animals involved as required by 9 CFR § 3.125(a);

(2) Failing to provide adequate drinking water as required by 9 CFR § 3.130;

(3) Failing to provide sanitation, cleaning, and housekeeping of the pens as required by 9 CFR § 3.131.

Respondent is assessed a civil penalty of $1,000.00 of which $100.00 shall be paid by a certified check or money order made payable to the Treasurer of the United States. The remaining $900.00 is hereby suspended and shall be held in abeyance, provided that within ninety (90) days from the date this order becomes effective the respondent builds around his animal facility an eight-foot high perimeter fence of sufficient strength to prevent animals from escaping.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: VIVIAN MILLER, a/k/a VIVIAN MILLER GRANDPRE, d/b/a V-G VENDERS and VIVIAN'S PETS. AWA Docket No. 376. Decided on August 7, 1986.

Class B Dealer—Failure to follow regulations and standards—Civil Penalty—Dealer license revoked—Consent.

Respondent was selling improperly identified dogs and cats and failed to provide purchase records and to maintain proper inspection records. Respondent also violated standards of clean buildings and grounds. License is revoked. Civil penalty of $1,000.00, payment suspended if respondent is not in violation of the Animal Welfare Act.

M. Bradley Flynn, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Vivian Miller, also known as Vivian Miller Grandpre, is an individual doing business, at all times material herein, as V-G Venders and Vivian's Pets.

2. The respondent, at all times material herein, was located at 16774 Reed Street, Fontana, California 92335.

3. The respondent, at all times material herein, was a licensed Class B dealer (License No. 93B-099) under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Respondent, her agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

a. Selling any animal without such animal being properly identified by an official tag or tattoo;

b. Otherwise violating section 2.50 of the regulations (9 CFR § 2.50);

c. Failing to accompany each shipment of any dog or cat sold or otherwise disposed of with a copy of the record containing information required by section 2.75(a) of the regulations (9 CFR § 2.75(a));

d. Otherwise violating section 2.75 of the regulations (9 CFR § 2.75);

e. Failing to store food in facilities which adequately protect the food from deterioration, molding, or contamination by vermin;

f. Otherwise violating sections 3.1 and 3.125 of the standards (9 CFR §§3.1, 3.125);

g. Failing to provide clean buildings and grounds and preventing a buildup of trash;

h. Otherwise violating sections 3.7 and 3.131 of the standards (9 CFR §§3.7, 3.131); and

i. Failing to maintain, and failing to keep available for inspection records concerning the date and method of disposition of animals, if any animals are disposed of.

2. Respondent is hereby assessed a civil penalty of $1000. Payment of such penalty is suspended so long as respondent is not alleged to be in violation of the Animal Welfare Act or of the regulations and standards promulgated thereunder for a period of one year from the date of this order.

3. Respondent's Class B dealers license No. 93B-099 is hereby revoked. Respondent shall surrender her license within 30 days after the effective date of this order by mailing it to: Animal and Plant Health Inspection Service, Veterinary Services, 83 Scripps Drive, Sacramento, California 95825, Attention: James D. Roswurm, AVIC. The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: GLEN and SHIRLEY THOMPSON. AWA Docket No. 368. Decided on August 19, 1986.

Dealers—Violation of regulations and standards of the Act—License revoked—Civil penalty—Consent.

Robert Frisby, for complainant.
Respondent, *pro se*.

Decision by Dorethea A. Baker, Administrative Law Judge.

DECISION AND ORDER (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156 (1982), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142 (1985). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Glen and Shirley Thompson are individuals whose address is P.O. Box 1, Valley Center, Kansas 67147.

B. The respondents, at all times material herein, were dealers within the meaning of that term as defined in the Act and were licensed as Class B dealers (No. 48-BC-24) under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Glen and Shirley Thompson shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§2131-2156, and the standards and regulations issued thereunder, 9 CFR §§1.1-3.142, and shall cease and desist from any violation thereof.

In particular, the respondents shall cease and desist from failing to:

(1) Repair dog houses as required by 9 CFR §§3.1 and 3.4;

(2) Provide protection from inclement weather for dogs as required by 9 CFR § 3.3;

(3) Repair dog runs and provide adequate drainage as required by 9 CFR §§3.1 and 3.3;

(4) Provide adequate space for dogs, when chained, as required by 9 CFR § 3.4;

(5) Provide clean food and water dishes as required by 9 CFR §§3.5 and 3.6;

(6) Remove accumulations of debris from their facility as required by 9 CFR § 3.7;

(7) Control flies as required by 9 CFR § 3.7; and

(8) Provide proper care for emaciated and apparently malnourished dogs as required by 9 CFR §§3.5 and 3.10.

Respondents are assessed a civil penalty of $2,000, $1,000 of which is suspended provided the respondents do not engage in any business requiring a license under the Animal Welfara Act for a period of three (3) years. After this 3 year period has expired the respondents may apply for a license. The remaining $1,000 civil penalty is payable by certified check or money order nade to the order of the Treasurer of the United States.

Respondents' license (No. 48-BC-24) is revoked.

Copies of this decision shall be served upon the parties.

In re: JULIEN BRONSON, d/b/a BRONSON'S TROPICAL BIRDS. AWA Docket No. 383. Decided on August 25, 1986.

Violation of provisions of the Animal Welfare Act—Failed to maintain records—Did not provide health certificate, issued by licensed veterinarian, for non-human primate—License suspended—Civil penalty—Consent.

Brad Flynn, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to

the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only' to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Julien Bronson is an individual doing business as Bronson's Tropical Birds.

2. The respondent, at all times material herein, was located at 700 Cross River Road, Katonah, New York.

3. The respondent, as all material times herein, was a licensed Class B dealer under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Respondent, his agents and employees, directly or indirectly through any corporation, trust, or other device whatsoever, shall cease and desist from violating the provisions of the Animal Welfare Act and the regulations and standards issued thereunder, and in particular, respondent shall cease and desist from:

a. Filing annual reports which do not correctly indicate the number of animals the respondent bought and sold during the period of time covered by the report;

b. Otherwise violating section 2.7 of the regulations (9 CFR § 2.7);

c. Failing to make, keep, and maintain records that fully and correctly disclose required information concerning animals which were purchased, acquired, owned, held, or possessed by the respondent;

d. Failing to provide a copy of the information required by 9 CFR § 2.75(b)(1) for each shipment of any animal;

e. Otherwise violating section 2.75 of the regulations (9 CFR § 2.75);

f. Failing to provide with each shipment of a non-human primate a health certificate executed and issued by a licensed veterinarian; and

g. Otherwise violating section 2.79 of the regulations (9 CFR § 2.79).

2. Respondent is hereby assessed a civil penalty of $2,000, to be paid by certified check or money order made to the order of the Treasurer of the United States.

3. Respondent's Class B license is hereby suspended for one year and thereafter until respondent demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Animal Welfare Act and the regulations and standards issued pursuant thereto. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued pursuant thereto, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: RICHARD SMITH. AWA Docket No. 373. Decided on June 24, 1986.

Operating without a license—Civil penalty.

Respondent was ordered to cease and desist from operating a dog kennel without being licensed and violating the Act and regulations and standards issued thereunder. A civil penalty of $2,000.00 was assessed.

Howard Haas, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§2131-2156), herein referred to as the Act, instituted by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that the respondent wilfully violated the Act and regulations and standards promulgated thereunder (9 CFR §§1.1-3.142).

Copies of the complaint and Rules of Practice (7 CFR §§1.130-1.151) governing proceedings under the Act were served upon re-

spondent by the Hearing Clerk by certified mail. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C F.R. § 1.139).

FINDINGS OF FACT

1. Richard Smith is an individual whose address is P.O. Box 230, Vian, Oklahoma.

2. The respondent, at all times material herein, was operating a dog kennel and was a dealer within the meaning of the Act. The respondent, at all times material herein, was not licensed as required by the Act.

3. In March 1984, the respondent was aware of the requirement that he be licensed, and in August 1984, the respondent received a copy of the regulations and standards promulgated under the Act. No application was made.

4. In violation of § 4 of the Act and 9 CFR § 2.1, the respondent engaged in business as a dealer in that during March and April 1984, the respondent sold at least nineteen dogs to Julia Gray, a licensed dealer in Texas.

5. On July 10, 1985, the respondent's premises were inspected and as described below the respondent was found to be in violation of section 2.100 of the regulations and the specified standards.

(a) In violation of 9 CFR § 3.1(a), the facilities for dogs were not structurally stable and sound.

(b) In violation of 9 CFR §§ 3.1(b) and 3.6, adequate potable water was not supplied.

(c) In violation of 9 CFR § 3.1(c), food was stored in open containers not providing protection against infestation.

(d) In violation of 9 CFR §§ 3.1(d) and 3.7 (a), (b), animal waste and other filth was piled up and not properly disposed of.

(e) In violation of 9 CFR § 3.3, shelter was inadequate to protect dogs from excessive heat from sunlight.

(f) In violation of 9 CFR § 3.4(b), dogs were overcrowded to the extent that six to ten dogs were housed in small cages only large enough for two dogs.

(g) In violation of 9 CFR § 3.7(c), grounds contained many truck bodies.

(h) In violation of 9 CFR § 3.9, dogs were not maintained in compatible groups.

(i) In violation of 9 CFR § 3.10, adequate veterinary care was not provided in that dogs were allowed to freely roam around the grounds causing a potential rabies problem, and all nineteen dogs sold by the respondent to J. Gray were found to be diseased.

CONCLUSIONS

By reason of the facts set forth in the Findings of Fact above, the respondent has willfully violated § 4 of the Act (7 U.S.C. § 2134), section 2.100 of the regulations (9 CFR § 2.100), and the specified standards.

ORDER

Respondent Richard Smith, his agent and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Operating on any capacity for which a licensee is required under the Animal Welfare Act and the regulations issued thereunder without having applied for and obtained a license in accordance with the Act and the regulations.

(2) Operating as a licensee under the Act without maintaining facilities for dogs that are structurally stable and sound in accordance with 9 CFR § 3.1(a);

(3) Operating as a licensee under the Act without supplying adequate water in accordance with 9 CFR §§ 3.1(b) and 3.6;

(4) Operating as a licensee under the Act without storing food in containers that provide protection against infestation in accordance with 9 CFR § 3.1(c);

(5) Operating as a licensee under the Act without properly disposing of animal waste and other filth in accordance with 9 CFR §§ 3.1(d) and 3.7 (a), (b);

(6) Operating as a licensee under the Act without providing shelter that is adequate to protect dogs from excessive heat in accordance with 9 CFR § 3.3;

(7) Operating as a licensee under the Act without ensuring that dogs are not overcrowded in cages in accordance with 9 CFR § 3.4(b);

(8) Operating as a licensee under the Act without ensuring that grounds are kept clean and free of accumulations of trash in accordance with 9 CFR § 3.7(c);

(9) Operating as a licensee under the Act without maintaining dogs in compatible groups in accordance with 9 CFR § 3.9; and

(10) Operating as a licensee under the Act without providing adequate veterinary care in accordance with 9 CFR § 3.10.

The respondent Richard Smith is assessed a civil penalty of $2,000.00 which shall be paid by a certified check or money order made payable to the Treasurer of the United States. The check or money order shall be mailed to Howard B. Haas, Office of the General Counsel, United States Department of Agriculture, Room 2014-South, Washington, D.C. 20250-1400.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR §§ 1.130-1.151).

Copies hereof shall be served upon the parties.

[This Decision and Order became final on August 29, 1986—ED.]

In re: DANNY and LINDA LYONS, and SANTA'S LAND. AWA Docket No. 394. Decided on August 29, 1986.

Violation of provisions of the Animal Welfare Act—Civil penalty—Consent.

M. Bradley Flynn, for complainant.
Fred Moody, Jr., Bryson City, North Carolina, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Danny and Linda Lyons are owners and officers of Santa's Land, a corporation.

B. The respondents, at all times material herein, were located at Route 1, Box 134A, Cherokee, North Carolina 28719.

C. The respondents, at all times material herein, were licensed exhibitors (License No. 55-C-40).

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. The respondents, their agents, employees, and assigns, acting directly or indirectly, or through any corporation, trust, or any device whatsoever, shall cease and desist from violating any and all provisions of the Animal Welfare Act and the regulations and standards issued thereunder, and in particular the respondents shall cease and desist from:

(a) Failing to provide housing facilities for non-human primates which are structurally sound and in good repair;

(b) Otherwise violating any of the provisions of sections 3.75 and 3.78 of the standards (9 CFR §§ 3.75, 3.78 (1986));

(c) Failing to store food for any animal in covered containers so as to protect the food from contamination and infestation by vermin;

(d) Otherwise violating any of the provisions of sections 3.50, 3.75, and 3.125 of the regulations (9 CFR §§ 3.50, 3.75, 3.125 (1986));

(e) Failing to provide a suitable means of draining excess water from any animal enclosure; and

(f) Otherwise violating any provision of section 3.127 of the regulations (9 CFR § 3.127 (1986)).

2. Respondents are hereby assessed a civil penalty of $1,000, paid by check or money order, and made to the order of the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: MARJORIE BROWN. AWA Docket No. 139. Decided on July 3, 1986.

John Griffith, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

ORDER (OF DISMISSAL)

Complainant has moved to dismiss this case.

In support of complainant's motion, complainant has stated that respondent is no longer operating the dog business which gave rise to the charges in this case.

WHEREFORE, FOR GOOD CAUSE SHOWN, it is hereby ordered that this complaint is dismissed without prejudice.

In re: HELENE INOUYE. AWA Docket No. 405. Decided on August 13, 1986.

Robert Frisby, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

ORDER

Complainant has moved to dismiss this case.

In support of complainant's motion, complainant has stated that the respondent closed her facility and cannot be located. As a result, the complainant was unable to serve her with the complaint.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is ordered that this complaint be dismissed, without prejudice.

In re: JUNE PARK. AWA Docket No. 344. Decided on August 15, 1986.

Robert Frisby, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

ORDER

Complainant has moved to dismiss this case.

In support of complainant's motion, complainant has stated that the respondent closed her facility and cannot be located.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is ordered that this complaint be dismissed, without prejudice.

In re: LEVONIAN BROTHERS, INC. FMIA Docket No. 85. Decided on July 8, 1986.

Meat processor, wholesale distributor—Felony conviction for adulterated food.

Respondent is recipient of federal meat inspection services but operated a wholesale distribution warehouse which is not federally inspected. Respondent was convicted of handling and storing adulterated food. Inspection services under Title I withdrawn for one (1) Year, 50 weeks will be held in abeyance if provisions of this stipulation and consent order are met.

Kevin Thiemann, for complainant.
Peter O. Safir, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. § 601 *et seq.*), hereinafter referred to as the FMIA, and the Applicable Rules of Practice (9 CFR § 335.1 *et seq.*), to withdraw federal meat inspection services from Levonian Brothers, Inc., hereinafter referred to as the respondent. This proceeding was commenced by a complaint filed by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture, who is responsible for the administration of the FMIA. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision as set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision, respondent admits all of the jurisdictional allegations of the complaint, admits the Findings of Fact, and waives:

(a) Any further procedural steps;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by respondent in connection with this proceeding.

FINDINGS OF FACT

1. Levonian Brothers, Inc., is a business, incorporated in the State of New York, which operates a meat processing establishment at 27 River Street, Troy, New York 12180.

2. Levonian Brothers, Inc., is, and at all times material herein was, a recipient of federal meat inspection services under Title I of the Act at 27 River Street, Troy, New York 12180 (Establishment No. 5065).

3. Levonian Brothers, Inc., operates a wholesale distribution warehouse facility, which is not federally inspected, at 41 River Street, Troy, New York 12180.

4. On or about September 11, 1984, Levonian Brothers, Inc., was convicted, in the United States District Court for the Northern District of New York, of one felony for handling and storing food products in a manner which caused them to become adulterated with rodent fecal materials, in violation of the FMIA (21 U.S.C. §§ 601(m)(3), 610(d), 661(c), and 676(a)).

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Order and Consent Decision in disposition of this proceeding, such decision will be issued.

ORDER

1. Inspection services under Title I of the FMIA are withdrawn from and denied to the respondent, its owners, officers, directors, successors, affiliates, or assigns, directly or through any corporate or other device for a period of one (1) year beginning on June 18, 1986. Two (2) consecutive weeks of actual suspension will begin December 21, 1986 and end on January 3, 1987. During this two consecutive week period respondent will only be permitted to perform general maintenance, sanitation, and renovation work at its federally inspected facility. This Order will not effect normal operations at the respondent's wholesale distribution warehouse facility. The remaining fifty (50) weeks of the one (1) year withdrawal period will be held in abeyance and will not become effective:

(a) For so long as, within one (1) year of the effective date of this Consent Decision, respondent, or any of its officers, employees, or agents do not violate (as that term is defined in paragraph 2 *infra*) any section of the FMIA (21 U.S.C. § 601 *et seq.*) involving the preparation, sale, transportation, or attempted distribution of any adulterated or misbranded products; and

(b) For so long as respondent, within one (1) year of the effective date of this Consent Decision:

(1) Does not knowingly hire, in any capacity, any individual who has been convicted of any felony; and

(2) To the extent permitted by New York law, dismisses from its employment any such individual, hired after the effective date of this Consent Decision, when that individual's conviction becomes known.

2. The violation of any provision in paragraph 1 of this Order will result in the immediate withdrawal of inspection services under Title I of the FMIA. The term "violation" means a final decision in a formal adjudicatory proceeding before the Secretary of Agriculture or a conviction in federal or state court. This shall not preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

3. If any provision of this Order is declared to be invalid, such declaration shall not affect the validity of any other provision herein.

4. This Order shall become effective on the day upon which service of this Order is made upon the respondent.

DISCIPLINARY DECISIONS

In re: PAUL JOLLEY. P & S Docket No. 6665. Decided on July 3, 1986.

Dealer—Market agency—Failure to pay when due—Registration suspended—Consent.

Roberta Swartzendruber, for complainant.
Jim H. Camp, Sparta, Tennessee, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION (CONSENT)

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Paul Jolley, hereinafter referred to as the respondent, is an individual whose principal place of business is located in Doyle, Tennessee, and whose business mailing address is Route 1, Doyle, Tennessee 38559.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis and buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Paul Jolley, his agents and employees, directly or through any corporate or other device, in connection with his business operations subject to the Packers and Stockyards Act, shall cease desist from failing to pay, when due. the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of 21 days.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: LEFFLER BROS. INC., FRED G. STERNAU and ALAIN FOSTER. P & S Docket No. 6650. Decided on July 11, 1986.

Packer—Failure to pay when due—Insufficient funds—Civil penalty—Consent.

Allan Kahan, for complainant.
Ben C. Friedman, P.C., New York, New York, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION WITH RESPECT TO ALAIN FOSTER (CONSENT)

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding. (7 CFR § 1.138).

Respondent Alain Foster admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they apply to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Leffler Bros. Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of

New York. Its business mailing address is c/o Fred G. Sternau, Box 216, Schoolhouse Road, Cross River, New York 10518.

2. The corporate respondent was at all times material herein:

(a) Engaged in the business of marketing meat, meat food products and poultry products acting as a wholesale broker, dealer or distributor in commerce; and

(b) A packer within the meaning of the Act and subject to the provisions of the Act.

3. Alain Foster, hereinafter referred to as respondent Foster, is an individual whose business mailing address is 147-12 95th Avenue, Jamaica, New York 11435.

4. Respondent Foster was at all times material herein owner, through De Mer Resource Corporation, of 14% of the stock of the corporate respondent, and was President of the corporate respondent from November, 1983 to June, 1984.

5. Respondent Foster was, at all times material herein a packer within the meaning of the Act and subject to the provisions of the Act.

CONCLUSIONS

Respondent Alain Foster having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Alain Foster, directly or through any corporate or other device, shall cease and desist from:

(1) Failing to pay, and from failing to pay when due, for meat and meat food products and poultry products purchased; and

(2) Issuing checks in payment for meat, meat food products or poultry products without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks or drafts when presented for payment.

Respondent Alain Foster is hereby assessed a civil penalty of Five Thousand Dollars ($5,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: DAVID WILLIAMS. P & S Docket No. 6710. Decided on July 11, 1986.

Dealer—Bonding requirement not met—Cease and desist—Consent.

Ben E. Bruner, for complainant.
Respondent, *pro se*.

Decision by Dorethea A. Baker, Administrative Law Judge.

DECISION (CONSENT)

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent, David Williams, is an individual whose mailing address is Route 2, Box 207A, Carlisle, Arkansas 72024.

2. The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent David Williams, directly or through any corporate or other device, in connection with his operations subject to the Act,

shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH. P & S Docket No. 6174. Decided on July 14, 1986.

Dealer—Failure to pay when due—Use of incomplete financial statements—Ordered to cease and desist—Consent.

Alan Kahan, for complainant.
Harrison W. Hertlberg and *Michael B. Margolis*, Los Angeles, California, for respondents.

Decision by Victor W. Palmer, Administrative Law Judge.

(CONSENT) DECISION WITH RESPECT TO LANDMARK BEEF PROCESSORS, INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, and a subsequent Amended Complaint and Notice of Hearing alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Landmark Beef Processors, Inc., admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they pertain to it and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Landmark Beef Processors, Inc., hereinafter referred to as respondent Landmark Beef Processors, is a corporation whose busi-

ness mailing address is 3163 E. Vernon Avenue, Los Angeles, California 90058.

2. Respondent Landmark Beef Processors is, and at all times material herein was:

(a) Engaged in the business of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent Landmark Beef Processors, Inc., having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Landmark Beef Processors, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, for meat and meat food products purchased;

2. Preparing and using any false, misleading, incorrect or incomplete financial statements or inventory reports for the purpose of inducing suppliers and vendors of meat and meat food products to sell or otherwise transfer such products to respondents.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in its business subject to the Packers and Stockyards Act and the regulations, including, but not limited to: (1) invoices and other accountings which disclose all purchases and sales of meat or meat food products; (2) records of all receipts and disbursements; (3) a general ledger of accounts disclosing respondent's assets, liabilities, income, expenses and net worth; and (4) an accurate and current inventory record.

Respondent shall keep and maintain, and shall not destroy or otherwise dispose of, any purchase invoices, sales invoices, inventory records, or similar accounts and records documenting the purchase and sale of meat or meat food products for a minimum period of two years. In addition, respondent shall strictly comply with the provisions of section 203.4 of the statements of general policy (9 CFR § 203.4).

The provisions of this order shall become effective on the first day after service of this decision on respondent Landmark Beef Processors, Inc.

Copies hereof shall be served upon the parties.

In re: WALKERTON LIVESTOCK AUCTION INC., and DARRELL GLASS. P & S Docket No. 6495. Decided on July 14, 1986.

Dealer—Bonding requirement not met—Civil penalty—Consent.

Ben E. Bruner, for complainant.
Harry R. Hart, Knox, Indiana, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION (CONSENT)

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Walkerton Livestock Auction, Inc., hereinafter referred to as respondent Walkerton, is a corporation with its principal place of business located at Walkerton, Indiana. Respondent Walkerton's business mailing address is Route 1, Walkerton, Indiana 46574.

2. Respondent Walkerton is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Walkerton Livestock Auction, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in the business of a market agency, selling livestock in commerce on a commission basis; and

(c) Engaged in the business of a dealer, buying and selling livestock in commerce for its own account; and

(d) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

3. Darrell Glass, hereinafter referred to as respondent Glass, is an individual with his principal place of business located at Walkerton, Indiana. Respondent Glass' business mailing address is Route 1, Walkerton, Indiana 46574.

4. Respondent Glass is, and at all times material herein was:

(a) Owner and president of respondent Walkerton, and managed, directed and controlled its market agency and dealer operations;

(b) Engaged in the business of a market agency and dealer within the meaning of those terms as defined in the Act and subject to the provisions of the Act; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Walkerton Livestock Auction, Inc., its officers, directors, agents and employees, successors and assigns, and respondent Glass, his agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and regulations.

Respondents are jointly and severally assessed a civil penalty in the amount of Three Hundred Dollars ($300.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies hereof shall be served upon the parties.

In re: MELOY H. HART and DONNA L. HART. P & S Docket No. 6695. Decided on July 15, 1986.

Livestock dealer—Bonding requirements—Suspension pending compliance—Civil penalty—Consent.

Allan R. Kahan, for claimant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Meloy H. Hart and Donna L. Hart, hereinafter referred to as the respondents, are partners doing business as Hart Livestock. Respondents' business mailing address is 1200 Coal Canyon Rd., Corona, California 91720.

2. The respondents are, and at all times material herein were:

(a) Engaged in the business of buying and selling livestock in commerce for their own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Meloy H. Hart and Donna L. Hart, their agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondents are suspended as registrants under the Act until they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Seven Hundred and Fifty Dollars ($750.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: HUB CITY LIVESTOCK SALES, INC. P & S Docket No. 6705.. Decided on July 15, 1986.

Livestock dealer—Insolvency—Suspension pending compliance—Consent.

Andrew Y. Stanton, for complainant.
Daniel Olsen, Kansas City, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondent did not meet the requirements of the Act, and that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the re-

maining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Hub City Livestock Sales, Inc., hereinafter referred to as the respondent, is a corporation with a business mailing address at P.O. Box 1735, Aberdeen, South Dakota 57401.

2. The respondent is and at all times material herein was:

(a) Engaged in the business of selling livestock on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, its officers, directors, agents and employees, shall cease and desist from:

1. Engaging in business as a market agency while its current liabilities exceed its current assets;

2. Failing to deposit in any "Custodial Account for Shippers' Proceeds" within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42) amounts equal to the proceeds receivable for the sale of consigned livestock; and

3. Failing to otherwise maintain its "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42).

Respondent, Hub City Livestock Sales, Inc., is suspended as a registrant under the Act for a period of 14 days and thereafter until it demonstrates that it is no longer insolvent and that the deficit in its custodial account has been eliminated. When respondent demonstrates that it is no longer insolvent and that the deficit in its custodial account has been eliminated, a supplemental order will be issued terminating this suspension after the expiration of the 14 day period of suspension.

The provisions of this Order shall become effective on the 30th day of July, 1986.

Copies of this decision shall be served upon the parties.

In re: CHAMPION PACKERS, INC. P & S Docket No. 6617. Decided on July 22, 1986.

Meat packer—Insolvency—Livestock purchases limited to cash at time of purchase—Consent.

Peter V. Train, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of Champion Packers, Inc. does not meet the requirements of the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph 1 of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Champion Packers, Inc., hereinafter referred to as the respondent Champion, is a corporation whose mailing address is P.O. Box 68, Waterloo, Wisconsin 53594.

2. Respondent Champion is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Champion Packers, Inc., its successors, officers, directors, agents and employees, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from purchasing livestock in commerce if it becomes insolvent, i.e., if current liabilities exceed current assets, unless the respondent pays the full purchase price of the livestock at the time of purchase in U.S. currency, by cashier's check or wire transfer.

Respondent has demonstrated that it is presently solvent. Therefore it may continue paying for its livestock purchases by check for so long as its current assets remain greater than its current liabilities.

This order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondent.

Copies of this decision shall be served upon the parties.

In re: MID-WEST MEAT COMPANY, INC., and ERNEST G. BARBELLA.
P & S Docket No. 6734. Decided on July 22, 1986.

Meat packer and distributor—Misrepresentation of source of meat products sold—Payment to influence supplier employees—Civil penalty—Consent.

Jory M. Hochberg, for complainant.
Marvin B. Segal, New York, New York, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor

deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Mid-West Meat Company, Inc., hereinafter referred to as respondent Mid-West, is a corporation organized and existing under the laws of the State of New York. Its business mailing address is 61 Second Street, Mineola, New York 11501.

2. Ernest G. Barbella, hereinafter referred to as respondent Barbella, is an individual whose business address is 61 Second Street, Mineola, New York 11501.

3. Respondent Barbella is and at all times material herein was:

(a) President, manager and a director of respondent Mid-West;

(b) Owner of a substantial percentage of the outstanding stock issued by respondent Mid-West; and

(c) Responsible for the direction, management and control of respondent Mid-West.

4. Respondents Mid-West and Barbella are, and at all times material herein were:

(a) Engaged in the business of marketing meats and meat food products, acting as a wholesale broker, dealer or distributor in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Mid-West Meat Company, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondent Barbella, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Misrepresenting to purchasers of meat or meat food products, or aiding and assisting any person to misrepresent to such purchasers:

(a) the identity of the seller of the meat or meat food products; and

(b) the source of the meat or meat food products being sold.

2. Giving consideration of more than nominal value to, or for the benefit of an officer, director, agent or employee of a supplier or customer of respondent for the purpose of influencing such officer, director, agent or employee in the course of the performance of his duties for his principal or employer.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Mid-West and Barbella are jointly and severally assessed a civil penalty in the amount of Eighty-Five Thousand Dollars ($85,000.00).

The provisions of this order shall become effective on the first day after service of this order on respondents.

Copies of this decision shall be served upon the parties.

In re: OTTO DOERRER AND SON, INC., RUDOLPHO PANIGROSSO and GENE LOMBARDO. P & S Docket No. 6459. Decided on July 23, 1986.

Failure to pay when due—Civil penalty—Consent.

Allan Kahan, for complainant.
Frank D. Platt, New York, New York, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION WITH RESPECT TO RESPONDENTS OTTO DOERRER AND SON, INC. AND RUDOLFO PANIGROSSO

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Otto Doerrer and Son, Inc. and Rudolfo Panigrosso admit the jurisdictional allegations set forth in paragraph I of the Complaint and Notice of Hearing as they relate to them, and specifically admit that the Secretary has jurisidiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Otto Doerrer and Son, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of New York. Its business mailing address is B-19 Hunts Point Cooperative Market, Bronx, New York 10474.

2. The corporate respondent was, at all times material herein:

a. Engaged in the business of buying livestock in commerce for purposes of slaughter; and

b. A packer within the meaning of and subject to the provisions of the Act.

3. Rudolfo Panigrosso, hereinafter referred to as the respondent Panigrosso, is an individual whose mailing address is 3 Gypsy Place, Rye, New York 10580.

4. Respondent Panigrosso is, and at all times material herein was:

a. President and owner of 100% of the stock of respondent Otto Doerrer and Son, Inc.; and

b. Responsible for the management, direction and control of the practices and activities of respondent Otto Doerrer and Son, Inc.

5. Respondent Panigrosso was, at all times material herein, a packer within the meaning of the Act and subject to the provisions of the Act.

CONCLUSIONS

Respondents Otto Doerrer and Son, Inc. and Rudolfo Panigrosso having admitted the jurisidictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Otto Doerrer and Son, Inc., its officers, directors, agents and employees, and respondent Rudolfo Panigrosso, directly or through any corporate or other device, shall cease and desist from failing to pay, when due, for meat and meat food products.

Respondent Otto Doerrer and Son, Inc. and Rudolfo Panigrosso are jointly and severally assessed a civil penalty of Eighteen Thousand Seven Hundred and Fifty Dollars ($18,750.00).

The provisions of this order shall become effective on the first day after service on the respondents.

Copies of this decision shall be served upon the parties.

In re: LEROY H. HOTTLE and DEBORAH M. HOTTLE. P & S Docket No. 6578. Decided on July 29, 1986.

Livestock dealer—Liabilities exceed assets—Custodial account—Insufficient funds checks—Suspension of registration—Consent.

Andrew Y. Stanton, for complainant.
Robert L. Miller, Waverly, New York, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondents does not meet the requirements of the Act, and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Leroy H. Hottle and Deborah M. Hottle, hereinafter referred to as the respondents, are individuals doing business as Owego Livestock Sales with a business mailing address at Box 202, RD 3, Owego, New York 13827.

2. The respondents are and at all times material herein were:

(a) Engaged in the business of selling livestock in commerce on a commission basis and buying and selling livestock in commerce for their own account; and

(b) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce for their own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents individually, or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a market agency or dealer while their current liabilities exceed their current assets;

2. Failing to deposit in any "Custodial Account for Shippers' Proceeds" within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42) amounts equal to the proceeds receivable from the sale of consigned livestock;

3. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit in the bank account upon which they are drawn to pay such checks; and

5. Failing to pay, when due, the full purchase price of livestock.

The respondents, in connection with their operations as a market agency and dealer, shall keep and maintain accounts, records and memoranda which fully and correctly disclose their transactions subject to the Act and the regulations, including but not limited to: purchase and sales invoices, copies of issued scale tickets, bank notices of insufficient funds checks, cancelled checks, deposit slips, bank statements, and monthly reconcilations of their bank accounts.

The respondents are suspended as registrants under the Act for a period of 14 days and thereafter until they demonstrate that they are no longer insolvent and that the deficit in their "Custodial Account for Shippers' Proceeds" has been eliminated. When the respondents demonstrate that they are no longer insolvent and that the deficit in the "Custodial Account for Shippers' Proceeds" has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 14 day period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: DELMAR R. MILLS. P & S Docket No. 6647. Decided on May 19, 1986.

Livestock dealer—Insolvency—Custodial account—Insufficient funds checks—Suspension of registration.

In respondent's business of trading in livestock for his own account and for others, checks issued for payment of livestock were returned due to insufficient funds. Respondent's current liabilities exceed assets. Registration is suspended for five (5) years but may be reduced to forty-five (45) days if unpaid livestock sellers are paid in full and financial conditions meet requirements of the Act.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers snd Stockyards Administration, United States Department of Agriculture, charging that the respondent's financial condition does not meet the requirements of the Act and that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 CFR § 202.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Delmar R. Mills, hereinafter referred to as the respondent, is an individual doing business as Mills Neoga Livestock Auction. Respondent's principal place of business is located in Neoga, Illinois, and his business mailing address is Box F, Neoga, Illinois 62447.

(b) The respondent, at all times material herein, was:

(1) Engaged in the business of a market agency selling livestock in commerce on a commission basis;

(2) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

2. (a) As of March 29, 1985, respondent's current liabilities exceeded his current assets. As of that date, the respondent had current liabilities in the amount of $210,783.00 and current assets in the amount of $2,288.67, resulting in an excess of current liabilities over current assets of $208,494.33.

(b) The respondent's current liabilities presently exceed his current assets.

3. The respondent, in connection with his business as a market agency selling livestock on a commission basis, failed to maintain and use properly his Custodial Account for Shippers' Proceeds, hereinafter referred to as the custodial account, thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due the owners and consignors of livestock, in that:

(a) As of March 29, 1985, the respondent had outstanding custodial account checks in the amount of $55,698.59, an overdraft in the amount of $1,350.87, and proceeds due shippers of livestock in the amount of $11,035.79, and had, to offset these amounts, cash on hand in the amount of $8,645.26, resulting in a shortage in the amount of $59,439.99 in funds available to pay shippers their proceeds.

(b) This shortage was due, in part, to the failure of the respondent to deposit in his custodial account, within the time prescribed by the regulations, an amount equal to the proceeds receivable from the sale of consigned livestock.

4. (a) The respondent, in connection with his business as a market agency subject to the Act, on or about the dates and in the transactions set forth in paragraph IV of the complaint, and at various other times between February 4, 1985, and March 18, 1985, issued custodial account checks to consignors of livestock in purported payment of the net proceeds due from the sale of livestock which were returned unpaid by the bank upon which they were drawn because the respondent did not have and maintain sufficient funds on deposit and available in his custodial account to pay such checks when presented.

(b) The respondent, on or about the dates and in the transactions set forth in paragraph IV of the complaint, and at various other times between February 4, 1985, and March 18, 1985, sold consigned livestock and failed to remit to the consignors of such livestock, when due, the net proceeds resulting from the sale of their livestock.

(c) As of August 7, 1985, the respondent had failed to remit a total of $62,462.40 to consignors due from the sale of their livestock.

5. (a) The respondent, in connection with his operations as a dealer subject to the Act, on or about the dates and in the transactions set forth in paragraph V of the complaint, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because the respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) The respondent, on or about the dates and in the transactions set forth in paragraph V of the complaint, purchased livestock and failed to pay, when due, for such livestock purchases.

(c) As of August 7, 1985, there remained unpaid a total of $3,511.06 for such livestock purchases.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the financial condition of the respondent does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 3 herein, the respondent has wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 CFR § 201.42).

By reason of the facts found in Finding of Fact 4 herein, the respondent has wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.43(a) of the regulations (9 CFR § 201.43(a)).

By reason of the facts found in Finding of Fact 5 herein, the respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Delmar R. Mills, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Act, shall cease and desist from:

1. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Issuing checks in payment of the proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they were drawn to pay such checks when presented;

4. Failing to remit to the owners and consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock;

5. Failing to remit to the owners and consignors of livestock the net proceeds resulting from the sale of consigned livestock;

6. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

7. Failing to pay, when due, for livestock purchases;

8. Failing to pay for livestock purchases; and

9. Engaging in business subject to the Act while his current liabilities exceed his current assets.

The respondent is suspended as a registrant under the Act for a period of five (5) years, provided, however, that a supplemental order will be issued terminating this suspension at any time after the expiration of forty-five (45) days upon demonstration by the respondent that all unpaid livestock sellers have been paid in full, the shortage in his Custodial Account for Shippers' Proceeds has been eliminated and that his financial condition meets the requirements of the Act. This suspension may be further modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the forty-five (45) day period of suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and order became final on July 29, 1986—ED.]

In re: L.M. SELF. P & S Docket No. 6629. Decided on July 31, 1986.

Livestock dealer—Failure to pay when due—Insufficient funds checks—Suspension of registration—Consent.

Andrew Y. Stanton, for complainant.
Samuel J. Abrams, Sumter, South Carolina, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. L.M. Self, doing business as L.M. Self Livestock, Inc., hereinafter referred to as the respondent, is an individual whose business mailing address is 570 Pinewood Road, Sumter, South Carolina 29150.

2. The respondent at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent L.M. Self, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

Respondent L.M. Self is suspended as a registrant under the Act for a period of five years, provided, however, that a supplemental order will be issued terminating this suspension at any time after the expiration of 120 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided further that this suspension may be modified upon application to the Packers and Stockyards Administration to permit respondent's employment by another registrant or packer after the expiration of the 120 day period of suspension.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: KNOKE LIVESTOCK BUYERS, INC., and THOMAS LENZ. P & S Docket No. 6565. Decided on August 4, 1986.

Livestock dealer—Failure to pay when due—Insufficient funds checks—Suspension of registration—Consent.

Jory M. Hochberg, for complainant.
Robert Brinton, Clarion, Iowa, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agricuiture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary

has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Knoke Livestock Buyers, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Iowa, with its principal place of business located in Knoke, Iowa. Its business mailing address is Knoke, Iowa 50553.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for its own account;

(b) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and a market agency to buy livestock in commerce on a commission basis.

3. Thomas Lenz, hereinafter referred to as the individual respondent, is an individual whose business mailing address is Knoke, Iowa 50553.

4. The individual respondent is, and at all times material herein was:

(a) President and principal stockholder of the corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent;

(c) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account;

(d) Engaged in the business of a market agency buying livestock in commerce on a rommission basis; and

(e) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Knoke Livestock Buyers, Inc., its officers, directors, agents, and employees, and respondent Thomas Lenz, individually or as an officer, agent or employee of respondent Knoke Livestock Buyers, Inc., directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

Respondents shall prepare and maintain accounts, records and memoranda which fully and correctly disclose all transactions in their business subject to the Act including (1) load assembly sheets; and (2) scale tickets.

Respondents are suspended as registrants under the Act for a period of sixty (60) days.

The provisions of this order shall become effective on the first day of August, 1986.

Copies of this decision shall be served on the parties.

In re: WILLIAM and ARLENE MacKERRACHER. P & S Docket No. 6712. Decided on August 4, 1986.

Dealer—Market agency—Bonding requirement—Civil penalty—Consent.

Andrew Y. Stanton, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondents, William and Arlene MacKerracher, are partners doing business as All Western Sales Co. Respondents' business mailing address is 23377 North Elliott Road, Acampo, California 95220.

2. The respondents are, and at all times material herein were:

(a) Engaged in the business of conducting and operating the All Western Sales Co., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents William and Arlene MacKerracher, their officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondents are suspended as registrants under the Act until they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of One Thousand Dollars ($750.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: CHEHALIS LIVESTOCK MARKET, INC. P & S Docket No. 6696. Decided on A igust 5, 1986.

Livestock dealer—Ordered to cease operations while liabilities exceed assets—Consent.

Ben E. Bruner, for complainant.
Paul Snyder, Tacoma, Washington, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondent does not meet the requirements of the Act and that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Chehalis Livestock Market, Inc., hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Chehalis, Washington. Its mailing address is 137 LaBree Road, Chehalis, Washington 98532.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Chehalis Livestock Market, Inc., its agents and employees, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business subject to the Act while its current liabilities exceed its current assets.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: JERRY L. FINLEY. P & S Docket No. 6672. Decided on June 26, 1986.

Livestock dealer—Bonding requirements—Failure to pay when due—Insufficient funds checks—Suspension—Default.

Respondent engaged in livestock trading for own account and failed to increase surety bond to $100,000.00 as instructed. Checks for payment of livestock have been returned unpaid and, on various occasions, respondent failed to pay full price when due. Respondent is ordered to cease and desist and dealer registration is suspended for five (5) years.

Jory Hochberg, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 CFR § 202.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Jerry L. Finley, d/b/a River Valley Cattle Co., Cattlemen's Shipping and Receiving Center, Southern Cross Cattle Co., Centennial Cattle Co., and Frontier Cattle Co., hereinafter referred to as the respondent, is an individual whose business mailing address is 3038 Edinburg, Fort Smith, Arkansas 72903.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer, buying and selling livestock in commerce for his own account.

2. Respondent was notified by mail that the $10,000 surety bond which he maintained to secure the performance of his livestock obligations under the Act was inadequate and that it was necessary to increase his bond to $100,000.00. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

3. The respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth in paragraph III of the complaint, and on various other occasions, issued checks or drafts in purported payment for livestock purchased in commerce from Bagby Land & Cattle Co., which checks or drafts were returned unpaid by the banks upon which they were drawn because respondent did not have and maintain sufficient funds on

deposit and available in the accounts upon which such checks or drafts were drawn to pay such checks or drafts when presented.

4. (a) The respondent, on or about the dates and in the transactions set forth in paragraph III of the complaint, and on various other occasions, in connection with his operations as a dealer, purchased livestock in commerce and failed to pay, when due, the full purchase price of such livestock.

(b) As of January 26, 1986, there remained unpaid in excess of $1,000,000.00 for livestock purchased.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the respondent has willfully violated section 312(a) of the Act (7 U.S.C. 213(a)), and sections 201.29 and 201.30 of the regulations promulgated thereunder (9 CFR §§ 201.29, 201.30).

By reason of the facts found in Findings of Fact 3 and 4 herein, the respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. § 213(a), 228(b)).

ORDER

Respondent Finley, his agents, employees, representatives, successors and assigns, directly or indirectly, or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required under the Act and regulations;

2. Issuing checks or drafts in purported payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the account upon which such checks or drafts are drawn to pay such checks or drafts when presented; and

3. Failing to pay, when due, for livestock purchased.

Respondent is suspended as a registrant under the Act for a period of five years and until such time as he complies fully with the bonding requirements under the Act and the regulations. Once respondent has complied fully with the bonding requirements of the Act and the regulations, a supplemental order will be issued in this proceeding terminating the suspension after the five year period, provided, however, that upon application to the Packers and Stockyards Administration a supplemental order may be also be issued terminating this suspension after the expiration of 180 days upon demonstration by respondent that he has complied fully with the bonding requirements of the Act and the regulations and

that all unpaid livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the 180 day period of suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and Order became final on August 6, 1986—ED.]

In re: ELDON WILLIAMS. P & S Docket No. 6569. Decided on August 18, 1986.

Livestock dealer—Bonding requirement—Suspension pending compliance—Civil penalty—Consent.

Ben E. Bruner, for complainant.

Ann Tilford Sims, Belen, New Mexico, for respondent.

Decision by William J. Weber, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Eldon Williams, hereinafter referred to as the respondent, is an individual whose mailing address is P.O. Box 22, Moriarty, New Mexico 87035.

2. Respondent is, and at all times material herein was:

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(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account. Such registration has been inactive since June 13, 1983.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Eldon Williams, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: ROBERT HIBBERD. P & S Docket No. 6713. Decided on August 21, 1986.

Livestock dealer—Market agency—Insufficient funds checks—Failure to pay when due—Suspension of registration—Consent.

Edward M. Silverstein, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Robert Hibberd, hereinafter referred to as the respondent, is an individual whose mailing address is Valley View Trailer Park # 192, Kearney, Nebraska 68847.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a market agency, buying livestock in commerce on a commission basis and the business of a dealer, buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to purchase livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Hibberd, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank

account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of 90 days upon demonstration that (a) all unpaid livestock sellers have been paid in full; and (b) that respondent is in full compliance with the bonding requirements of the Act and regulations, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit the salaried employment of respondent by another registrant after the expiration of the 90 day period of suspension.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: CURTIS J. LEDET. P & S Docket No. 6732. Decided on August 22, 1986.

Livestock dealer—Market agency—Bonding requirement—Civil penalty—Consent.

Ben Bruner, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Curtis J. Ledet, hereinafter referred to as the respondent, is an individual whose business mailing address is 1907 Slatter Street, Houma, Louisiana 70363.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Curtis J. Ledet, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Seven Hundred and Fifty Dollars ($750.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: OZARK COUNTY CATTLE COMPANY, INC., DWIGHT LEDBETTER, LEDBETTER LAND and CATTLE COMPANY, INC., and H.H. LEDBETTER, NATIONAL ORDER BUYING COMPANY OF ST. JOSEPH, MISSOURI and THOMAS D. RUNYAN, DIXIE NATIONAL STOCKYARDS, INC., d/b/a ABRAHAM CATTLE COMPANY, DR. LEROY ABRAHAM and JEFFERY JACKSON. P & S Docket No. 6743. Decided on August 22, 1986.

Livestock dealers—Market agents—Misrepresentation of bank account balance by creation of false "float"—Suspension—Civil penalty.

Ben Bruner, for complainant.
Henry C. Shelton, Memphis, Tennessee, for respondents.

Decision by William J. Weber, Administrative Law Judge.

DECISION WITH RESPECT TO DIXIE NATIONAL STOCKYARDS, d/b/a ABRAHAM CATTLE COMPANY, DR. LEROY ABRAHAM AND JEFFREY JACKSON

This proceeding was instituted under the Packers and Stockysrds Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of respondents Ozark County Cattle Company, Inc., and National Order Buying Company of St. Joseph, Missouri, does not meet the requirements of the Act and that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Dixie National Stockyards, Inc., d/b/a Abraham Cattle Company, Dr. LeRoy Abraham and Jeffrey Jackson admit the jurisdictional allegations in paragraph I of the complaint as they pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Dixie National Stockyards, Inc., d/b/a Abraham Cattle Company, hereinafter referred to as respondent Dixie, is a corporation organized and existing under the laws of the State of Tennessee. Its mailing address is 1460 Wardford Street, P.O. Box 8447, Memphis, Tennessee 38108.

2. Respondent Dixie at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for its own account and acting as an agent of the purchaser or vendor of livestock; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and provide clearing services as an agent of purchasers or vendors of livestock;

3. Respondent LeRoy Abraham is an individual whose business mailing address is 1460 Warford Street, P.O. Box 8447, Memphis, Tennessee 38101.

4. Respondent LeRoy Abraham at all times material herein was:

(a) President of respondent Dixie National Stockyards, Inc;

(b) Owner of 50% of the outstanding stock of respondent Dixie National Stockyards, Inc; and

(c) Responsible for the direction, management and control of respondent Dixie National Stockyards, Inc., d/b/a respondent Abraham Cattle Company.

5. Jeffrey Jackson, hereinafter referred to as respondent Jackson, is an individual whose business mailing address is 1460 Warford Street, P.O. Box 8447, Memphis, Tennessee 38101.

6. Respondent Jackson at all times material herein was:

(a) General Manager of respondent Abraham Cattle Company, Inc.;

(b) Engaged in the business of buying and selling livestock in commerce as the employee or agent of the vendor or purchaser of livestock; and

(c) A "dealer" as that term is defined in the Act.

CONCLUSIONS

Respondents having admitted the jurisdictional facts as they pertain to them and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Dixie National Stockyards, Inc., d/b/a Abraham Cattle Company, Dr. LeRoy Abraham and Jeffrey Jackson, their officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from exchanging drafts or checks with any person for the purpose or with the effect of concealing the true amount of funds available in any checking or other bank account or of creating a false "float" or balance in any such account.

Respondent Dixie National Stockyards, Inc., is suspended as s registrant under the Act for a period of six (6) months.

Respondent Dr. LeRoy Abraham is prohibited from operating subject to the Act for a period of six (6) months.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents Dixie National Stockyards, Inc., Dr. LeRoy Abraham and Jeffrey Jackson are jointly and severally assessed a civil penalty in the amount of Fifty Thousand Dollars ($50,000.00). Such civil penalty shall be paid in full on or before November 8, 1986.

Respondent Jeffrey Jackson is prohibited from operating subject to the Act for a period of two (2) years, thirty (30) days of which shall be active prohibition, and the remaining twenty-three (23) months of which shall be held in abeyance and which shall not become effective unless respondent, after being afforded the opportunity for a hearing, is found to have engaged in the practice described in paragraph VII of the complaint during such twenty-three (23) months and thirty (30) days. The thirty (30) days of active prohibition will begin on September 1, 1986. At the expiration of that thirty (30) day period, the twenty-three (23) month period of prohibition held in abeyance will begin.

No provision of this order shall be construed to prohibit respondent Dixie National Stockyards, Inc., d/b/a Abraham Cattle Company from performing any contract for the purchase or sale of livestock entered into prior to July 1, 1986, or to permit or encourage any person contracting with Dixie National Stockyards, Inc. to breach or fail to perform any such contract, or to prohibit or disapprove performance of that memorandum agreement between Dixie National Stockyards, Inc., LeRoy Abraham, and Prairie Livestock, Inc. of June 21, 1986, as amended July 10, 1986.

The provisions of this order shall become effective on the sixth day after service of this order on respondents.

Copies of this decision shall be served upon the parties.

In re: JIMMY HIGGINS. P & S Docket No. 6589. Decided on August 27, 1986.

Livestock dealer and market agent—Bonding requirement—Suspension of registration—Civil penalty—Consent.

Ben Bruner, for complainant.
D. Russell Thomas, Murfreesboro, Tennessee, for respondent.

Decision by William J. Weber, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and stookyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jimmy Higgins, doing business as Higgins Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is P.O. Box 396, Wobdbury, Tennessee.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account, and the business of a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to bay and sell livestock in commerce for his own account.

CONCLUSIONS

The Respondent have admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jimmy Higgins, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. 213(b)), respondent is assessed a civil penalty in the amount of Seven Hundred Fifty Dollars ($750.00).

The provisions of this order shall become effective on September 6, 1986.

Copies of this decision shall be served upon the parties.

In re: GRO-TEX INVESTMENTS, INC., and RUSSELL I. DE CORDOVA. P & S Docket No. 6670. Decided on August 27, 1986.

Unregistered livestock dealer—Bonding requirement—Civil penalty—Consent.

Peter Train, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Gro-Tex Investments, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Texas. Corporate respondent's business mailing address is Route 2, Box 140–E, Groesbeck, Texas 76642.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for its own account; and

(b) Not registered with the Secretary of Agriculture.

3. Russell I. De Cordova, hereinafter referred to as the individual respondent, is an individual whose mailing address is Route 2, Box 140-E, Groesbeck, Texas 76642.

4. The individual respondent is, and at all times material herein was:

(a) Owner of the corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Gro-Tex Investments, Inc., its officers, directors, agents, successors and assigns, and Russell I. De Cordova, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent Russell I. De Cordova is suspended as a registrant under the Act and respondent Gro-Tex Investments, Inc., is prohibited from operating subject to the Act until such time as they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. 213(b)), respondents are severally and jointly assessed a civil penalty in the amount of One Thousand Seven Hundred Fifty Dollars ($1,750.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: D & E FEEDER PIGS, LTD., A CORPORATION, and DARRELL WESSELS, an INDIVIDUAL. P & S Docket No. 6657. Decided on August 29, 1986.

Livestock dealer and market agency—Failure to pay when due or to pay full price—Insufficient funds—Ordered to cease and desist—Registration suspended—Consent.

Roberta Swartzendruber, Washington, D.C., for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Respondent D&E Feeder Pigs, Ltd., hereinafter referred to as the corporate respondent, is an Iowa corporation whose mailing address is Box 30, Rural Route 1, Little Cedar, Iowa 50454.

2. The corporate respondent, at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis and as a dealer to buy and sell livestock in commerce for its own account.

3. Darrell Wessels, hereinafter referred to as the individual respondent, in combination with his wife, owns all of corporate respondent's outstanding stock and is President of the corporate respondent.

4. Individual respondent Wessels directs, manages and controls the business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent, its officers, directors, agents, employees, successors and assigns, and individual respondent, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Act, including (1) a general ledger or journal; (2) a purchase and sale journal; (3) a cash receipts and cash disbursement journal; (4) a check register; and (5) sales invoices.

Corporate respondent and individual respondent are suspended as registrants under the Act for a period of five years, provided, however, that a supplemental order will be issued terminating this suspension after the expiration of four months upon demonstration by respondents that all unpaid livestock sellers have been paid in full, and provided further that this suspension may be modified upon application to the Packers and Stockyards Administration to permit respondents' salaried employment by another registrant after the expiration of the four month period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: HAROLD KOPLIN. P & S Docket No. 6730. Decided on August 29, 1986.

Livestock dealer—Insufficient funds checks—Failure to pay when due—Registration suspended—Consent.

Roberta Swartzendruber, Washington, D.C., for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

(CONSENT) DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harold Koplin, hereinafter referred to as the respondent, is an individual whose principal place of business is located in Marengo, Illinois, and whose business mailing address is 1206 North Page, Marengo, Illinois 60152.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Harold Koplin, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent Harold Koplin is suspended as a registrant under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of 120 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the 120 day period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: GILES AND STRATTON AUCTION, INC., d/b/a LIVESTOCK PRODUCERS, FLOYD GILES, and RONNIE STRATTON. P & S Docket No. 6660. Decided on July 14, 1986.

Roberta Swartzendruber, for complainant.
Michael G. Eplay, Magnolia, Arkansas, for respondent.

Decision by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On June 26, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended respondents as registrants under the Act for a period of seven days and thereafter until such time as they demonstrate that they are no longer insolvent and that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued, is terminated. The order shall remain in full force and effect in all other respects.

In re: WESTERN STOCKYARDS CORPORATION. P & S Docket No. 6680. Decided on July 22, 1986.

John Casey, for complainant.
Don Olsen, Kansas City, Missouri, for respondent.

Decision by Victor W. Palmer, Administrator Law Judge.

SUPPLEMENTAL ORDER

On May 30, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of two (2) weeks, beginning July 6, and ending July 19, 1986, and thereafter until such time as it demonstrates that the shortage in the Custodial Account for Shippers' Proceeds of Amarillo Livestock Auction Company has been eliminated.

Respondent has demonstrated that the shortage in the custodial account has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued May 30, 1986, is terminated effective July 19, 1986. The order shall remain in full force and effect in all other respects.

In re: OTTO DOERRER AND SON, INC., RUDOLFO PANIGROSSO and GENE LOMBARDO. P & S Docket No. 6459. Decided on July 23, 1986.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO GENE LOMBARDO

Complainant moves to dismiss the complaint with respect to respondent Gene Lombardo.

IT SHOULD BE AND HEREBY IS ORDERED that the complaint insofar as it refers to respondent Gene Lombardo is dismissed without prejudice.

In re: NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK, and GEORGE BITZ. P & S Docket No. 6678. Decided on July 28, 1986.

Jory Hochberg, for complainant.
Jos. A. Vogel, Jr., Mandan, North Dakota, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

REQUEST FOR SUPPLEMENTAL ORDER

On June 30, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent Napoleon as a registrant under the Act until it demonstrates that the deficit in its custodial account has been eliminated.

Respondent Napoleon has now demonstrated that the deficit in its custodial account has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued June 30, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: TERRY KREWSON, BOBBIE KREWSON, D.E. KREWSON, and LICKING LIVESTOCK AUCTION CO., INC. P & S Docket No. 6702. Decided on August 21, 1986.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On June 26, 1986, an order was issued in the above-captioned matter which, *inter alia,* suspended respondents Terry and Bobbie Krewson as registrants under the Act for a period of 21 days and thereafter until such time as they demonstrate that they are no longer insolvent and that the deficit in their custodial account has been eliminated. Such order further prohibited respondents Licking Livestock Auction Company, Inc., and D.E. Krewson from engaging in business subject to the Act until they demonstrate that Licking Livestock Auction Company, Inc., is no longer insolvent, that the deficit in its custodial account has been eliminated, and that it is in compliance with the bonding requirements under the Act and the regulations.

All the respondents in this proceeding have demonstrated that they are no longer insolvent; respondents Terry and Bobbie Krewson have demonstrated that the deficit in their custodial account has been eliminated; respondents Licking Livestock Auction Company, Inc., and D.E. Krewson have demonstrated that the deficit in Licking Livestock Auction Company, Inc.'s custodial account has been eliminated, and that it is in compliance with the bonding requirements under the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued, is terminated. The order shall remain in full force and effect in all other respects.

In re: HUB CITY LIVESTOCK SALES, INC. P & S Docket No. 6705. Decided on August 22, 1986.

Andrew Stanton, Washington, District of Columbia, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On July 15, 1986, an order was issued in the above-captioned matter which, *inter alia,* suspended respondent as a registrant under the Act for a period of 14 days and thereafter until it demonstrates that it is no longer insolvent and that the deficit in its custodial account has been eliminated.

Respondent has now demonstrated that it is no longer insolvent and that the deficit in its custodial account has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued July 15, 1986, is terminated. The order shall remain in full force and effect in all other respects.

REPARATION DECISIONS

JAMES M. MORRIS *v.* TED LEWIS, BILL LARGENT, and BENTONVILLE LIVESTOCK AUCTION, INC. P&S Docket No. 6448. Decided on July 15, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*) begun by a complaint received on September 7, 1983, and amended on August 6, 1984, alleging in substance unilateral refusal to deal. The amount claimed was $20,000.00.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondents on October 3, 1984. A copy of the investigation report was served on complainant on September 28. An answer was received from respondents on October 9. A copy thereof was served on complainant on October 22. A request for oral hearing was received from complainant on November 6.

An oral hearing as requested was held on February 26, 1985 in Bentonville, Arkansas before John J. Casey of the Office of the General Counsel of this Department. Complainant was represented by John A. Skaggs II, Esq., Bentonville. Respondents were represented by Jerry B. Dossey, Esq., also of Bentonville. Fifteen witnesses testified. Four exhibits were received. Thereafter briefs were filed by both sides.

It is undisputed that, beginning in August 1983, respondents refused to deal with complainant at their livestock auction market, this was in violation of the Act unless justified, and respondents had the burden of establishing justification. Also, on refusal to deal, by a livestock market subject to the Act, as a violation of the Act, see *U.S.* v. *Am. Livestock Co.*, 279 U.S. 435 (1928) and *Farmers' Livestock Commission Co.* v. *U.S.*, 54 F.2d 375 (7 C. 1931).

When respondents refused to deal with complainant, they brought an action, No. E-83-1332-1, Chancery Court, Benton County, Arkansas, to enjoin him from entering the market property. After trial, he was so enjoined. However, the Court did not consider the Act, and specified that any contrary determination under the Act would take precedence over its order. Also, see *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); and *Iowa Beef Processors* v. *Ill. Central Gulf R. Co.*, 685 F.2d 255 (8 C. 1982). "It is basic

that administrative procedure requires that an agency be given the opportunity to address a question before resorting to the courts." *Governor* v. *Rehab. Hosp. Services Corp.*, 285 Ark. 393, 688 S.W.2d 272 (1985).

Respondents, in partial justification of their refusal to deal with complainant, accused complainant of making unjust accusations against them to various authorities. The evidence in this record about complainant's complaints to authorities is not sufficient to justify the respondents' refusal to deal with him, as explained hereinafter.

Shortly before respondents refused to deal with him, complainant complained to the Packers and Stockyards Administration (P&S) about possible misweighing of livestock sold at that market on a weight basis, and possible selling of like consignments in sequence other than as received. In July 1983, a P&S Industrial Specialist appeared at the market without prior notice, checkweighed some livestock, that is, reweighed livestock which had just been sold and weighed, and reviewed the sequence in which some consignments had been sold. This "spot check" inspection did not uncover any material violations, nor did it uncover sufficient basis for further investigation.

Complainant also complained to the Benton County Sheriff and the Bentonville Police about respondents. Mr. Don Rystrom, who was Sheriff in 1983, testified (Tr. 170–1):

> Q. Did Mr. Morris, the complainant in this case, come to you and talk to you about Bentonville Livestock Auction?
>
> A. Yes, sir.
>
> Q. What did he say to you?
>
> A. He was complaining about the weighing procedures at the Bentonville Livestock Auction. That he was going to file a complaint with the Packers and Stockyards Commission (sic), wanted us to investigate it as to them weighing cattle heavy and light, this type of situation.
>
> Q. Did he make any allegations to you about underground money being used to operate the Bentonville Livestock Auction?

A. Yes, sir. It was—this was mentioned to myself and also Captain Clark, who was the other Sheriff, as to underground money and underworld money financing Mr. Lewis and Mr. Largent, that they were crooked and somebody was behind them.

Mr. Rystrom's testimony was vague as to the time of this. Complainant testified (Tr. 83 et seq.) that he complained to the Sheriff but denied saying anything about "underworld money." He also testified (Tr. 199-200) that this complaint was earlier than the P&S inspection.

About "underworld money," nothing was established by a preponderance of the evidence. As to whether complainant complained to the Sheriff or the Police about respondents after the P&S inspection, there was no evidence of this.

The record does not support a finding either that violations were or were not taking place at the market before respondents refused to deal with complainant. Neither does it support a finding that complainant acted in bad faith in complaining to the authorities against them. Complainant acted pursuant to a good faith belief so far as the record shows.

Complainant testified (Tr. 53) in substance that, at the time when respondents first refused to deal with him, one of them or an employee of theirs accused him of making an unjust complaint against them to a Missouri State official relating to Brucellosis control. Respondent Largent testified (Tr. 196) that he concluded this from the fact that respondents were investigated by the Missouri official, and that complainant shortly before then had followed him and one McNelly on the highway when they were transporting a load of cattle in the direction of the Arkansas/Missouri State line. Complainant (Tr. 200) denied either following them or making any such complaint. Nothing about this was established by a preponderance of the evidence.

Mr. Marvin Spencer, who was then the weighmaster at respondents' market, testified (Tr. 163 et seq.) about complainant's telling him to keep his hands off the scale when weighing. On cross examination he testified that this happened once.

It is undisputed that complainant, before the P&S inspection, spoke to other customers of respondents about possible violations by respondents. In view of the vagueness of respondents' evidence of this, and complainant's testimony, we must conclude that in this respect facts which would justify the refusal to deal were not established by a preponderance of the evidence.

Respondents' witness Mr. George Dwight Hill testified (Tr. 128) that complainant "just said them damn scales is not right." Mr. Freddie Trentham testified (Tr. 160) that complainant from time to time would say the scale was inaccurate. Mr. Larry Foster, who in 1983 worked for respondents, testified on direct examination (Tr. 181 et seq.):

> A. * * * I've known Mr. Morris for quite some time and on numerous occasions I've heard him say things about the way the [respondents' sale] barn was run.
>
> Q. What did you hear?
>
> A. Okay. Specifically, that Marvin Spencer was not weighing the cattle correctly, that he was crooked, that the sale barn was crooked and just along the same line like——.

Mr. Foster could not remember when this was. He also testified that it was not unusual to hear people criticize the way a sale barn is operated but that complainant seemed more angry than most. He also testified that he believed that complainant was honest and sincere about his belief.

Complainant testified that his statements to other customers, before the P&S inspection, about possible violations by respondents, were made only to a few people, and amounted to no more than a recommendation to observe the facts and draw their own conclusions.

Complainant promised respondents, after the P&S inspection, not to say any more about the matters complained about to the authorities, and at the time of the first refusal to deal had kept this promise, so far as the record shows.

In partial justification of respondents' refusal to deal with complainant, respondent Larqent testified that, after the P&S inspection, Mr. Marvin Shipman told him that complainant was making allegations against them again.

Mr. Shipman testified (Tr. 166 et seq.) that he overheard complainant at the auction market talking with five or six others who were there to sell cattle, and saying in substance that cattle prices were higher elsewhere. We take official notice that prices vary from place to place, and that persons in the livestock business know this.

Mr. Shipman, on direct examination by respondents' counsel, also testified (Tr. 167):

Q. Did you hear anything else in that conversation that Mr. Morris was saying about the Bentonville Livestock Auction?

A. He wasn't talking too highly of it. I heard him saying that——

Q. Were his comments generally derogatory? In your opinion were they derogatory, running the business down?

A. Right.

Mr. Shipman did not testify more specifically as to what he heard complainant say. He also testified that this incident was late in 1983, which would be several months after respondents first refused to deal with complainant.

Respondents, in partial justification of their refusal to deal with complainant, cited certain NSF checks he had given to them. There were only two or three such checks, they were caused by failures of others to wire transfer money as promised to complainant, they were made good promptly, and each time respondents told him not to worry about it, so far as the record shows. Also, if respondents had good reason to doubt whether complainant's checks were good, they could have told complainant that they would deal with him on a "cash only" basis. See *Vance* v. *Nashville Lvsk. Comm. Corp.*, 34 Ag. Dec. 1680 (1975). It is undisputed that they did not.

Respondents, also in partial justification of their refusal to deal with complainant, cited a certain assault and battery involving complainant which disrupted a sale at their market. There was lengthy testimony about this, which shows clearly that the incident took place in April 1984, many months after respondents first refused to deal with complainant. The testimony also shows clearly that complainant's only activity in that connection was an attempt to restore order.

For a refusal of an auction market to deal with someone, more justification is needed than is shown on this record.

In the matter of damages, complainant testified that the only business he did at respondents' market which he could not do elsewhere was to purchase 190–210 pound hogs for a certain small packer. Complainant's Exhibit 2, his tickets showing purchases in 1983 up to August 27, show hogs in that weight range as follows (each column showing date, number of head, and pounds of weight):

August:		May:	
27	1 205	14	5 990 (198 avg.)
	1 200		1 200

20	1 200	7		2 410 (205 avg.)	
13	1 210			1 210	
6	1 200			1 190	
July:		April:			
23	1 210	23		1 200	
13	1 200	20		5 990 (198 avg.)	
9	1 205	16		1 190	
	1 195	9		2 400 (200 avg.)	
June:		March:			
25	1 205	30		1 210	
	9 1795 (199 avg.)	26		1 200	
	1 200	5	1 200		
	1 205	Feb.:			
	1 210	26		9 1855 (206 avg.)	
	1 200			1 200	
11	1 190	19		1 200	
	2 400 (200 avg.)	Jan.:			
4	2 400 (200 avg.)	29		2 380 (195 avg.)	
1	9 1860 (207 avg.)	9		13 2475 (190 avg.)	
	3 620 (207 avg.)			1 190	
May:		8		1 200	
28	1 190			1 200	
	1 200				
25	1 200				

However, the record does not show the basis on which, or the amount, complainant was paid for such purchases.

Complainant introduced his purchase tickets, his sale tickets, and a page from his income tax return, to show his gross business done at respondents' market in 1983 before the refusal to deal, and his total income, figuring his damages as a percentage of his gross business. However, a computation of his lost profits attributable to the refusal to deal should be limited to the business which he might have done at that market and could not have done just as well elsewhere. The record does not support a finding as to this.

On compensation for lost profits, see AmJur2d *Damages* §§ 171 et seq.; *Bone* v. *Refco, Inc.*, 774 F.2d 235 (8 Cir. 1985); *Rogers* v. *Allis-Chalmers Credit Corp.*, 679 F.2d 138 (8 Cir. 1982); *Red Lobster Inns, Etc.* v. *Lawyers Title Ins. Corp.*, 656 F.2d 381 (8 Cir. 1981); *Hyde* v. *C.M. Vending Co., Inc.*, 288 Ark. 218, 703 S.W.2d 862 (1986); and *First Service Corp.* v. *Schumacher*, 16 Ark. App. 282, 702 S.W.2d 412 (1985).

In conclusion, respondents did not establish justification for refusing to deal with complainant, but complainant did not establish his damages. On that basis, this complaint must be dismissed but, if the refusal to deal continues, complainant can recover such damages as he can establish in another such proceeding.

An issue was raised as to whether a sufficient complaint was filed within 90 days of accrual of the cause of action as required by the Act to begin such a proceeding. On September 7, 1983, the Packers and Stockyards Administration received a brief letter from complainant (Investigation Report Exhibit 128) which clearly identifies in writing what was complained about and who was complained against. That letter was sufficient to stop the running of the 90-day. limitation for such complaints in the Act.

An issue was raised as to jurisdiction over the persons of the individual respondents. It was undisputed that they were at the times material herein engaged in the buying and selling of livestock at the market as agents of the corporate respondent. They are "dealers" as defined, and subject to the reparation provisions, in the Act, on that basis. A reparation order against a dealer was upheld in *Rice* v. *Wilcox*, 630 F.2d 586, 39 Ag.Dec. 883 (8 Cir. 1980).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702–3 and *United States* v. *I.C.C.*, 337 U.S. 426.

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

JJ&T TRUST, SHIRLEY A. BOLLINGER, TRUSTEE *v.* NEVADA LIVESTOCK AUCTION COMPANY, INC., and LAVERNE SCOTTEN. P & S Docket No. 6403. Decided on August 6, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 et seq.) begun by a com-

plaint received on March 30, 1984, alleging in substance an overcharge for care of certain livestock. The amount claimed was $1,006.00.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondents on June 25, 1984. A copy of the investigation report was served on complainant on June 26. An answer was received from respondent on or about June 27. A copy thereof was served on complainant on July 6.

By agreement of the parties a written hearing was held as provided in the Rules of Practice. John J. Casey of the Office of the General Counsel of this Department acted as Presiding Officer. Complainant was not represented by counsel. Respondents were represented by William G. McCaffree, Esq., Nevada, Missouri.

The following is undisputed. On Sunday, January 15, 1984, David Loyd, Manager of the JJ&T Ranch, caused 98 animals in poor condition to be moved from the Ranch to respondents' market, to be cared-for until the following Saturday, January 21, and then sold at the regular weekly auction. The weather at the time was severe. On Friday, January 20, Mr. Loyd's employer Mrs. Bollinger appeared at respondents' market with trucks to remove the animals. Respondents would not permit the animals to be removed until they were paid $1,006.00, which they itemized at the time as follows: "advertisement, yardage, caring for livestock, hired help, they were billed in ready for sale, help gathering cattle at farm." Mrs. Bollinger paid the $1,006.00 under protest and removed the animals.

The record shows the following. Mr. Loyd either violated instructions or acted without authority of his employer Mrs. Bollinger on January 15 in moving the animals to respondents' market. He was authorized to move them off the JJ&T Ranch but not to consign them for sale. Shortly after January 20, when Mrs. Bollinger removed the animals from respondents' market, litigation ensued between her and Mr. Loyd.

Complainant contends that the $1,006.00 was exorbitant and should be repaid in full except for yardage in accord with respondents' tariff on file with the Department.

Respondents filed affidavits of Mr. Loyd and respondent Scotten. In Mr. Loyd's affidavit he states that he acted as agent for complainant in engaging the services of respondents. The record does not contain any evidence that respondents knew of his lack of authority or violation of instructions at the time of the events in dispute. In Mr. Scotten's affidavit he gives an itemization of the

$1,006.00 charge, for yardage, feed necessary since Mr. Loyd did not supply enough, medication necessary, straw for bedding since the weather was severe, and a total of $421.00 pay (approximately 10 man-days at $42.50 per day) for respondents' employees' labor needed for care of the 98 animals.

The record does not contain any testimony of persons who observed the animals after Mrs. Bollinger removed them from respondents' market, as to their condition or the care they needed at that time. Nor does it contain any specific information as to the weather during the time of the events in dispute.

In view of the undisputed facts that the animals were in poor condition and the weather was severe, and the lack of specific information as to their condition and the weather, a finding that the $1,006.00 charge was exorbitant or unreasonable is not supported by the record.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States v. I.C.C.*, 337 U.S. 426.

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

ALFRED MARSCHELL *v.* CASSIDY LIVE STOCK COMMISSION COMPANY and SAINT LOUIS NATIONAL STOCKYARDS COMPANY. P & S Docket No. 6407. Decided on August 6, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 et seq.) begun by a complaint received on February 9, 1984 and amended February 24, alleging in substance a mixup of animals shipped to the stockyard and consigned to the commission firm for sale. The amount claimed was $1,141.32.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent commission firm on June 11, 1984, and on respondent stockyard company June 21. A copy of the investigation report was served on complainant on June 9. Answers were received from respondent commission firm on or about June 20, and from respondent stockyard company on or about June 28. The latter requested an oral hearing. Complainant filed letters on July 8 and 26. Copies of each of these items were promptly served on each party other than the one filing it.

An oral hearing as requested was held on November 1, 1984 in St. Louis, Missouri, before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Five witnesses testified. One exhibit was received. No brief was filed.

The following is undisputed. Thirteen animals were loaded by complainant on a truck of Mr. Dale Hackmann. Thirteen animals were delivered by Mr. Hackmann to the National Stockyards with instructions that they were to be consigned to respondent Cassidy for sale there for complainant's account. Thirteen animals were so consigned. Thirteen animals were so sold. The issue is, were they all the same animals?

The account of sale issued to complainant shows animals as follows (in order by weight):

Steers		Heifers	
Number	Pounds of weight	Number	Pounds of weight
1	910		
1	910		
1	770	1	650
1	630		
1	540		
2	910 (455 avg.)		
1	370		
2	705 (352.5 avg.)	1	240
1	180		

Thus the five lightest steers had an average weight of 342 pounds (180+705+370+455=1,710 /5=342) according to the account of sale.

Mr. Henry Bunge, complainant's father-in-law, was not present at the loading. However, he testified in substance as follows. He was familiar with the 13 animals in dispute, and with four others

which were kept, and those 17 were the only ones in the particular field. The 13 animals consisted of 10 Herefords plus three which were Holstein/Angus cross. Five of the Herefords were two-year-olds, and the other five were about 14 months old.

Complainant testified in substance as follows. The smallest of the 13 animals in dispute were five Hereford steers about 14 months of age. He kept four Hereford heifers which he called the "sisters" of those steers, the same age, born at the same time and place, and kept with them their entire lives. He caused those heifers to be weighed at a scale near his home, a few days after the events in dispute, and those heifers weighed a total of 2300 pounds (the average of that would be 575 pounds). The lightest steers would have been at least as heavy as those heifers.

Mr. Dale Hackmann testified in substance as follows. He delivered to the stockyard the same 13 animals which complainant loaded on his truck. The smallest weighed about 450 pounds each by his estimate. The only other animals on his truck on the same trip were pure Holsteins, which would not be confused with the 13 animals in dispute.

At the hearing, Mr. Leonard Wittich, then Vice President of the stockyard company, was the only witness to testify for either respondent. Mr. Michael Henderson, who owned the commission firm at the time of the events in dispute, appeared for the commission firm but introduced no evidence. Complainant called Mr. Henderson as a witness. Neither Mr. Wittich nor Mr. Henderson ever saw the 13 animals in dispute.

Mr. Wittich testified that stockyard company records showed as follows. About 11:00 P.M., when the animals were unloaded from Mr. Hackmann's truck, the 13 in dispute and the Holsteins, a stockyard company employee received them and moved them to chute pen number 148. During the same shift of that stockyard company employee, only eight drafts came in, of which only one other was consigned to the Cassidy commission firm. The one other draft consigned to the Cassidy firm was driven by its owner down to a pen, and consisted entirely of Angus animals, which would not be confused with the 13 in dispute. About 5:30 the next morning, the Crain Driving Agency moved the 13 to sale pen 106F, which is assigned to the Cassidy firm, and moved the Holsteins to another sale pen, assigned to another commission firm, McCall-Runyon. The Crain firm is separate from either of the respondents.

The record does not contain any evidence as to who mixed complaint's animals with others before they were sold. There is precedent for shifting the burden to respondents in a case to furnish information to exonerate themselves, and for holding liable any who

do not. However, in such a case, the persons who are made respondents must include every person who could have caused the damage. See *Graff* v. *United Stockyards Corp.*, 37 Ag. Dec. 529 (1978); *Loizzo* v. *St. Francis Hospital*, 121 Ill. App. 3d 172, 76 Ill. Dec. 677, 459 N.E.2d 314 (1984); and *McGowen* v. *Tri-County Gas Company*, 483 S.W.2d 1 (Mo. 1972).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR §2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702–3 and *United States* v. *I.C.C.*, 337 U.S. 426.

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

COURT DECISIONS

MAGIC CITY PRODUCE COMPANY, INC. *v.* SECRETARY OF AGRICULTURE. No. 85-7527. (USDA PACA Docket No. 2-6448) Date of decision: July 10, 1986.

Edward M. Silverstein, for complainant.
Ann C. Robertson, Birmingham, Alabama, for respondent.

William J. Weber, Administrative Law Judge.

Donald A. Campbell, Judicial Officer.

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

Petition for Review of an Order of the United States Department of Agriculture.

Before FAY, JOHNSON and CLARK, Circuit Judges.
PER CURIAM: AFFIRMED. See Circuit Rule 25.

DISCIPLINARY DECISIONS

In re: BEACON PRODUCE COMPANY. PACA Docket No. 2-7129. Decided on May 28, 1986.

Failure to pay—License revoked—Default.

Respondent purchased, received and accepted perishable commodities without making full payment of agreed purchase prices, which is a violation of Section 2 of the Act. There was no appeal from respondent and license is revoked.

Ben E. Bruner, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on March 17, 1986, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period March 1985 through October 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 28 sellers, 72 lots of fruits and vegetables all being perishable agriculture commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $414,205.95.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Beacon Produce Co., is a corporation, whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060.

2. Pursuant to the licensing provisions of the Act, license number 207880 was issued to respondent on May 3, 1965, was renewed annually, presently is in effect, and was next subject to renewal on or before May 3, 1986.

3. As more fully set forth in paragraph 5 of the complaint, during the period March 1985 through October 1985 respondent purchased, received and accepted in interstate and foreign commerce, from 28 sellers, 72 lots of fruits and vegetables, all being

perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $414,205.95.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 72 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final on July 16, 1986-ED.]

In re: UNITED PROVISIONS, INC. PACA Docket No. 2-7018. Decided on May 2, 1986.

Failure to pay promptly—License terminated—Default.

Respondent failed to make payment on transactions with 58 sellers, constituting violations of Section 2 of the Act. License was terminated after failure to pay required annual fee. Respondent did not appeal.

Ed Silverstein, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on December 2, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of

Agriculture. It is alleged in the complaint that during the period August 1984 through March 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 58 sellers, 584 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $985,535.66.

A copy of the complaint was served upon respondent which complaint has not been answered.[1] The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, United Provisions, Inc., is a corporation, whose last known mailing address was P.O. Box 266596, Houston, Texas 77207.

2. Pursuant to the licensing provisions of the Act, license number 681718 was issued to respondent on April 2, 1968. This license was renewed annually, but terminated on April 2, 1985, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period August 1984 through March 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from 58 sellers, 584 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $985,535.66.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 584 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C.

[1] It is noted that the Hearing Clerk was unable to make service on respondent by certified mail. Accordingly service was accomplished by regular mail as permitted by the Rules of Practice. 7 CFR § 1.147. Further, it is noted that complainant attempted to make personal service on the complainant but was unable to do so.

499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final on July 29, 1986–ED.]

In re: BAKKER SALES INCORPORATED. PACA Docket No. 2-7214. Decided on July 31, 1986.

Failure to pay promptly—License revoked—Consent.

Edward M. Silverstein, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER (CONSENT)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.;* hereinafter referred to as the "Act"), instituted by a Complaint filed on June 23, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period April 1985 through February 1986, Respondent failed to make full payment promptly to 31 sellers of the agreed purchase prices, or balances thereof, in the total amount of $649,342.66 for 58 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Bakker Sales Incorporated (hereinafter "Respondent"), is an Ohio corporation, whose mailing address is 16000 Pearl Road, Strongsville, Ohio 44136.

2. Pursuant to the licensing provisions of the PACA, license number 841753 was issued to Respondent on July 27, 1983. This license has been renewed annually, and is next subject to renewal on or before July 27, 1986.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period April 1985 through February 1986, Respondent failed to make full payment promptly to 31 sellers of the agreed purchase prices, or balances thereof, in the total amount of $649,342.66 for 58 lots of perishable agricultural commodities purchased, received and accepted in interstate and foreign commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order below is issued.

ORDER

Respondent's license is revoked.
This order shall become effective August 11, 1986.
Copies hereof shall be served upon the parties.

In re: JOHN SLOUGH d/b/a/ SLOUGH'S FARM FRESH MUSHROOMS.
PACA Docket No. 2-7082. Decided on June 30, 1986.

Failure to pay promptly—License revoked—No appeal.

Respondent failed to pay for perishable agricultural commodities purchased, received and accepted from 27 sellers over a period of twelve (12) months. Such failure to pay constitutes violation of Section 2 of the Act. Respondents license is revoked. There was no appeal.

Andrew Stanton, for complainant.
Nathan M. Schenker, Kennett Square, Pennsylvania, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on February 6, 1986, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June 1984 through June 1985, respondent purchased, received and accepted, in interstate commerce and in contemplation of resale in interstate commerce, from 27 sellers, 492 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $349,146.05. Complainant further alleged that such actions were willful, flagrant and repeated violations of section 2 of the PACA, and requested that respondent's license be revoked.

On March 5, 1986, respondent filed an answer in which in effect admitted the allegations of the complaint. Complainant has moved for a decision on the pleadings and changed its requested sanction to a finding of repeated and/or flagrant violations of the PACA, and publication of such finding.

FINDINGS OF FACT

1. Respondent, John Slough d/b/a Slough's Farm Fresh Mushrooms, is an individual, whose address is P.O. Box 219, West Grove, Pennsylvania 19390.

2. Pursuant to the licensing provisions of the Act, license number 841019 was issued to respondent on April 4, 1984. The license terminated on April 7, 1986, when respondent failed to pay the required annual license fee.

3. The Secretary has jurisdiction in this proceeding.

4. As more fully set forth in paragraph 5 of the complaint, during the period June 1984 through June 1985 respondent purchased, received and accepted in interstate commerce and in contemplation of resale in interstate commerce, from 27 sellers, 492 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $349,146.05.

CONCLUSIONS

Respondent has admitted in his answer that he failed to make full payment promptly with respect to the 492 transactions alleged in the complaint and set forth in Finding of Fact No. 4, above. Respondent's admitted failures to pay constitute repeated and/or flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent has committed repeated and/or flagrant violations of Section 2 of the PACA (7 U.S.C. § 499(b)).

The facts and circumstances as set forth herein shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final on August 11, 1986–ED.]

In re: METRO PRODUCE, INC. PACA Docket No. 2-7083. Decided on June 30, 1986.

Failure to pay promptly—License terminated—Default.

Respondent failed to pay for perishable agricultural commodities purchased, received and accepted from four (4) sellers over a period of six (6) months. Failure to pay constitutes violation of Section 2 of the Act. Respondent did not pay the required annual fee and license was terminated. An answer to the complaint was not filed.

Edward Silverstein, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*)

hereinafter referred to as the "Act", instituted by a complaint filed on February 6, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period March through August 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from four sellers, 80 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $121,103.70.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Metro Produce, Inc., is a corporation, whose address is 1901 Powers Ferry Road, Suite 250, Marietta, Georgia 30067.

2. Pursuant to the licensing provisions of the Act, license number 830913 was issued to respondent on May 3, 1983. This license was renewed, but terminated on May 3, 1985, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period March through August 1984, respondent purchased, received, and accepted in interstate and foreign commerce, from four sellers, 80 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $121,103.70.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 80 transactions set forth in F. ding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final on August 28, 1986–ED.]

In re: SAM COMPTON PRODUCE COMPANY INCORPORATED. PACA Docket No. 2-7200. Decided on August 28, 1986.

Failure to pay promptly—License revoked—Consent.

Andrew Stanton, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER (CONSENT)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.;* hereinafter referred to as the "Act"), instituted by a Complaint filed on June 12, 1986 , by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period May 1984 through October 1985, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,859,863.82 for 789 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Sam Compton Produce Company Incorporated, (hereinafter "Respondent") is a Tennessee corporation, whose business address is 2208 Forest Avenue, N.W., Knoxville, Tennessee 37916.

2. Pursuant to the licensing provisions of the PACA, license number 672197 was issued to Respondent on May 31, 1967. This license has been renewed annually, and is next subject to renewal on or before May 31, 1986.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period May 1984 through October 1985, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,859,863.82 for 789 lots of perishable agricultural commodities purchased, received and accepted in interstate commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order below is issued.

ORDER

Respondent's license is revoked.
This order shall become effective September 8, 1986.
Copies hereof shall be served upon the parties.

In re: REEVES PRODUCE, INC. PACA Docket No. 2-6213. Order issued July 2, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

REMOVAL OF STAY ORDER

The stay order previously issued in this proceeding pending the outcome of proceedings for judicial review is hereby lifted. The Decision and Order previously issued on August 26, 1985, shall become effective on the 30th day after service of this order on respondent.

REPARATION DECISIONS

RITCLO PRODUCE INC. *v.* MICHIGAN REPACKING and PRODUCE CO.
PACA Docket No. 2-6774. Decided on July 9, 1986.

Evidentiary material submitted with brief excluded—Notice of rejection—Acceptance by unloading—Adjustment, proof of.

Two loads of tomatoes were sold and shipped by complainant to respondent. Following arrival respondent's complaint to broker that tomatoes were "unacceptable" did not amount to clear and unmistakable notice of rejection. Also there was insufficient proof that notice was promptly conveyed by broker to seller. In addition the record indicated that the tomatoes on one load had been unloaded prior to Federal inspection, but not for purpose of inspection, thus constituting acceptance. Complainant adequately demonstrated that the parties agreed, following arrival, to a new adjusted price for the tomatoes.

George S. Witten, Presiding Officer.
James A. Soto, for complainant.

David S. Steingold, Detroit, Michigan, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $11,709.00 in connection with the shipment in interstate commerce of two truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complainant was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both complainant and respondent filed a brief. Respondent's brief contained evidentary material which complainant objected to. Such evidentary material, to the extent that it was not already properly

in evidence, has not been considered in arriving at our decision in this case. Respondent also filed a reply brief which is not permitted under the Rules of Practice. This brief has not been considered.

FINDINGS OF FACT

1. Complainant, Ritclo Produce, Inc., is a corporation whose address is P.O. Box 794, Nogales, Arizona.

2. Respondent, Michigan Repacking and Produce Co., is a corporation whose address is Rooms 106–112, 7201 W. Fort Street, Detroit, Michigan. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about March 14, 1984, complainant sold to respondent, and shipped from loading point in Arizona to respondent in Detroit, Michigan, one truckload containing 1,296 lugs of medium-large (6X6) tomatoes, Ritz label, at $6.00 per lug, plus $.50 per lug for palletizing and cooling, and $22.50 for a temperature recorder. On the following day when contracting for a second shipment of tomatoes the parties agreed to a reduction in price for the March 14, shipment of $1.00 per lug, down to $5.00 per lug, or a total invoice price of $7,150.50.

4. Following arrival of the tomatoes shipped March 14, 1984, respondent unloaded such tomatoes into its warehouse, and on March 19, 1984, at 1:05 p.m., the tomatoes were federally inspected. The inspection showed that the temperatures of the tomatoes were 46°F to 50°F, and the condition was stated to be as follows:

> Average approximately 5% turning to pink, and 80% light red to red color. Soft from 4 to 12%, average 9%. Decay in most samples from 2 to 12%, some none, average 5% Bacterial Soft Rot and Gray Mold Rot in mostly early, some advanced stages. Serious damage by Internal Discoloration averages 2%. Damage by sunken discolored areas over shoulders averages 2%.

The parties through their respective brokers negotiated an adjustment in price of $1.00 per carton to $4.00 per carton.

5. On or about March 15, 1984, complainant sold to respondent, and shipped from loading point in Arizona to respondent in Detroit, Michigan, one truckload containing 1,296 lugs of medium-large size tomatoes (6X6), Ritz label, at $5.00 per lug, plus $.50 cents per lug for palletization and cooling, and $22.50 for a temperature recorder, or a total of $7,150.50.

6. The truck containing the second shipment of tomatoes arrived after respondent's closing time on March 19, 1984, and when the driver called respondent he was told to deliver the tomatoes the fol-

lowing morning. When the tomatoes arrived on March 20, respondent instructed the driver to take the load to a different terminal in order to have the tomatoes inspected. The driver became lost, and by the time he arrived at the place for inspection the inspectors had left for the day. The load was inspected on the following morning, March 21, 1984, at 6:00 a.m. Such inspection was made on the truck, and was restricted to product and lading in all layers of 5 pallets nearest the rear doors which was made accessible by the applicant. The temperatures at the rear doors were stated to be 45° for the top layer, and 45° for the floor layer. Condition was stated to be as follows:

> Average approximately 10% green to breakers, 25% turning to pink, 50% light red to red. Soft from 4 to 18%, average 12%. Decay average 3%. Damage by sunken discolored areas, generally occurring over shoulders, from 2 to 8%, average 4%.

Following the inspection of the second truckload of tomatoes complainant and respondent agreed through their respective brokers to an adjustment in price of $1.00 down to $4.00 per carton.

7. The formal complaint was filed on December 7, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the adjusted purchase price of two truckloads of tomatoes. Respondent alleges that no adjustment in the purchase price (other than the initial adjustment referred to in finding of fact 3) was made, and that both loads were rejected. Respondent took possession of both loads of produce, resold them, rendered an accounting showing only the gross proceeds, and claims that no proceeds are due to complainant.

Respondent's claim that both loads of produce were rejected is not substantiated by the evidence herein. As to the first load, respondent's Robert Tringale, who negotiated the transactions on behalf of respondent, stated only that following the government inspection he "contacted Mott and Simmons (respondent's broker) and told them that the shipment was unacceptable." According to Mr. Tringale Mott and Simmons then conveyed to him an offer by complainant's broker, Nickademos Distributing Company, to adjust the price by $1.00 per box. Tringale alleges that he refused this offer, and countered it with an offer to take the shipment on open account with a "price after sale" arrangement. Mr. Tringale states that this offer was refused. Subsequently respondent resold the tomatoes.

Even if we accept all of respondent's allegations recited above as true, such allegations do not prove a rejection of the tomatoes on the part of respondent. This is true for at least two reasons. We have held numerous times that notice of rejection must be given in clear and unmistakable terms, and that a mere complaint regarding a shipment is insufficient. See *Verd's Fruit Market* v. *Zaccone*, 36 Agric. Dec. 1603 (1977), and *Saikhon* v. *Russell Ward Co., Inc.*, 34 Agric. Dec. 1940 (1973). In *Beamon Brothers* v. *Cal. Sweet Potato Growers*, 38 Agric. Dec. 71 (1979) we specifically held that notice to a shipper that produce received was "not acceptable" did not amount to clear notice of rejection because such words could be interpreted as merely an expression of displeasure with the condition of the produce. We further stated that "The need for a clear and unmistakable rejection is doubly necessary where there is a subsequent unloading of the produce by the receiver, with a claim that the produce was to be handled for the shipper's account." Second, the evidence in this proceeding is not sufficient to show that even respondent's terminology "unacceptable" was clearly communicated to the seller. A rejection is not effective unless the buyer promptly notifies the seller, and the burden of proving prompt notice rests upon the buyer. See *San Tan Tillage Co., Inc.* v. *Kaps Foods, Inc.*, 38 Agric. Dec. 867 (1979). In addition we have held that notice to a broker is not sufficient. See *Hatcher* v. *White*, 37 Agric. Dec. 800 (1978). It is also clear that as to the first load respondent's communications with the broker, which it characterizes as a rejection, took place following the federal inspection. The federal inspection indicates that the tomatoes had already been unloaded into respondent's warehouse at time of inspection. We have held many times that even a partial unloading of a shipment, unless it is purely for the purpose of facilitating an inspection, will constitute sufficient control over perishable goods to constitute and acceptance thereof. See *Crown Orchard Co.* v. *Mid-Valley Prod. Corp.*, 34 Agric. Dec. 1381 (1975). In regard to the second shipment of tomatoes, respondent's Mr. Tringale did not even allege that the broker was informed that such tomatoes were "unacceptable". We conclude that neither of the loads of tomatoes where rejected by respondent.

Since respondent accepted the tomatoes it became liable to complainant for the full purchase price thereof less any damages shown to have resulted from any breach of contract on the part of complainant. However, although the inspections of the tomatoes indicate that the tomatoes may not have made good delivery, it is not necessary for us to consider this issue because complainant has alleged, and we think adequately proved, that the parties agreed to

an adjustment in price on both loads of tomatoes, following the inspections. Both of the brokers who negotiated the two tomato contracts, and who were involved in negotiations subsequent to the arrival of the tomatoes, affirmed on oath that respondent agreed to pay an adjusted price of $4.00 per lug, plus the $.50 per lug palletizing and cooling charge, following the inspections of the tomatoes. This has also been the consistent allegation of complainant. We note that during the informal stages of this proceeding respondent wrote to the Department and submitted copies of the two invoices covering the two shipments of tomatoes. These invoices show the type written $5.00 price struck through in ink, and also in ink written thereunder "per Mott & Simmons $4.00". Complainant pointed this fact out in its opening statement, but respondent never gave any explanation as to why the adjusted prices appeared on its own copies of the invoice. We conclude on the basis of all of the evidence that complainant has adequately shown that there was an agreement, following arrival and inspection of the two loads of tomatoes, that respondent would pay for such tomatoes at the adjusted $4.00 rate, plus palletization and cooling and temperature recorders, or a total for both loads of $11,709.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $11,709.00, with interest thereon at the rate of 13 percent per annum from April 1, 1984, until paid.

Copies of this order shall be served upon the parties.

ANTHONY PODESTA, INC. *v.* FOPPIANO PACKING CO., INC. a/t/a JMB PACKING CO. PACA Docket No. 2-6916. Decided on July 9, 1986.

Whether firm was responsibly connected with respondent, not for consideration in reparation proceeding—Grower's agent, authority to negotiate adjustments—Adjustments by grower's agent, not supported by adequate inspections.

The contention of a firm which filed an answer on behalf of respondent that it was not responsibly connected with respondent was not a proper issue for determination in a reparation proceeding. Respondent acted as agent for complainant in disposing of its apples and in connection with such disposition granted a substantial adjustment in the negotiated contract price. It was found that

there was insufficient evidence of authority to grant such adjustments, and that adjustments were not adequately supported by inspections at destination.

Mark L. Epstein, San Francisco, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,449.91 in connection with the shipment in interstate commerce of a truckload of apples.

A copy of the Report of Investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which defaulted in the filing of an answer. On May 1, 1985, a default order was issued against respondent. On May 6, 1985, Alvin Cortopassi, a stockholder in respondent firm, submitted an answer on behalf of respondent. On May 24, 1985, the default order, of May 1, 1985 was stayed, and respondent was given days from its receipt of the order to furnish good reason why the proceeding should be reopened, and why the answer was not filed in a timely fashion. On June 18, 1985, a response to the stay order was filed by Jacobs, Malcolm & Burtt, a California corporation that was also a stockholder in respondent firm at the time of the transaction involved herein. This reply disclosed lack of notice to such party of the complaint, and good reason why the proceeding should be reopened. Alvin Cortopassi also filed a reply to the stay order on June 13, 1985. On August 13, 1985, an order was issued reopening after default, and respondent's answer, previously submitted, was ordered filed.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure the verified formal complaint is considered a part of the evidence in this case, as is the Department's report of investigation. Respondent's answer, since it was not verified, is not a part of the evidence herein. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and two answering statements were filed on behalf of respondent, one by Alvin Cortopassi, and one by Jacobs, Malcolm & Burtt. Complainant also filed a statement in reply. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, Anthony Podesta Inc., is a corporation whose address is 4001 North Duncan Road, Linden, California.

2. Respondent, Foppiano Packing Co., Inc., is a corporation, doing business as J M B Packing Co., whose address is 14993 E. Highway 26, Linden, California. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On or about October 1, to October 5, 1983, pursuant to an agreement between complainant and respondent complainant picked, and delivered to respondent for packing and selling on behalf of complainant, a quantity of Granny Smith apples. Respondent sorted and packed the apples, and on or about October 10, 1983, sold the apples which it had sorted and packed to Fruitco in Bronx, New York, in the following quantities, and for the following prices, on an f.o.b. basis:

125 size 72 at $16.00 or $2,000.00
469 size 80 at $16.00 or $7,504.00
140 size 88 at $16.00 or $2,240.00
178 size 100 at $16.00 or $2,848.00
21 size 113 at $12.00 or $252.00
2 size 125 at $10.00 or $20.00

On October 11, 1983, at 4:15 p.m., the apples were shipped to Fruitco in Bronx, New York by truck. A prelimary restricted inspection report was issued covering an inspection made at the place of business of Fruitco on October 17, 1983, at 6:30 a.m., of apples in cartons. The report stated that the inspection took place at the applicant's store, and covered "California apples, 80, 88, 72, 100 J M B Packing-CA." Such inspection stated in addition as follows:

> Grade defects average 1% mostly firm ripe, some firm. 11 to 24% average 16% damage by Bruising scattered throughout the pack. No decay. Meets quality requirements but fails to grade U.S. No. 1 only account of condition.
>
> TEMPERATURES: 40 to 43° F.

An additional preliminary restricted inspection was made on October 20, 1983, at 10:15 a.m., at the place of business of Fruitco, and was stated to cover apples in cartons "J M B Packing California Apples 80, 88, 100." Such inspection stated in addition as follows:

> Grade defects average 1%. Mostly ripe & firm. 6 to 20% per carton, average 11% damage by Bruising, scattered throughout pack, affecting all stages of ripeness. 6 to 18%,

average 12% Bitter pit. No decay. *Grade:* U.S. No. 1. Bruising & Bitter Pit being factors of condition.

TEMPERATURES: 42 to 43°F.

5. Respondent allowed an adjustment to its customer on the 100 size and larger apples of $5.88 a box, on the 113 size apples of $3.75 per box, and on the 125 size apples of $4.30 a box, for a total adjustment of $5,449.91. Respondent's customer remitted to respondent on the basis of the original purchase price less the adjustment. Respondent deducted a packing fee in the amount of $4.50 per carton, the adjustment in the total amount of $5,449.91, cooling in the amount of 50 cents per carton, of 25 cents per carton, and remitted net proceeds to complainant of $4,505.34.

6. The informal complaint was filed on July 9, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the amount by which respondent adjusted the invoice price. The submissions made in this proceeding on respondent's behalf by Jacobs, Malcolm & Burtt deal almost totally with reasons why such firm should not be considered to be responsibly connected with respondent. This is not, of course, a subject for consideration in this proceeding. Alvin Cortopassi, who was the person principally responsible for operating respondent firm at the time of the transaction which is the subject of this proceeding has stated at several points in the record that in his opinion the apples were in good condition when shipped, and that he personally objected to making any allowance to Fruitco in regard to the apples. However, Mr. Cortopassi stated that the broker who negotiated the sale of the apples between respondent at Fruitco urged that an adjustment be made, and that Fruitco insisted on an adjustment. Respondent, as an agent for complainant, was obligated not only to get the best possible price for the apples, but also not to allow an adjustment unless such adjustment was warranted. While frequently an agent in this type of situation is allowed discretion in the granting of adjustments there is no evidence that there was any specific agreement between respondent and complainant herein giving respondent the authority to grant adjustments without consultation with complainant. See *Regulations,* § 46.32 (7 CFR § 47.32). However, even assuming that respondent had such discretion there are a number of reasons why respondent cannot be allowed to take credit for the adjustments which were made in this case. First, and most importantly, the inspections made at destination do not disclose the quantity of apples inspected. We have no way of knowing whether the quantity in-

spected was representative of the whole of the shipment of apples or merely covered a very small amount of such apples. Second, the first inspection on October 17, 1983, discloses temperatures in the apples that are somewhat high, and if made on the day of arrival, shows that there was at least a one day delay in transit. The inspection also is somewhat borderline as far as showing a failure of the apples to make good delivery. The second inspection is too remote in time to show the condition of the apples on arrival, but it is strong evidence that the Bitter Pit was not present in the apples on arrival. We conclude that respondent has not furnished sufficient evidence to support the adjustment which was made in the price of the apples. Respondent is therefore liable to complainant for the amount of the adjustment, or $5,449.91. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $5,449.91, with interest thereon at the rate of 13% per annum from November 1, 1983, until paid.

Copies of this order shall be served upon the parties.

STEVCO, INC. *v.* C.B. MARCHANT & CO., INC. PACA Docket No. 2-7162. Decided on July 16, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on September 3, 1985, and a formal complaint was filed on January 16, 1986. Complainant seeks to recover $21,835.50 which amount is alleged to be the total purchase price for grapes sold to and accepted by respondent on or about July 3, 4, 6, and 9, 1985. Respondent filed an answer to the formal complaint on April 22, 1986, admitting that $10,780.50 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admit-

> ted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, *$10,780.50.* Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from *August 1, 1985,* until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

NAT FEINN SALES CORPORATION *v.* BERRYMAN PRODUCE, INC. PACA Docket No. 2-7169. Decided on July 17, 1986.

James Vallis, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,635.00 in connection with shipments of yellow onions in interstate commerce. The formal complaint was served upon respondent, and respondent submitted as an answer a document that failed to comply with 7 CFR § 47.8(b). Respondent was given an opportunity to submit a proper answer but failed to do so. Therefore, respondent is considered to have failed to file an answer, which constitutes a waiver of hearing and an admission of the facts alleged in the complaint, pursuant to 7 CFR § 47.8(c). Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Nat Feinn Sales Corporation, is a corporation whose address is P.O. Box 848, Fresno, California 93712. Respond-

ent, Berryman Produce, Inc., is a corporation whose address is 3120 Produce Row, Houston, Texas 77023. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $2,635.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, *$2,6350.00,* with interest thereon at the rate of 13 percent per annum from *July 1, 1985,* until paid.

Copies of this order shall be served upon the parties.

SUN WORLD INTERNATIONAL, INC. *v.* BERRYMAN PRODUCE, INC.
PACA Docket No. 2-7170. Decided on July 17, 1986.

Failure to file an answer—Reparation.

Complainant, pro se.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,436.00 in connection with shipments of kiwifruit in interstate commerce. The formal complaint was served upon respondent, and respondent submitted as an answer a document that failed to comply with 7 CFR § 47.8(b). Respondent was given an opportunity to submit a proper answer but failed to do so. Therefore, respondent is considered to have failed to file an answer, which constitutes a waiver of hearing and an admission of the facts alleged in the complaint, pursuant to 7 CFR § 47.8(c). Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Sun World International, Inc., is a corporation whose address is P.O. Box 9110, Bakersfield, California 93389. Respondent, Berryman Produce, Inc., is a corporation whose address is 3120 Produce Row, Houston, Texas 77023. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $2,436.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, *$2,436.00,* with interest thereon at the rate of 13 percent per annum from *September 1, 1985,* until paid.

Copies of this order shall be served upon the parties.

BUD ANTLE INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7175. Decided on July 17, 1986.

Admission of liability—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*

Louis Pulvermacher, New York, New York, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $179,507.30 in connection with shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting indebtedness to the complainant in the amount of $162,402.10. Respondent also claimed that payment arrangements had been made. Complainant was given an opportunity to dispute that the amount due was actually $162,402.10 and to further dispute the fact that payment arrangements had been made. Complainant filed a response indicating that the amount due had in fact been reduced to $162,402.10, but disputed the fact that payment arrangements had been made. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Bud Antle, Inc., is a corporation whose address is P.O. Box 1759, Salinas, California 93902. Respondent, Freshville Produce Distributors, Inc., is a corporation whose address is 1367

Viele Avenue, Bronx, New York 10474. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $162,402.10. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, *$162,402.10,* with interest thereon at the rate of 13 percent per annum from *February 1, 1986,* until paid.

Copies of this order shall be served upon the parties.

PRO-VEG, INC. *v.* M & M PRODUCE FARMS AND SALES a/t/a ZYGMUND ROGOWSKI & SONS. PACA Docket No. 2-6793. Decided on July 18, 1986.

Accord and satisfaction.

Where complainant accepts a lesser payment from respondent which respondent offers in final settlement of dispute, accord and satisfaction is reached, and complaint must be dismissed.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant originally sought a reparation award against respondent in the amount of $6,293.00 in connection with a transaction, in interstate commerce, involving onions, a perishable agricultural commodity. Subsequent to the filing of the complaint, the complainant notified the department that it had received a check in the amount of $4,193.00 from the respondent, and that it was therefore only seeking $2,100.00 as reparation from respondent.

A copy of the department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying liability to complainant.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements, but neither of them did so. Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Pro-Veg, Inc., is a corporation whose mailing address is P.O. Box 727, Lamont, California 93241-0727.

2. Respondent, M & M Produce Farms & Sales a/t/a Zygmund Rogowski & Sons, is a partnership consisting of Matthew Rogowski, Mark Rogowski, and Sigmund Rogowski, Jr., whose mailing address is Route 2, Goshen, New York 10924. At all material times, although the respondent was not licensed under the Act, it was operating subject to license.

3. On or about July 7, 1984, in the course of interstate commerce, complainant, by oral contract, sold to the respondent 899 50 pound sacks of prepack yellow onions at an agreed price of $10.50 per sack delivered. Subsequent thereto, it was agreed that the respondent would pay the transportation costs at $3.15 per bag and would pay the complainant $7.00 per bag. 599 sacks were "Triple S" brand, and the remaining 300 were "Bunny Luv" brand onions.

4. The onions were shipped on July 7, 1984, from California to respondent in New York. Upon arrival on July 12, 1984, the respondent accepted the onions. On July 17, 1984, some of the onions were the subject of a federal inspection. The Preliminary Restricted Report issued by the inspector at that time (Serial No. A 95767) indicates that only 46 bags of prepacked onions were inspected but that these bags showed an average of 72% decay. The report also indicates that the inspector inspected 150 bags of medium onions which showed an average of 64% decay as well as 2% damage by dry sunscald. The inspector noted that all of the onions bore the "Bunny Luv" brand label.

5. On or about August 28, 1984, the respondent sent the complainant a check in the amount of $4,193.00.

6. On April 8, 1985, the department received a letter from the complainant in which in pertinent part it states:

> Mr. Alexis M. Estevez, Acting Regional Director of NE Region, PACA Branch, was unable to obtain a release of Check 4896, for $4,193.00, issued to us by M & M Produce Farms & Sales, a Partnership, in which Zygmund Ro-

gowski is a Partner. Mr. Estevez mailed the check to us and we had placed it "out-for-collection" on 1-29-85. The check has cleared the bank the amount $4,193.00, was deposited to out bank account on 2-11-85.

7. The formal complaint was filed on November 30, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case presents a multitude of issues for resolution. However, the dispositive issue in this case is whether or not the complainant accepted the respondent's $4,193.00 check in accord and satisfaction for the indebtedness arising out of the subject shipment of onions. The respondent in its answer alleged that complainant did so. The complainant, after being served with the answer, never responded thereto although it was given an opportunity to do so during the course of the procedure followed in this case.

In order for there to be an accord and satisfaction, there must exist a bona fide dispute between the parties, one party must tender an amount in satisfaction of the disputed debt accompanied by such actions and declarations as notify the other party that the tender, if accepted, would be accepted in full satisfaction thereof, and an acceptance of the tender. *Blue Goose Growers* v. *Boler Fruit*, 23 Agric. Dec. 115 (1964).

In the instant case, it appears that respondent offered to settle the dispute between the parties for $4,193.00, and that complainant, at first, rejected this tender. However, it further appears that, after the Department failed to gain respondent's agreement to release the respondent's $4,193.00 check as an undisputed amount, complainant accepted respondent's offer and negotiated the check. In view of this, all of the prerequisites of accord and satisfaction are present in this case. Our conclusion is supported by the acknowledgement in the complainant's April 2, 1985, letter to the Department that, although an attempt had been made to get respondent to release the check as an undisputed amount, complainant was aware that respondent refused to do so, and nevertheless the complainant negotiated the check and received payment thereon. In view of this, we must conclude that the complainant was aware that respondent offered the check in full satisfaction of the alleged indebtedness, and that the complainant accepted it as such. In *Florida Fruit Growers, Inc.* v. *Fleisher Bros. & Danziger,* P.A.C.A. Docket No. 400 (January 16, 1933), we held that acceptance of a check accompanied by a letter indicating that the check was tendered in full satisfaction for the disputed transactions resulted in an accord and satisfaction. The law does not appear to have

changed in the 53 years since that decision was issued. *See Potter* v. *Pacific Coast Lumber Co. of California*, 234 P. 2d 16, 37 C.2d 592 (1951); *Venzie Corporation of Ohio* v. *Riethmiller*, 145 N.E. 2d 460, 103 Ohio App. 343, 3 0. Ops. 2d 369 (1957). Cf. *Mendelson-Zeller* v. *Season Produce*, 31 Agric. Dec. 1288 (1972), wherein it was held that no accord and satisfaction occurred where respondent, neither on its check nor in its accompanying letter indicated that acceptance of its check was conditional upon complainant's accepting it in full satisfaction of its claim; and *Pruden Packing Co.* v. *Hager's Wholesale Frts.*, 12 Agric. Dec. 264 and 12 Agric. Dec. 1195 (1953), wherein no accord and satisfaction was held to result when complainant refused to accept the check tendered by respondent and the Department held the check in escrow during the pending of the reparation proceeding.

In this case, we conclude that respondent tendered its $4,193.00 check in full satisfaction of the disputed transactions, that complainant was aware of this when it accepted it, and that an accord and satisfaction has taken place. Accordingly, we have no choice but to dismiss the complaint. *Rocky Ford* v. *Vita-Wellbrock-Kearney*, 31 Agric. Dec. 306 (1972).

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

G.W. TRASK & SONS *v.* H.M. SHIELDS, INC. PACA Docket No. 2-6878. Decided on July 18, 1986.

Evidence, failure to rebut.

Complainant sought to recover balances alleged due on 11 lots of produce. Complainant failed to rebut respondent's explanations and justifications for failure to pay the alleged balances and such balances were found to be not due to complainant as to all but one transaction. On that transaction it was found that even though respondent and complainant concurred in turning over a portion of the shipment to other receivers to be handled on a consignment basis, respondent failed to furnish any justification for accounting on a consignment basis for the remainder which it kept.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $11,696.44 in connection with the shipment in interstate commerce of 11 lots of cucumbers and squash.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Harold E. Trask, James H. Trask, William D. Trask, Margaret S. Trask, and Harold E. Trask, Jr., doing business as G.W. Trask & Sons, whose address is P.O. Box 4010, Burton, South Carolina.

2. Respondent, H.M. Shields, Inc., is a corporation whose address is State Farmers Market, Room 8-4, Pompano Beach, Florida. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 12, 1984, under its invoice No. 4692, complainant sold and shipped to respondent 100 containers of zucchini squash at $6.00, 100 containers of yellow squash at $6.00, and 50 containers of large zucchini squash at $8.00, for a total price of $1,600.00. Respondent has paid complainant $1,359.65 after deducting $240.35 for freight on two previous lots of produce with complainant's permission.

4. On or about May 18, 1984, under its invoice no. 4707, complainant sold and shipped to respondent, or respondent's customer, 218 containers of zucchini squash at $8.50, 109 containers of yellow squash at $8.50, and an additional 10 containers of zucchini squash

at $8.50, for a total price of $2,864.60. On arrival the shipment was short by 6 boxes of zucchini squash, and 4 boxes of yellow squash. In addition the boxes were slack. Respondent contacted complainant, and complainant agreed to the boxes being reworked. The boxes were reworked, and yielded 162 containers of zucchini squash, and 84 containers of yellow squash. Respondent paid complainant on this basis a total of $2,176.00.

5. On or about May 26, 1984, under its invoice no. 4723, complainant sold and shipped to respondent or respondent's customers 200 containers of zucchini squash at $5.00, and 100 containers of yellow squash at $5.00, for a total price of $1,500.00. After arrival complainant agreed to the rejection of the yellow squash, and billed respondent $1,000.00 for the remaining 200 containers of zucchini squash. Seventy-eight containers of the yellow squash were actually taken back by complainant, and sent to another firm for sale. Respondent remitted to complainant on the basis of $2.25 for the 200 containers of zucchini squash, and $2.25 for the 22 containers of yellow squash, or a total of $499.50.

6. On or about June 2, 1984, under its invoice no. 3819, complainant sold and shipped to respondent, or respondent's customer, 90 containers of select cucumbers at $4.00, and 45 containers of pickling cucumbers at $15.00, for a total price of $1,035.00. After arrival of the produce complainant and respondent agreed to a change in the price of the pickling cucumbers to $6.00. Respondent has remitted to complainant on this basis.

7. On or about May 28, 1984, under its invoice no. 3813, complainant sold and shipped to respondent's customer 200 containers of extra fancy zucchini squash at $5.50, 50 containers of fancy zucchini squash at $3.50, 200 containers of extra fancy yellow squash at $5.50, and 50 containers of fancy yellow squash at $3.50, for a total of $2,550.00. Complainant's invoice erroneously totaled the amount due as $5,400.00. On arrival at the place of business of respondent's customer trouble in the squash was reported, and complainant agreed to 100 containers of extra fancy zucchini squash, and 85 containers of extra fancy yellow squash being rejected and sent to Al Nagleberg Co., Inc., in New York to be sold for complainant's account. On arrival at the place of business of Al Nagleberg Co., Inc., such firm refused the squash, and it was then turned over to Yeckes-Eichenbaum for sale for complainant's account. Complainant rebilled respondent for 100 containers of extra fancy zucchini squash at $5.50, 50 containers of fancy zucchini squash at $3.50, 125 containers of extra fancy yellow squash at $5.50, and 50 containers of fancy yellow squash at $3.50, or a total of $1,587.50. Respondent paid complainant $917.00.

8. On or about May 31, 1984, under its invoice no. 3825, complainant sold and shipped to respondent 40 containers of extra fancy zucchini squash at $5.00, and 40 containers of extra fancy yellow squash at $5.00, for a total of $400.00. Respondent has paid complainant $300.00 pursuant to complainant's agreement following arrival of the produce.

9. On or about June 13, 1984, under its invoice no. 3844, complainant sold and shipped to respondent 125 containers of select cucumbers at $8.10, for a total of $1,012.50. Respondent has paid complainant $343.75 pursuant to complainant's agreement with respondent following arrival of the produce.

10. On or about June 16, 1984, under its invoice no. 3854, complainant consigned to respondent, and shipped to various brokerage houses at respondent's direction, 100 containers of super select cucumbers, 200 containers of select cucumbers, 185 containers of super select cucumbers, 140 containers of select cucumbers, 22 containers of small cucumbers, 127 containers of select cucumbers, and 67 containers of large cucumbers. Complainant requested that the cucumbers be handled on a consignment basis because they would be the last harvested and were in poor condition. Federal inspections at the various destinations confirmed that the cucumbers were in poor condition on arrival. Respondent, without taking a commission, remitted all the net proceeds on these cucumbers in the total amount of $2,640.62 to complainant, and no balance is now due to complainant.

11. On or about June 16, 1984, under its invoice no. 4002, complainant consigned to respondent, and shipped to Finest Fruits, Inc., in Bronx, New York, for sale on consignment, 179 containers of super select cucumbers and 144 containers of select cucumbers. Complainant requested that these cucumbers be handled on a consignment basis because they would be the last harvested, and were in poor condition. At complainant's request, in order to reduce expenses, no inspections were taken on these cucumbers. Respondent, without taking a commission, remitted all the net proceeds on these cucumbers, in the total amount of $656.45, to complainant, and no balance is due to complainant.

12. On or about June 19, 1984, complainant shipped to respondent for sale on consignment by a brokerage house to be selected by respondent, 100 packages of super select cucumbers, 200 containers of select cucumbers, 19 containers of small fancy cucumbers, and 241 containers of large cucumbers. The cucumbers were delivered to, and sold by, Yeckes-Eichenbaum in New York for net proceeds of $1,318.05. Respondent remitted this entire amount to complainant.

13. On or about June 22, 1984, complainant consigned to respondent to be placed with brokerage houses selected by respondent, containers of 101 super select cucumbers, 75 containers of select cucumbers, 75 cartons of cucumbers, 101 cartons of super select cucumbers, 80 cartons of select cucumbers, 69 cartons of large cucumbers, and 106 cartons of cucumbers. Approximately one-half of the cucumbers were resold by Kaleck Brothers in Philadelphia for net proceeds of $378.09, and the remaining cucumbers were resold by M. Trombetta & Sons, Inc., in New York for net proceeds of $348.55. The entire net proceeds were remitted to complainant by respondent. Federal inspections taken shortly after arrival at the places of business of Kaleck and Trombetta showed that the cucumbers were in generally poor condition.

14. The informal complaint was filed on October 11, 1984, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

In this proceeding complainant seeks to recover balances alleged to be due on the alleged purchase prices of 11 lots of cucumbers and/or squash sold to respondent. Complainant, in its informal complaint, claimed balances in connection with 19 lots, but for unspecified reasons dropped its claims as to eight invoices when it filed its formal complaint.

In its unverified informal complaint, which is attached as an exhibit to the report of investigation, and again in its brief (which is not in evidence), complainant alleges that respondent made no complaints concerning any of the produce until two or three weeks after shipment. However, this allegation is not repeated in complainant's sworn complaint, its only verified submission in this proceeding. Respondent's verified contentions to the contrary relative to specific lots of produce have therefore been accepted as true.

Complainant's evidence in support of its contention that balances are due on the 11 invoices which are the subject of the formal complaint consists only (except for the sworn allegation itself) of copies of invoices attached to the informal and formal complaints. Many of these invoices are heavily marked up and altered, and are obviously not the original. On the other hand respondent has submitted sworn statements in regard to each invoice in which it attempts to set forth its justification for paying less than the amounts billed. Respondent has also submitted reams of its own copies of the relevant (and some irrelevant) invoices, also heavily marked up and altered, and in each case there are two or more versions of each invoice.

Due to complainant's failure to counter in any way any of respondent's justifications and explanations, respondent's claims must in almost all instances be taken at face value and considered to be accurate. Our task would have been relatively easy were it not for the fact that many of respondent's explanations and justifications are quite sketchy, and in some cases difficult to comprehend.

In regard to the produce covered by Finding of Fact 3, shipped under invoice no. 4692, respondent has alleged that complainant's Mr. Trask granted a credit to cover the cost of freight paid by respondent on a prior shipment of produce. Complainant has not rebutted this contention by respondent with any credible evidence. We conclude that the $1,359.65 payment made by respondent relative to this invoice extinguishes respondent's debt to complainant thereon.

The May 18, 1984, shipment under invoice no. 4707, covered by Finding of Fact 4, was billed by complainant in the amount of $2,864.50, and paid for by respondent in the amount of $2,176.00. Complainant claims a shortage of $688.50. Respondent explained that when the shipment arrived it was noted that the boxes were not fully packed. Respondent states that Mr. Trask was notified of this problem, and agreed that the receiver "should work the squash out." Respondent states that no charge was to be made for the repacking cost, and all remaining squash would be paid for in full. Respondent further states that remittance was made in accord with this agreement. Complainant did not offer any rebuttal evidence to these contentions of respondent. We conclude on the basis of all of the evidence that respondent's payment was in accord with the agreement between the parties, and that complainant is not due any balance on this shipment.

In regard to the squash covered by Finding of Fact 5, and shipped under invoice no. 4723, respondent has contended that an inspection on arrival showed excessive decay, and that Mr. Trask agreed to a portion of the squash being sent to a firm in Boston to be sold for complainant's account. Respondent states that Mr. Trask also agreed to the adjusted price of $2.25 for the remaining squash. Complainant submitted no rebuttal evidence to these contentions by respondent, and we conclude that respondent does not owe complainant any further payment on this shipment.

The produce shipped on June 2, 1984, on the complainant's invoice no. 3819, is stated by respondent to have had a problem on arrival. Respondent states that Mr. Trask was notified, and that an inspection was taken. In regard to the 90 containers of select cucumbers covered by this invoice complainant changed its invoice to

reflect the exact amount that respondent remitted. In regard to the remaining 45 containers of pickling cucumbers respondent states that Mr. Trask agreed by telephone to remittance on the basis of $6.00 per container for 41 containers, and complainant has not submitted rebuttal evidence to this allegation. We conclude on the basis of all of the evidence that there is nothing remaining due from respondent to complainant on this shipment.

As to the squash covered by complainant's invoice no. 3813 (Finding of Fact 7) complainant claims a balance due of $670.50 based apparently on the fact that complainant agreed to the placement of 100 containers of extra fancy zucchini squash, and 75 containers of extra fancy yellow squash, elsewhere. However, complainant's own notation on the invoice shows that 85 containers of extra fancy yellow squash were actually placed elsewhere, so that the amount should have been reduced by an additional $55.00 to $1,532.50. Respondent in its submission alleged that the squash showed problems on arrival, and that complainant was notified of this. Complainant then is alleged to have asked that the receiver "work out any portion that he could", and that the balance be sent to Al Nagleberg & Co., Inc., in New York to be sold for complainant's account. Respondent states that when the truck got to New York, Nagleberg "refused to unload all the squash due to its poor quality and condition". Respondent alleges that complainant then contacted respondent, and asked if respondent could arrange the sale of the squash. Respondent states that "the remaining squash was sent to Yeckes-Eichenbaum, and the returns forwarded to complainant". As stated earlier, due to complainant's lack of response to respondent's allegations we are bound to take all the above as true. However, from none of respondent's allegations can we infer that any of the squash other then the 100 extra fancy zucchini, and 85 extra fancy yellow, were dealt with other than by respondent, and respondent has given us no justification for its accounting to complainant on a consignment basis for the squash which it kept. In addition it is not clear from respondent's statements what portions of the squash were handled by any of the receivers. We conclude that respondent owes complainant the full contract price for the remainder of the squash, or $615.50. See *Genbroker Corp.* v. *Super Food Services,* 38 Agric. Dec. 83 (1979).

In regard to the produce covered by Findings of Fact 8 and 9, complainant has failed to submit any rebuttal evidence to respondent's contention that complainant agreed, following arrival, to the payments that respondent eventually made. We conclude that respondent does not owe complainant any balance relative to the produce covered by Findings of Fact 8 and 9.

In regard to the produce covered by Findings of Fact 10 and 11, the facts as set forth in the Findings of Fact were not rebutted in any way by complainant, and accordingly we have concluded that no balance is due to complainant in regard to this produce.

In regard to the produce covered by Findings of Fact 12 and 13, respondent alleges that in spite of Mr. Trask's prior assertion that he would harvest no more cucumbers following June 16, 1984, Mr. Trask called respondent on June 21, 1984, stating that he intended to strip a different field in order to keep his labor busy through that week and perhaps be able to cover his expense. Respondent states that complainant carried through with this intention in spite of respondent's urging that complainant not do so, and then prevailed upon respondent to place these last cucumbers for sale in various terminal markets. Respondent supplied arrival inspections, covering most of the cucumbers, showing that they arrived in poor condition, and also supplied detailed accountings rendered by the terminal market firms which handled the cucumbers. Respondent passed along the entire net proceeds of the cucumbers to complainant without deducting any commission. Complainant has not submitted any rebuttal evidence to any of the allegations of respondent, and we find on the basis of all of the evidence that respondent does not owe complainant any balance as to these cucumbers.

In summary we have found that there remains due and owing from respondent to complainant only the sum of $615.50 in connection with invoice no. 3813. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, the sum of *$615.50,* with interest thereon at the rate of thirteen percent per annum from *July 1, 1984,* until paid.

Copies of this order shall be served upon the parties.

STANDARD FRUIT & STEAMSHIP CO. *v.* R. THEODORE, INC. PACA Docket No. 2-6908. Decided on July 18, 1986.

Unverified statements cannot be given evidentiary value—Acceptance occurs when product unloaded—Damages, burden of proof on respondent—Produce presumed to have some commercial value—Dump certificate needed to prove disposition.

Respondent received and unloaded three truckloads of bananas. Because transaction was free on board it had burden to show it suffered damages because goods did not meet contract specifications. It failed to do so since mere statements that goods were dumped are not sufficient to overcome presumption goods have some market value.

Dennis Becker, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint filed in which complainant's seeks an award of reparation in the amount of $8,376.41 in connection with the sale and shipment of three truckloads of bananas in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant, and which in addition filed a counterclaim. Since the amounts claimed in the formal complaint and the counterclaim do not exceed $15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in this case, as is the Department's report of investigation. The parties were given the opportunity to file additional evidence in the form of verified statements. Complainant filed an opening statement which was verified. Respondent filed an answering statement which was not verified, and therefore cannot be given evidentiary value. *Frank W. Prillwetz, Jr.* v. *Sheehan Produce*, 19 Agric. Dec. 1213 (1960). Complainant filed a statement in reply which was verified. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Standard Fruit and Steamship Company, is a corporation with an address at P.O. Box 3080, Boca Raton, Florida 33431-0980. At the time of the transactions involved in this proceeding complainant was licensed under the Act.

2. Respondent, R. Theodore, Inc., is a corporation with an address at 52 Elm Street, Manchester, New Hampshire 03101. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

3. On or about February 8, 1984, complainant sold to respondent three truckloads of bananas, which bananas were shipped from port in New York, New York to respondent at its place of business in Manchester, New Hampshire. The three truckloads consisted of 2,696 cartons of bananas. They were sold for $7.50 a box plus a fuel charge of $1,024.48, and handling of $1,132.32, for a total contract price of $22,376.80, f.o.b. The three truckloads arrived in Manchester, New Hampshire on or about February 9, 1984, where they were received, unloaded and accepted by respondent.

4. On February 9, 1984, respondent notified complainant that the bananas showed pulp temperatures of mostly 54°F, with some as high as 57°F, and therefore that the bananas would not ripen properly because they had been chilled as a result of which, respondent believed that they were not in merchantable condition when received.

5. Respondent dumped all 2,096 cartons of bananas. However, respondent did not procure dump certificates with respect to its action. Its claim that the bananas were disposed of to a "pigman" were not fully substantiated. Complainant granted respondent an adjustment of the full contract price of $14,000.39, leaving unpaid $8,376.41.

6. A formal complaint was filed in this proceeding on April 8, 1985. An informal complaint was filed in this proceeding on November 6, 1984, which was within nine months of the time the causes of action involved herein arose.

DISCUSSION

This proceeding involves three truckloads of bananas shipped in interstate commerce on or about February 8, 1984 from port in New York to Manchester, New Hampshire. They were all part of the same contract, but each truckload constitutes a separate transaction under the Perishable Agricultural Commodities Act. However, for purposes of this Decision and Order it is not necessary to deal with each truckload separately since the facts are exactly the same. Complainant claims that respondent received, unloaded and

accepted the three truckloads of bananas, but has failed to pay it $8,376.41 of a total contract price of $22,376.80, after complainant granted it an adjustment of $14,000.39 as a result of respondent's assertions that the bananas were chilled upon arrival. Respondent, on the other hand, claims that the bananas had to be dumped because they were totally unmerchantable upon arrival. It further claims that it is entitled to damages in the amount of $7,933.86 as a result of its efforts to save the bananas. Based upon our analysis of the evidence in this proceeding we must rule for complainant.

The difficulty with respondent's contentions is that respondent has not submitted sufficient evidence for us to conclude that the bananas were not merchantable when they were received. We find that respondent accepted the bananas in these free on board transactions when it unloaded them from the trucks. *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Pandol Brothers, Inc.* v. *Tropic Banana*, 43 Agric. Dec. — (1984). Because it accepted them it has the burden of proof to show damages, which as mentioned above, it has failed to do. *Rydell California Potato Co.* v. *The Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957); *Lester Distributing Co.* v. *A. Levantino Produce Corporation*, 43 Agric. Dec. — (1984). Essentially, respondent submitted statements that the bananas were received with pulp temperatures of 54°F, which is below that temperature at which bananas usually suffer chill damage. See *Mic Bruce, Inc.* v. *Chiquita Brands, Inc.*, PACA Docket No. 2-6608 45 Agric. Dec. — (1986). However, it did not submit any extrinsic evidence other than its statement in support of this claim. Complainant apparently accepted respondent's claim that the bananas were chilled upon arrival, and assumed responsibility to at least a partial degree because it was willing to grant a large adjustment with respect to the three truckloads involved. However, complainant insisted that the bananas were not totally unmerchantable.

In support of its claim that the bananas had no value when received respondent submitted its own sales tickets with notations reflecting that a certain number of cartons of bananas had been dumped, or otherwise disposed of to what it called a "Pigman". We believe that a pigman in the jargon of the industry is someone who is feeding such fruits or vegetables to swine because they are not fit for human consumption. However, respondent had a greater burden to show that such was the case, and to show clearly that whatever bananas were furnished to the "Pigman" were the ones involved in the three transactions herein. It did not do so. It merely made an assertion that that is how it disposed of all of the bananas. Even had it proved that all 2,696 cartons of bananas were

disposed of to the "Pigman", it would not have met its burden of proof that they were not fit for human consumption. The presumption is that fruits and vegetables when received have some commercial value. Respondent has the burden to show that the bananas had no commercial value. See *Growers Produce* v. *Star Produce*, 33 Agric. Dec. 693, 696 (1974); *Homestead Pole Bean Co-op, Inc.* v. *Wayne F. Jones d/b/a Jones Produce Co.*, 43 Agric. Dec. — (1984). In order to show that they did not it was necessary either to have secured a federal inspection, which may not have been possible since there are no federal inspectors in the State of New Hampshire, or alternatively, a statement from a reliable third party that it had inspected the bananas and found them not to be merchantable in their entirety. See *Mutual Vegetable Sales* v. *Selec Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); *Tyre Farm, Inc.* v. *Dandrea Produce, Inc.*, 45 Agric. Dec. — (1986). Respondent failed to do so. Furthermore, as required by 7 CFR § 46.22, it was necessary to procure a dump certificate as to their ultimate disposition. See *A.J. Elggren & Sons Co.* v. *J.A. Wood Co.*, 11 Agric. Dec. 1032 (1952); *Nationwide Produce Distributors* v. *Lewis H. Astrin et al.*, 43 Agric. Dec. — (1984).

In view of the above we have no alternative other than to conclude that respondent has failed to carry its burden of proof that the bananas were totally without commercial value. Therefore, complainant must prevail, and respondent's counterclaim in this proceeding must be dismissed. Respondent's failure to pay complainant $8,376.41 with respect to the three transactions discussed above is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order respondent shall pay to complainant, as reparation, *$8,376.41*, with interest thereon at the rate of 13% per annum from *March 1, 1984*, until paid.

The counterclaim in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

WELL-PICT, INC. *v.* C.H. ROBINSON COMPANY. PACA Docket No. 2-6819, Decided on August 8, 1986.

Acceptance—Damages for non-conforming goods—Unsuitable shipping condition.

Where recording thermometer showed maintenance of proper temperatures and there was no transit delay, strawberries which arrived with 12% Rhizopus Rot were in unsuitable shipping condition.

Edward M. Silverstein, Presiding Officer.
Mr. Thomas R. Oliveri, Newport Beach, California, for complainant.
Owen Gleason, Esq., Eden Prairie, Minnesota, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of $5,239.30 in connection with one transaction, in interstate commerce, involving strawberries, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) has been filed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement, respondent filed a verified answering statement, and complainant filed a verified statement in reply. Also, each party filed a brief.

FINDINGS OF FACT

1. Complainant, Well-Pict, Inc., is a corporation whose mailing address is P.O. Box 973, Watsonville, California 95076.

2. Respondent, C.H. Robinson Company, is a corporation whose mailing address is 7525 Mitchell Road, Eden Prairie, Minnesota 55344. Respondent has a branch office in Miami, Florida, whose mailing address is P.O. Box 420833, Miami, Florida 33242. At all material times, respondent was licensed under the Act.

3. On August 13, 1984, in the course of interstate commerce, complainant, by oral contract, sold to respondent 768 flats of strawberries, a perishable agricultural commodity, at an agreed price of $6.00 per flat ($4,608.00), plus 60 cents per flat cooling ($460.80), 8 units of tectrol at $18.50 per unit ($148.00), and $22.50 for a temperature recorder, for a total agreed f.o.b. price of $5,239.30. On August 14, 1984, complainant invoiced respondent in accordance with this agreement.

4. The strawberries which respondent purchased from complainant were shipped from complainant's location in California on August 13, 1984, to respondent in Miami, Florida. These strawberries were destined for respondent's customer, International AG, Inc., 1930 Northwest 23rd Street, Miami, Florida 33142. Also on board the truck were 96 flats of strawberries which the respondent had purchased from another shipper and which were destined for respondent's customer Associated Grocers of Florida, Inc., whose mailing address is P.O. Box 520695, Miami, Florida 33152.

5. The tape of the temperature recorder which was on board the truck, reflects that the air temperature on board the truck, except for some minor variations at the beginning and end of the trip, remained in the 35°F. range.

6. The subject strawberries were received at the location of International AG on August 18, 1984, and were the subject of a federal inspection. The inspector found that the temperature of the strawberries was 42° to 45°F. As to quality, the inspector noted grade defects averaging 4%. The inspector further noted the condition of the strawberries as follows: "Berries are mostly ripe and firm. Decay ranges from 8 to 17% average 12% Rhizopus Rot in various stages." The strawberries were again inspected on August 21, 1984. Their temperature was noted as being 40°, and their condition was reported as follows: "From 6 to 18% per sample average 11% serious damage by wet and leaking berries. Decay ranges 9 to 63% per sample average 32% Rhizopus Rot in advanced stages." The strawberries were again inspected on August 24, 1984. Their temperature was again recorded as being 40°, and their condition was reported as follows: "From 6 to 48% per sample average 25% serious damage by wet and leaking berries. Decay ranges 27 to 82% per sample average 56% Rhizopus Rot in advanced stages." The August 24, 1984, inspection certificate further notes that the applicant (International AG) stated that the lot was to be dumped. Subsequently 671 flats of strawberries from this particular lot were dumped.

7. On August 20, 1984, the respondent sent to complainant a "CONFIRMATION OF ADJUSTMENT" which contained the fol-

lowing note: "per our conversation on 8-18-1100 AM and on 8-20 1130 AM we mutually agreed to have Int. AG handle for your account 768 Berries due to USDA. We will advise when amount of claim is known. USDA. temp. 42° mostly ripe & firm Decay range 8-17% avg. 12% Rhizopus Rot in various stages."

8. On August 24, 1984, the respondent sent to complainant the following mailgram:

> ON MONDAY, 8-13-84, 768 STRAWBERRIES WERE SHIPPED TO INTERNATIONAL AG IN MIAMI. THE SHIPMENT ARRIVED 8-18-84. ON 8-18-84 AT 930 AM INTERNATIONAL AG INFORMED US STRAWBERRIES WERE MOLDY AND THEY WERE GETTING THEM INSPECTED. WE REPORTED THE PROBLEM TO YOU AT 11 AM EDT, 8-18-84. YOU WANTED THE RYAN TAPE WHICH WE SENT 8-20. WE INFORMED YOU INTERNATIONAL AG WOULD GET THE INSPECTION AND WE WOULD INFORM YOU OF THE RESULTS ON 8-20-84. ON 8-20-84 AT 1130 AM WE INFORMED YOU OF THE RESULTS OF THE INSPECTION. YOU ASKED IF INTERNATIONAL AG WOULD HANDLE FOR YOUR ACCOUNT. WE REPLIED YES AND THAT WE WOULD KEEP YOU INFORMED TO WHICH YOU AGREE. ON WEDNESDAY 8-22-84, AT 11 AM, WE INFORMED YOU OF THE RE-INSPECTION TO WHICH YOU WANTED TO KNOW WHY THEY WERE GETTING ONE. WE REPLIED THAT THEY WERE HAVING TROUBLE SELLING THE STRAWBERRIES DUE TO THE DETERIORATION OF THEM. ON FRIDAY, 8-24, AT 430 PM, WE INFORMED YOU THAT INTERNATIONAL AG WAS DUMPING 671 STRAWBERRIES. WE WILL SEND YOU THE FOLLOWING SUPPORTING DOCUMENTATION: THE ORIGINAL INSPECTION, THE RE-INSPECTION, AND THE DUMP CERTIFICATE. WE WILL BE SENDING YOU A BILL FOR 671 STRAWBERRIES AT $1.50 EACH FOR FREIGHT.

9. On August 27, 1984, the complainant sent respondent the following telegram: "THIS IS YOUR OFFICIAL NOTICE THAT WELL-PICT, INC., IS SEEKING PAYMENT IN FULL AS INVOICE. IT HAS COME TO OUR ATTENTION THAT THE ABOVE REFERENCED LOAD OF STRAWBERRIES WAS TOTALLY MISHANDLED. TO ENABLE WELL-PICT TO COMPLETE THIS MATTER, PLEASE FORWARD YOUR CHECK IN THE AMOUNT $5,239.30."

10. On August 27, 1984, respondent sent complainant the following message: "Your invoice indicates the merchandise was 'sold' to

us, whereas in reality we acted as your broker in this transaction and have invoiced the merchandise as an accommodation for your account. Please reinvoice, showing us as agents on your invoice."

11. On August 30, 1984, the respondent sent the complainant the following telegram:

> IN RESPONSE TO YOUR MAILGRAM DATED 8/27/84 C.H. ROBINSON IS TAKING THE FOLLOWING POSITION.
>
> THE STRAWBERRIES WERE NOT IN SUITABLE SHIPPING CONDITION AS EVIDENCED BY THE EXCESSIVE DETERIORATION BETWEEN SATURDAY 8/18 THE DAY THEY ARRIVED AND WERE INSPECTED AND TUESDAY 8/21 WHEN THE RE-INSPECTION WAS TAKEN. BECAUSE OF THIS EXCESSIVE DETERIORATION INTERNATIONAL A.G. WAS UNABLE TO SELL THE STRAWBERRIES. DURING THIS TIME AS EVIDENCED BY THE USDA A TEMPERATURE WAS MAINTAINED AT 40 DEGREES. THUS THE STRAWBERRIES WERE KEPT AT A CONSTANT TEMPERATURE. IT IS OUR CONTENTION THAT THE STRAWBERRIES WERE NOT IN SUITABLE SHIPPING CONDITION AND THAT THERE IS A BREECH [SIC] OF WARRANTY ON THE ART [SIC] OF WELL-PICT INCORPORATED.

12. On August 30, 1984, the complainant sent the respondent the following letter:

> With reference to your purchase order No. 11244, this note is to acknowledge the receipt of your incorrect confirmation of sale received by this office on August 30, 1984, for the amount of 768 strawberries shipped from Watsonville on August 13, 1984.
>
> You were the buyer, as reflect by your purchase order #11244. We do not understand the Broker's standard Memorandum Of Sale postmarked August 27, 1984 and wish to advise you that your records should be corrected to reflect C.H. Robinson as the buyer as agreed on at the time of the sale.

13. On September 6, 1984, the respondent sent the complainant the following telegram:

IN REFERENCE TO YOUR LETTER DATED AUGUST 30TH 1984 WE TAKE THE FOLLOWING EXCEPTION:

1. THE CONTRACT WAS BREACHED AT THE TIME OF NOTIFICATION THAT THE STRAWBERRIES FAILED U.S.D.A. INSPECTION AS PER THE CONVERSATION DATED 8/20/84 AT 11AM WITH MR. MURPHY.

2. THE PURCHASE ORDER WAS CANCELLED AT THE SAME TIME AS ACKNOWLEDGED BY MR. MURPHY. MR. MURPHY ASKED US IF INTERNATIONAL A.G. WOULD HANDLE THE STRAWBERRIES FOR WELL-PICT'S ACCOUNT TO WHICH WE REPLIED YES THEY WOULD.

3. PLEASE CHANGE YOUR RECORDS TO SHOW THAT OUR PURCHASE ORDER HAS BEEN CANCELLED AND THAT C.H. ROBINSON IS NOT ACTING AS AGENT AS INDICATED BY OUR MEMORANDUM OF SALE.

14. On September 7, 1984, the following mailgram was sent to complainant by respondent: "THIS MAILGRAM IS TO CORRECT THE MAILGRAM SENT ON 9-6-84 IT SHOULD BE CORRECTED TO READ AS FOLLOWS: PLEASE CHANGE YOUR RECORDS TO SHOW THAT OUR PURCHASE ORDER HAS BEEN CANCELLED AND THAT C.H. ROBINSON IS NOW ACTING AS AGENT AS INDICATED BY YOUR MEMORANDUM OF SALE."

15. The strawberries which respondent had purchased from another shipper which were also on board the truck carrying the subject shipment, and which were delivered to Associated Grocers of Florida, Inc., arrived in good condition. According to a sworn statement received from the buyer: "There was no undue decay and the strawberries met good delivery standards and did not deteriorate rapidly after arrival, and were paid for in full by me." The buyer further noted that he had occasion to look at the truck and did not observe any problems with the carrier or its refrigeration equipment. He further stated that "a review of [his] records indicated T&T Trucking, Inc., had protected the strawberries adequately during shipment. The strawberries arrived showing good pulp temperatures."

16. No account of sales with respect to this shipment was ever sent to complainant by either respondent or International AG.

17. The formal complaint was filed on March 18, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The initial dispute between the parties concern whether or not the lot of strawberries was rejected by respondent. Respondent has the burden of proof on such matters. It contends that complainant agreed after the rejection to allow International AG to handle the strawberries for complainant's account. *Gerrard Co.* v. *Eveloff,* 12 Agric. Dec. 1048 (1953). The only substantive evidence regarding this matter are the sworn statements of each party's representative. The statements are in direct conflict with one another. Also, the evidence submitted by respondent does not indicate that either it or International AG sent complainant an account of sales for this shipment. In view of this, we cannot hold that the respondent has satisfied its burden of proof on this matter. *Estrella Frt. Shipping Corp.* v. *Springer,* 12 Agric. Dec. 1077 (1953). We therefore conclude that the respondent accepted the lot of strawberries.

Since respondent accepted the lot of strawberries, it is responsible for the contract price less any damages caused by a breach of contract committed by the complainant. *Jason* v. *Tavilla,* 30 Agric. Dec. 1360 (1971). The evidence indicates that the subject strawberries were placed on board the truck in unsuitable shipping conditions. This evidence consists of the evidence of the arrival condition of the strawberries based on the three federal inspections taken by the respondent's customer during the six days between the arrival of the strawberries and the dumping of 671 flats of them. Even more supportive of the fact that the subject strawberries were in unsuitable shipping condition is the fact that there was a second lot of strawberries on board the same truck as the lot in question which second lot of strawberries arrived in excellent condition. Had the in transit temperatures caused the deterioration of the subject load of strawberries, it should also have caused this second lot of strawberries to deteriorate but this load arrived in excellent condition. Since the Ryan recording thermometer tape indicates that the temperature on board the truck was in the 35°F. range throughout the transportation of the strawberries, and because the other lot of strawberries arrived in excellent condition at its destination, we hold that the strawberries shipped by complainant were shipped in unsuitable shipping condition, and that complainant, therefore, breached its contractual obligation to respondent. Respondent also must prove it was damaged by this breach. Respondent has shown that 671 out of the 768 flats shipped by the complainant were dumped. It has, however, failed to submit any substantive evidence as to the disposition of the remaining 97 flats of strawberries. Attached to its answering statement was a document allegedly detailing the disposition of the 97 lugs. However this document does not

satisfy the Department's requirements as to the contents of an account of sales (*see* 7 CFR § 46.29), and, in any event, is untimely since accounts of sales must be sent to a shipper within ten days after the last sales date (*see* 7 CFR § 46.2(2)). Respondent has, therefore, failed to prove the disposition of the remaining 97 lugs of strawberries. In view of this, we hold that it remains responsible for the contract price for these 97 flats of strawberries, or $681.20. Respondent's failure to pay complainant the $681.20 is a violation of section 2 of the Act for which reparation plus interest should be awarded.

In its answer, respondent "states" that it is owed $626.75 by complainant for freight charges related to this shipment. Such a statement does not constitute a properly pleaded counterclaim. In any event, respondent has offered no proof supporting such a claim. Therefore, had we considered the statement as a counterclaim, it would have been denied.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, *$681.20* plus interest at the rate of 13 percent per annum from *September 1, 1984,* until paid.

Copies of this order shall be served upon the parties.

GRANADA MARKETING, INC. *v.* NATIONAL FRESH FRUIT & VEGETABLE CO., INC. PACA Docket No. 2-6836. Decided on August 8, 1986.

Suitable shipping condition—Burden of proof.

Where recording thermometer reflected that proper temperatures were maintained on board truck and there was no transit delay, grapes which had average 8% serious damage and 6% decay were not in suitable shipping condition.

Edward Silverstein, Presiding Officer.
Mr. Thomas R. Oliveri, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U S.C 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of

reparation against respondent in the amount of $21,526.50 in connection with a shipment of grapes in interstate commerce.

A copy of the report of investigation made by the Department was served upon each of the parties. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties have waived oral hearing. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed a verified opening statement. It also filed a brief.

FINDINGS OF FACT

1. Complainant, Granada Marketing, Inc., is a corporation whose mailing address is P.O. Box 3006, Visalia, California 93278.

2. Respondent, National Fresh Fruit & Vegetable Co., Inc., is a corporation whose mailing address is P.O. Box 70132, 3000 Hicks Street, Houston, Texas 77007. At all material times, respondent was licensed under the Act.

3. On or about June 26, 1984, in the course of interstate commerce, complainant, by oral contract, sold to respondent 1,600 lugs of Thompson brand seedless grapes, a perishable agricultural commodity, at an agreed price of $14.00 per lug plus 75 cents per lug for pre-cooling, and $22.50 for a recording thermometer, for a total agreed f.o.b. price of $23,622.50. The grapes were shipped to respondent on that date on board a truck bearing Texas license plate 43R386. The recording thermometer placed on the truck was Ryan Instrument No. 389490 with chart No. 84166.

4. The grapes arrived at respondent's location on June 28, 1984. At 8 a.m. of that date, they were the subject of a federal inspection, after which certificate No. G 118757 was issued. On that certificate, the inspector noted that the temperature control unit on the truck was not operating, and that the rear doors were open. It also was noted that the truck was "well filled." The temperature of the grapes was reported as follows: "Near rear doorway: Top 38°F., Bottom 40°F. Center of pallet 45°F. Various locations remainder of load. Top layer 40 to 40°F. Bottom 42 to 45°F. Center of pallets 50 to 65°F." The condition of the grapes was noted as follows: "Mostly firm and firmly attached to capstems. Stems fresh and green. From 2 to 7% average 5% shattered berries. From less than ½ of 1% to

27% average 8% serious damage by split and/or wet and sticky berries. From less than ½ of 1% to 23% average 6% decay. Gray Mold Rot in various stages mostly advanced."

5. Ryan Recording thermometer chart No. 84166 reflects that the temperature of the grapes when first loaded on board the truck was approximately 80°, that the temperature was rapidly lowered to about 35°, and remained there throughout the trip. During the last few hours the Ryan instrument operated, presumably when the doors of the truck were opened upon arrival, the chart reflects a sharp increase from 35° to 60° for a short period of time, a drop to under 40°, and then a sharp rise again until the recording of the temperature ceased.

6. Upon testing the recording thermometer, Ryan Instrument, Inc., P.O. Box 599, Kirkland, Washington 98033, reported that the "instrument was tested and found to be accurate both in time and temperature within our 2% published tolerance." The company also indicated that it believed that the unit accurately recorded temperatures throughout the trip.

7. On July 2, 1984, the broker which handled this transaction, Cal-West Enterprises, P.O. Box 1276, Salinas, California 93902, sent each of the parties a memorandum in which it stated the following:

> Cal West Produce Enterprises is writing both the receiver and the shipper to notify them of Cal West's understanding of the aforementioned mentioned subject.
>
> The load was originally booked to be shipped Monday, June 25, 1984. Granada notified Cal West on June 25, 1984 that the grapes would not be shipped until June 26, 1984 because of light supplies.
>
> On June 26, 1984, at 11:15 a.m., the order was shipped. It consisted of 1,600 22# *lugs of Thompson seedless grapes under the label of 'Country Boy.' The order was shipped via a Brenham Express Truck, license 43R358 Texas, with Ryan Recorder #389349 aboard.*
>
> Upon arrival at National Fresh Fruit and Vegetable Co., Inc., Houston Texas, at 5:00 a.m., June 28, 1984, a problem was found in the product. A federal inspection was requested by the receiver. The receiver notified Cal West of the problem and federal inspection at 7:30 a.m., PST, June 28 2984 [sic], at which time shipper (Granada Marketing) was notified by Cal West.

* * * * * * *

At the time inspection was relayed from receiver to shipper, receiver stated that he was electing to reject grapes for failing to make good arrival.

It should be noted that the Ryan recording device and tape was removed from the truck June 28, 1984 by the Brenham Express driver. The Ryan recorder and tape were not returned to National until the morning of June 29, 1984.

Granada Marketing elected to refuse National's rejection. Granada Marketing is taking the position that the high pulp temperatures were caused by truck, causing the problems reflected upon inspection.

On June 29, 1984, National Fresh & Vegetable, to minimize losses placed the product at Sunsprouts of Texas to handle for the 'account of whom it may concern.'

* * * * * * *

8. On June 29, 1984, respondent sent complainant the following letter:

Because of a dispute regarding my P.O. ÷10272 for 1,600 lugs of Thompson Seedless grapes from C.I.D. Granada Marketing I find it necessary to withhold payment until a settlement can be reached.

As you know the product showed some very high pulp temperature [sic] and failed to pass a U.S.D.A. inspection upon arrival. The trucking company claims no responsibility because the recording thermometer tape showed temperature in the trailer was from 35°F to 36°F for the entire trip and timely arrival was made. Your contention is that the trucker caused the load to become hot.

In order to minimize the loss of the product I am compelled to handle the product for your account.

Because the evidence on the thermometer tape shows the trailer to be cold for the entire trip I feel that Granada Marketing is accountable for any loss sustained. When all moneys [sic] are collected, and loss is determined, I will let you know what can be remmited [sic] to you. Enclosed find copy of Ryan Tape #84166 from Ryan #389490. I will also send you a copy of the U.S.D.A. inspection as soon as I receive it.

9. By telegram dated July 9, 1984, the complainant send to respondent the following message:

RE: YOUR LETTER DATED 6-29 RECEIVED 7-5 RE: NATIONAL FRESH FRUIT & VEGETABLE P.O. #10272 GRANADA MARKETING INVOICE NO. 10569 1600 LUGS 22 POUND THOMPSON SEEDLESS GRAPES SHIPPED 6-26 ARRIVED 6-28 WE CANNOT ACCEPT YOU HANDLING THE PRODUCT FOR OUR ACCOUNT WE FEEL TEMPERATURES DURING TRANSIT CAUSED THE DETERIORATION EXPECTING FULL PAYMENT FOR THIS FILE WHICH WAS SOLD TO YOU ON AN FOB BASIS NATIONAL FRESH FRUIT AND VEGETABLE SHOULD CLAIM AGAINST ITS TRUCKER.

10. By letter dated August 1, 1984, the respondent remitted $2,096.50 to the complainant as payment for the subject shipment of grapes. Along with the remittance was an accounting for the grapes as follows:

	Number Lugs	Sales Price Per Lug	Total
	75	$8.00	$600.00
	160	5.50	880.00
	340	4.00	1,360.00
	560	3.00	1,680.00
	305	2.00	160.00
	160	1.00	160.00
Total	1,600		5,290.00
Less 15 percent handling			793.50
			4,496.50
Less Freight			2,400.00
			2,096.50

Complainant refused to accept respondent's check in this amount in settlement for its total invoice. Subsequent to respondent's releasing it as an undisputed amount, however, the complainant negotiated payment of the check.

11. A formal complaint was filed on February 12, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispute between the parties concerns the cause of the poor condition of the grapes upon arrival at the respondent's location. The respondent claims that the grapes were in unsuitable shipping condition. The complainant, on the other hand, alleges that the damage to the grapes was caused by high in transit temperatures. All of the evidence in the file seems to support the respondent's position. That evidence consists of the inspection certificate showing the deteriorated condition of the grapes upon arrival, the fact that there was no in transit delays, the apparent high temperatures of the grapes recorded when they were first loaded on board the truck, and the fact that the temperature on the truck was properly maintained. Complainant has, however, pointed out one inconsistency in the evidence, i.e. the trucker apparently took the Ryan device and chart with him for approximately one day after the time when the grapes were delivered to respondent. We do not pretend to know or understand why the trucker did that, nor has either party provided us with information so that we might even hypothesize as to his motives in doing so. Complainant does imply that the trucker might have falsified the temperature chart. However, we are satisfied that the chart which is in evidence is the chart which began and ended the trip with the subject shipment of grapes. We are also satisfied that the trucker could not have in any

way, shape, or form, falsified this document. We, therefore, accept it as evidence of the temperature on board the truck during the time when the grapes were in transit. The recording thermometer indicates that the temperature on board the truck was within the range called for by the complainant. The 35° temperature on board the truck should not have caused the grapes to deteriorate over the two days the grapes were in transit. From the high temperatures that were recorded when the grapes were first loaded on board the truck, and from the temperatures reported on the federal inspection taken upon the trucks arrival in Houston, Texas (in particular the extremely high temperature of the grapes in the center of the pallets), we conclude that the grapes were either improperly pre-cooled or were improperly loaded on board the truck, and that this improper pre-cooling or improper loading caused the high temperatures to occur. In view of that, it is clear that the complainant breached its contract with respondent. Respondent was well within its rights, therefore, to reject the load of grapes.

Of course, although respondent rejected the load, since it maintained possession of them, it has an obligation to properly handle them for complainant's account. It treated the grapes as a consignment transaction and remitted to the complainant the amount due it for the grapes, or $2,096.00. Since this amount has been received by the complainant, the complaint should be dismissed.

ORDER

This complaint is dismissed.

Copies of the order should be served upon the parties.

WALTERS PRODUCE, INC. *v.* EMANUELLA L. PERAINO d/b/a THE TOMATO OUTLET. PACA Docket No. 2-6903. Decided on August 8, 1986.

Respondent doing business at the time of the alleged sales—Purchases ratified by failure to repudiate them—Respondent buyer liable for contract price of the accepted commodities.

Evidence clearly shows that the respondent was doing business at the time of the alleged sales. Respondent ratified the purchases made by her employee by failing to repudiate them. Respondent is liable for the contract price of the accepted commodities.

Andrew Y. Stanton, Presiding Officer.
Complainant, *pro se.*

David J. McMahon, Esq., New Orleans, Louisiana, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $5,556.00 in connection with two trucklots of potatoes sold and shipped to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Walters Produce Inc., is a corporation whose address is P.O. Box 36, Newdale, Idaho.

2. Respondent, Emanuella L. Peraino d/b/a The Tomato Outlet, is an individual whose address is 1800 9th Street, Kenner, Louisiana. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately October 15, 1984, and November 19, 1984, complainant sold to respondent two trucklots of potatoes, delivered. The October 15 load was to consist of 238 cartons at $12.00 per carton, or $2,856.00, and the November 19 load was to consist of 200 cartons at $13.50 per carton, or $2,700.00, for a total of $5,556.00. The contract negotiations were made through a broker, Progressive Brokerage Co., Inc., Metarie, Louisiana. During the contract negotiations, the broker was represented by Jim Kinberger, complainant by W. Jeffrey Walters, and respondent by Robert Gomez.

4. Mr. Kinberger prepared a confirmation of sale reflecting the agreed upon contract terms and mailed a copy to each party. Respondent never made any objection upon receipt of the confirmation of sale.

5. On approximately October 15, 1984, and November 19, 1984, the two trucklots of potatoes were inspected at the point of origin, Newdale, Idaho, and shipped in interstate commerce to respondent's place of business. When the October 15 load arrived, the bill of lading was signed by a D. Dean, apparently on behalf of respondent. Mr. Dean signed under the heading "CONSIGNEE'S RECEIPT: Received above perishable property in good order, except as noted:" Upon arrival of the November 19 load, the bill of lading was signed and dated by a Jesse J. Hawkins on November 23, 1984, in the "CONSIGNEE'S RECEIPT" section. Neither Mr. Dean or Mr. Hawkins indicated any objection to the load on the bill of lading.

6. Complainant sent invoices to respondent for each load reflecting the agreed upon contract prices. Respondent received both invoices and made no objection to them.

7. On February 12, 1985, respondent sent complainant the following letter, under the letterhead "The Tomato Outlet, Inc., 1800 9th Street, Kenner, Louisiana 70062:"

> Regrettably, I have to advise you that because of extreme financial difficulties, the company is no longer in operation. There is no prospect that the company will reopen.
>
> We are attempting to determine the full amount of indebtedness including trade and bank debts. As soon as we have a complete financial picture we will be contacting you in order to attempt to arrange a mutually acceptable schedule of payment without having to file proceedings under the bankruptcy laws.
>
> We apologize for any difficulties our problems have caused.

8. Respondent has not paid complainant any part of the contract price.

9. A formal complaint was filed on March 1, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

In her answer and answering statement, respondent denies purchasing or receiving the potatoes. Respondent also denies doing business as the Tomato Outlet during October and November 1984, the period of the alleged sales. In her brief, respondent admits that

Robert Gomez was employed by the Tomato Outlet, but claims he had no authority to act on behalf of respondent. Respondent contends that under Louisiana Law, the principal/agent relationship must be clearly established, and claims that it has not been so established in this case.

The first issue is whether respondent was doing business as the Tomato Outlet during October and November 1984. The Department's report of investigation states that on August 15, 1984, respondent was issued a license as Emanuella L. Peraino d/b/a The Tomato Outlet. Further, respondent's February 12, 1985, letter to complainant relating her financial problems, bears the letterhead "The Tomato Outlet, Inc." with respondent's address as noted on her license (Finding of Fact 7). It is, therefore, clear that respondent was doing business as The Tomato Outlet from at least August 15, 1984, through February 12, 1985.

Whether or not Mr. Gomez was specifically given authority to purchase the two loads of potatoes for respondent, it is clear that respondent ratified the purchases by not repudiating them. *Fruit Basket Packing Company* v. *Joe Phillips, Inc. and/or Walter B. Adam*, 31 Agric. Dec. 1200 (1972). The broker's representative, Jim Kinberger, has submitted a sworn statement in which he states that on about October 15, 1984, and November 19, 1984, he spoke to Mr. Gomez, who indicated he was manager of The Tomato Outlet. Mr. Kinberger states that Mr. Gomez ordered the two loads of potatoes at issue. Mr. Kinberger then prepared a confirmation of sale setting forth the agreed upon contract terms and sent a copy of the confirmation to both complainant and respondent. Respondent does not deny receiving the confirmation, and does not claim to have made any objection upon receipt thereof. Respondent also admits, in her answering statement, that she received complainant's invoice containing the alleged contract terms, but does not claim to have made any objection to the invoice. Further, respondent admits that she sent complainant a letter dated February.12, 1985, which describes her financial problems and indicates that she will soon "be contacting you in order to attempt to arrange a mutually acceptable schedule of payment." (Finding of Fact 7). Respondent claims that this letter was not an acknowledgement of any contractual arrangement but was merely a form letter sent to all those from whom respondent had received invoices. However, we do not find this explanation credible, as we believe it highly unlikely that respondent would offer to arrange a mutually acceptable schedule of payment with someone whom it did not consider a creditor. It is our view that respondent's failure to object to the broker's confirmation of sale and complainant's invoice, and the February 12,

1985, letter which she sent to complainant, all lead to the ineluctable conclusion that respondent ratified the contract negotiated by Mr. Gomez.

Respondent's only other defense to liability is her claim that she never received the potatoes. However, the record contains bills of lading which show that persons purporting to act for respondent, Mr. Dean and Mr. Hawkins, signed these documents when the potatoes were delivered to respondent's place of business. Respondent has not denied that Mr. Dean or Mr. Hawkins were in her employ when they signed for the potatoes. The only reasonable assumption arising from their presence at respondent's warehouse and their acts of signing the bills of lading is that they were employed by respondent and authorized at the time to receive produce.

As respondent never gave any notice of rejection, we assume that the potatoes were received and accepted by her. Respondent is thus liable for the contract price of the potatoes, less damages resulting from any breach of warranty, which respondent has not claimed. *Farm Market Service Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983). Respondent's failure to pay the contract price of $5,556.00 to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, *$5,556.00,* with interest thereon at the rate of 13% per annum from *December 1, 1984,* until paid.

Copies of this order shall be served upon the parties.

MARTORI BROS. DISTRIBUTORS *v.* ANTHONY GAGLIANO & CO., INC.
PACA Docket No. 2-6938. Decided on August 8, 1986.

Price terms set at time of contracting, not price after sale—Buyer did not sustain burden of proving breach of warranty.

The evidence clearly shows that the sales were not on a price after sale basis, but specific price terms were set at the time of contracting. Respondent buyer failed to prove any breach of warranty and is thus liable for the unpaid contract prices of the accepted goods.

Andrew Y. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
LeRoy W. Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $7,279.20 in connection with two truckloads of cantaloupes and lettuce sold and shipped to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Martori Bros. Distributors, is a partnership whose address is 6560 North Scottsdale Road, Suite G-208, Scottsdale, Arizona.

2. Respondent, Anthony Gagliano & Co., Inc., is a corporation whose address is 301-315 North Broadway, Milwaukee, Wisconsin.

At the time of the transactions involved herein, respondent was licensed under the Act.

3. On approximately October 31, 1984, complainant sold to respondent two truckloads of cantaloupes and lettuce, f.o.b. One truckload (truckload A) contained 450 cartons of lettuce at an agreed upon price of $6.00 per carton, or $2,700.00, plus $315.00 for cooling, and 546 cartons of cantaloupes at $8.00 per carton or $4,368.00, plus $382.20 for cooling, for a total, including $22.50 for a Ryan recorder, of $7,787.70. The other truckload (truckload B) contained 420 cartons of lettuce at $6.00 per carton or $2,520.00, plus $294.00 for cooling, and 546 cartons of cantaloupes at $8.00 per carton or $4,368.00, plus $436.80 for cooling, for a total, including $22.50 for a Ryan recorder, of $7,641.30. Contract negotiations took place between complainant's employee, Joseph Colace, and respondent's president, Anthony Gagliano. Complainant prepared invoices reflecting the agreed upon contract terms and sent them to respondent, who received them without objection.

4. The two truckloads were sent in interstate commerce to respondent, who accepted them upon arrival. Respondent never secured federal inspections on either truckload.

5. Respondent has paid complainant $2,860.50 for truckload A and $5,289.30 for truckload B, which complainant has accepted as partial payment for the two truckloads.

6. A formal complaint was filed on April 26, 1985, which was within nine months when the cause of action involved herein accrued.

CONCLUSIONS

Respondent does not deny purchasing, receiving or accepting the two truckloads of lettuce and cantaloupes sold by complainant, and, therefore, is liable for the agreed upon contract price, less damages resulting from any breach of warranty. Respondent bears the burden of proving the breach and resulting damages by a preponderance of the evidence. *Farm Market Service Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983).

Respondent disputes the contract price as alleged by complainant, claiming that it bought the produce on a price after sale basis, with no agreement at the time of contracting as to any specific prices. Complainant's claim that f.o.b. prices were agreed to when the sales were made is bolstered by the fact that its invoices, which contain such prices, were sent to respondent and received without objection. Respondent's president, Anthony Gagliano, admits in respondent's answering statement that the employee of complainant with whom he dealt, Joseph Colace, did mention specific f.o.b.

prices and put them in complainant's invoices. However Mr. Gagliano claims that Mr. Colace "prefaced his remarks with the words that I am putting these prices on your ticket—work with them and if they don't work do what you have to baby—just move the merchandise.'" Respondent argues that this language constituted price after sale terms. Although the term "price after sale" is not included in the regulations, we have held that "open billing basis, to be priced after sale" is essentially the same as price arrival, which is defined in the Department's regulations as that "the price is to be subject to agreement between the customer and the consignor upon the arrival of the produce at the customer's destination, with sufficient time being permitted for inspection." 7 CFR 46.43(cc); *Northwest Fruit Sales, Inc.* v. *The Noringsberg Corporation,* 39 Agric. Dec. 1556 (1980). Under the definition of price arrival, the price is to be assigned after delivery, whereas, according to respondent, Mr. Colace indicated only that respondent should "work with" the f.o.b. prices set at the time of contracting. It is obvious that Mr. Colace did not agree that no specific prices would be in effect until after delivery. At most, Mr. Colace gave respondent only a vague assurance that complainant might adjust the contract prices if respondent had problems reselling the produce. We, therefore, agree with complainant that there were specific f.o.b. prices assigned to the commodities at issue as of the date of sale.

Respondent also claims that complainant committed a breach of warranty, as the cantaloupes and lettuce were not in good condition upon delivery. Respondent's claim is based solely on the representations made by Mr. Gagliano, as respondent has not submitted any federal inspections showing damage upon arrival. Mr. Gagliano alleges that Mr. Colace stated that inspections were not necessary. However, this is disputed by Mr. Colace in complainant's statement in reply. Respondent has presented no evidence such as memoranda or letters memorializing the alleged agreement with Mr. Colace that inspections would not be necessary for respondent to establish damages. Based on the evidence submitted, we must conclude that respondent has failed to sustain its burden of proving that any breach of warranty was committed by complainant.

Respondent is thus liable for the contract price of $15,429.00 less the $8,149.00 already paid, for a balance due of $7,279.20. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, *$7,279.20,* with interest thereon at the rate of 13% per annum from *December 1, 1984,* until paid.

Copies of this order shall be served upon the parties.

GROWERS MARKETING SERVICE, INC. *v.* CENTRAL GROWERS SALES, INC. PACA Docket No. 2-6837. Decided on August 11, 1986.

Rejection must be communicated in clear and unmistakable terms—Once accepted, it becomes respondent's burden to prove a breach of contract and damages—If respondent believes there is a breach of contract, he should arrange for an inspection as soon as practicable.

Parties agreed to a "delivered sale" truckload of eggplants and cucumbers. Respondent deducted an amount from bill for "reworking" the produce and offered an inspection certificate issued four days after the acceptance.

Jory M. Hochberg, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter "PACA." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,052.40, in connection with the sale to respondent of a truckload of fresh vegetables consisting of 570 boxes of cucumbers and 420 boxes of eggplants. Respondent had previously issued a check for $2,513.60 to complainant in payment for these commodities. However, complainant did not accept its check.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon the respondent and respondent filed an answer denying liability to complainant. The amount claimed as damages in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered a part of the evidence, as is the Department's report of investigation. The parties were given an op-

portunity to file additional evidence in the form of sworn statements. Neither party filed additional evidence and neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Growers Marketing Service, Inc., is a licensed corporation under the PACA whose business mailing address is P.O. Box 2595, Lakeland, Florida 33806.

2. Respondent, Central Growers Sales, Inc., is a corporation whose business mailing address is P.O. Box VV, Plant City, Florida 33566. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about October 26, 1984, in the course of interstate commerce, complainant contracted to sell and respondent contracted to buy one truckload of fresh "Holloway" cucumbers and "U.S. Fancy" eggplants, being perishable agricultural commodities at an agreed "delivered" sale price of $4.60 per box for the cucumbers and $3.50 per box for the eggplants. On the instructions of complainant, 570 boxes of cucumbers and 425 boxes of eggplants were then shipped from Andersonville and Moultrie, Georgia, to respondent's facility at Plant City, Florida, on October 26, 1984.

4. The truckload arrived at respondent's facility on Saturday, October 27, 1984. Complainant's agent was present at respondent's facility at the commencement of unloading and removed five boxes of eggplant to show as a sample to another prospective customer.

5. Respondent's agent signed receipts for the produce.

6. On Tuesday, October 30, 1984, respondent complained about the condition of the produce received and, on Wednesday, October 31, 1984, the produce was federally inspected.

7. On October 31, 1984, complainant billed respondent for the produce at a cost of $4,092.00 less $39.60 for unloading, for a total amount due of $4,052.40.

8. On December 15, 1984, respondent mailed an accounting to complainant on which it deducted $1,660.90 from the agreed selling price for "reworking" the produce. Respondent enclosed a $2,513.60 check made payable to complainant. Upon receipt of this accounting, complainant advised respondent that it expected to be paid the full amount billed and requested an additional check for $1,538.60 in payment of the balance. Complainant has not cashed the $2,513.60 check pending the resolution of this matter.

9. The formal complaint was filed on March 8, 1985, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant seeks to recover the full amount of the purchase price of 990 cartons of mixed fresh vegetables which were sold on a "delivered sale" basis to respondent. It is undisputed that the truckload in question arrived at respondent's place of business on Saturday morning, October 27, 1984, and that complainant's agent was present during part of the unloading. The parties differ concerning whether any complaints were made by respondent's agent at that time. However, there can be no doubt that respondent accepted the produce shipped since it is well-settled that a rejection must be in clear and unmistakable terms and a mere complaint will not suffice as a notice of rejection. *Davison Grape Co.* v. *Mercurio,* 18 Agric. Dec. 1434 (1959); *Hunt* v. *Humboldt Foods, Inc.,* 20 Agric. Dec. 236 (1961).

Having accepted the produce, it becomes respondent's burden to prove a breach of contract and damages resulting from that breach. *D.L. Piazza Co.* v. *Stacy Distributing Co.,* 18 Agric. Dec. 307 (1959). The federal inspection which was conducted at respondent's request is insufficient to carry this burden since it was conducted four days after the arrival of the produce. Respondent claims that the delay was initially due to its belief that Mr. James Ogelsby, complainant's agent, would be returning to respondent's facility or telephoning respondent later on Saturday, October 27, 1984, or Monday, October 29, 1984. When no communication was received by Monday, respondent contends that the distraction of other business and respondent's inability to learn which firm Ogelsby worked for accounted for further delay. The record reflects, however, that the receipt for the eggplant which respondent received upon its arrival identifies complainant as a party to the transaction. Moreover, if respondent believed there was a breach of contract, it was respondent's responsibility to arrange for an inspection as soon as practicable. Under the circumstances of this case, there is no assurance that the produce was maintained under the proper conditions for the entire pre-inspection period while it was in respondent's custody. Complainant is entitled to the full purchase price of $4,052.40 as originally agreed to by the parties. Respondent's failure to pay this amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, *$4,052.40* with interest thereon at the rate of 13% per annum, from *December 1, 1984,* until paid.

Copies of this order shall be served upon the parties.

EARL J. ROY d/b/a AVOYELLES SWEET POTATO AUCTION a/t/a EARL J. ROY PRODUCE *v.* MOTT AND SIMMONS BROKERAGE & SALES CORP. PACA Docket No. 2-6922. Decided on August 11, 1986.

Burden of proof.

Where complainant proved respondent purchased two loads of tomatoes, respondent obligated for contract prices plus interest.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $32,640.00 in connection with two shipments of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon the respondent which filed an answer thereto denying any liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties have waived oral hearing and therefore the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given the opportunity to submit additional evidence in the form of sworn statements. Complainant filed an opening statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Earl J. Roy, is an individual doing business as Avoyelles Sweet Potato Auction and also trading as Earl J. Roy Produce whose mailing address is P.O. Box 134, Hessmer, Louisiana 71341.

2. Respondent, Mott and Simmons Brokerage & Sales Corp., is a corporation whose mailing address is P.O. Box 1105, LaBelle, Florida 33935. At all material times respondent was licensed under the Act.

3. On or about January 26, 1985, complainant sold to respondent two truckloads of U.S. Combination grade, 25 pound lugs of tomatoes, consisting of 320 lugs 5x6 tomatoes at $13.00 per lug ($4,160.00); 1280 lugs 6x6 tomatoes at $11.00 per lug ($14,080.00), and 1600 6x7 tomatoes at $9.00 per lug ($14,400.00) for a total agreed f.o.b. price of $32,640.00. Each truckload was subjected to a shipping point inspection and each was graded as U S. Combination grade. The tomatoes were shipped on January 26, 1985, to respondent's customers Tomatoes Inc., Bronx, New York, and Larry Trover Produce, Tunnel Hill, Illinois.

4. The tomatoes were received and accepted. However, respondent has not paid complainant for them. One of respondent's customers, Tomatoes Inc., did, on or about May 13, 1985, attempt to pay complainant $4,000.00 with respect to one of these loads. By letter dated May 17, 1985, the complainant returned this check to Tomatoes, Inc., with the following cover letter: "Enclosed please find the above-mentioned check, which I am returning to you. I have no record of ever having any business transaction with your company, or shipping any commodities to you. I feel the check was sent to me in error."

5. The complaint was filed on August 7, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issue in this case is whether or not the complainant sold the two subject loads of tomatoes to respondent, or whether the respondent merely acted as a broker as to them. The complainant has submitted documentation which supports its position that, on January 26, 1985, it sold the two subject loads to the respondent. These documents consist of inspection certificates of that date, shipping documents of that date, and invoices of that date. Complainant's sworn statements are entirely consistent with these documents. In support of its claim that it acted as a broker, and that these two loads of tomatoes were shipped on consignment, the respondent offers its billings to its customers, Larry Trover Produce and Tomatoes, Inc., for brokerage for these two transactions, which are dated February 1, 1985, and copies of its Broker's Memorandum of Purchase and Sale indicating that these transactions were consignment transactions between its customers Trover Produce and Tomatoes, Inc., and the complainant, which are dated

January 22, 1985. These documents are not consistent with respondent's sworn answer in which it is attested that, although it viewed the tomatoes on January 22, 1985, at complainant's location in Immokalee, Florida, that nevertheless the negotiations with its customers were not completed until January 25, 1985, and that the tomatoes were not shipped until January 26, 1985. We do not understand nor is it explained by the respondent as to why, if these transactions did not take place until January 25, 1985, at the earliest, its broker's memorandum of sale were dated January 22 and why it listed the alleged date for these transactions on its bills to its customers as being January 22, 1985.

As the moving party, the complainant has the burden of proving, by a preponderance of the evidence, the terms of the contract, respondent's breach of such contract, and the resulting damages, if any, sustained by it. *New York* v. *Sandler* 32 Agric. Dec. 702 (1973). We find that the complainant has satisfied this burden. The sworn statements submitted by the complainant, and the documents offered by it, are clearly consistent with one another and clearly satisfy its burden of proof. The respondent, on the other hand, has offered evidence in the form of a sworn answer which is not consistent with the documents it has attached thereto. Although given the opportunity to counter the complainant's evidentiary submissions, it failed to do so. In view of the above, we hold that the respondent purchased the two loads of tomatoes from the complainant, that it was obligated to pay the complainant the sales prices thereof, or $32,640.00, and its failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, the respondent shall pay to complainant, as reparation, *$32,640.00* with interest thereon at the rate of 13% per annum from *March 1, 1985,* until paid.

Copies of this order shall be served upon the parties.

CAL/MEX DISTRIBUTORS INC. *v.* FAVCO, INC. a/t/a MINNESOTA PRODUCE. PACA Docket No. 2-6937. Decided on August 11, 1986.

Misrepresentation, voids settlement agreement—Good delivery, cucumbers—Temperature recorder, absence of—Transportation services and conditions—Accounting, inadaquate—Damages, assessed on basis of percentage of decay.

Following arrival and two inspections of portions of a load of cucumbers respondent unintentionally misrepresented the extent of the second inspection to complainant. This was found to void a settlement agreement reached between the parties. It was determined that even though the inspection was restricted and made two days following arrival, condition defects were so extensive as to show failure to make good delivery and the suitable shipping warranty applicable to f.o.b. sales. The inability of respondent to supply the temperature recorder and tape was deemed insignificant because temperatures at which cucumbers were stored prior to shipment, temperatures specified by complainant on bill of lading, and temperatures shown by Federal inspection of small portion of cucumbers shortly after arrival, were all lower than proper for cucumbers, and may have contributed to poor condition of product. Quantity figures on respondent's accounting were inconsistent with figures previously disclosed by respondent, and the accounting was consequently not used in assessing damages. Damages were computed on basis of percentage of decay disclosed by Federal inspection.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,642.35 in connection with the shipment in interstate commerce of a truckload of cucumbers. A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements.

Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California.

2. Respondent, Favco, Inc., is a corporation, also trading as Minnesota Produce, whose address is 2801 Wayzata Boulevard, Minneapolis, Minnesota. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On or about January 9, 1985, complainant sold to respondent on an f.o.b. basis, and shipped from loading point in Chula Vista, California to respondent in Minneapolis, Minnesota, one truckload containing 684 wirebound crates of super select cucumbers at $7.00, and 72 wirebound crates of select cucumbers at $6.00, plus palletizing and cooling charges of 65 cents per carton, and $22.50 for a Ryan temperature recorder, or a total of $5,733.90.

4. Respondent scheduled the truck to make drops at the places of business of various customers of respondent in the Minneapolis area. The truck arrived in the Minneapolis area on January 12, 1985, and made its first drop at the place of business of Northwest Produce Company, Inc., 760 Kasota Avenue, Minneapolis, Minnesota, where 108 cartons of super select cucumbers and 72 cartons of select cucumbers were unloaded. At 3:30 p.m. on January 12, 1985, the 72 crates of select cucumbers were federally inspected while stacked in the warehouse of Northwest Produce. Temperatures were noted in various locations as 42° and 43° F. Condition was stated to be as follows: "Generally fresh and firm. Average 1% damage by soft ends. Decay from 4 to 14%, average 10% Bacterial Soft Rot and Black Rot in various stages."

5. On January 14, 1985, at 9:10 a.m., cucumbers shipped by complainant tc respondent were federally inspected while still on the truck with the following results in relevant part:

Condition of Equipment: Temperature controls running; Doors closed.

Products Inspected: CUCUMBERS in wirebound crates labeled "Carrillo Brand, Rene Distributors, Inc., Nogales, Arizona, 1⅑ Bushel, Grown In Mexico." Applicant States 468 crates.

Condition of Load: Partly unloaded; remainder load palletized 2 pallets wide, 2 to 3 rows, 6 layers per pallet. Load extends approximately 10 feet from rear doors.

Temperature of Product: Approximately 10 feet from rear doors bottom layer 47°, top layer 48°; approximately 15 feet from rear doors 3rd layer 47°F.

Quality: Clean; mostly fairly well, some well formed; mostly well, some fairly well colored. Grade defects from 6 to 14%, average 10%, mostly misshapen and scars.

Condition: Mostly fresh and firm. Average 2% damage by soft ends. Average 2% damage by yellowing. Decay from 4 to 28%, average 12% Bacterial Soft Rot and Cottony Leak Rot in various stages.

Grade: Meets quality requirements but fails to grade U.S. No. 1 account condition.

Remarks: Inspection and certificate restricted to product and lading in all layers of 5 pallets nearest rear doors.

6. Following the inspection quoted above respondent informed complainant of the condition of the cucumbers as shown by the inspection and stated to complainant that the inspection was a "full inspection". Complainant granted respondent an allowance on the cucumbers, and in conformity with such allowance respondent has paid complainant $3,091.55 of the original purchase price.

7. The formal complaint was filed on May 30, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent admits that it informed complainant following the federal inspection of January 14, 1985, that such inspection was a "full inspection". Respondent's vice-president, Richard L. Piazza, explained that by "full inspection" he meant an "on the truck inspection". We do not agree that this is a reasonable interpretation, nor the normal interpretation which would be given in the industry, to the term "full inspection". While, as will later be explained, we conclude that these cucumbers did not make good delivery, in breach of complainant's warranty of suitable shipping condition, the fact that the relevant inspection was a restricted inspection is a material fact which complainant was entitled to know, and which would be very relevant data in determining the amount which complainant would be willing to give respondent as an allowance on the cucumbers. We deem respondent's statement that the inspection was a full inspection to be an unintentional misrepresentation which necessitates the voiding of the settlement agreement between the parties. See *The Garin Co.* v. *New England Farms,* 41 Agric. Dec. 337 (1982) and *Sahara Packing Co.* v. *Rozak's Produce Co., Inc.,* 39 Agric. Dec. 314 (1980).

Complainant has pointed out that the inspection made on January 14, 1985, was made two days following arrival of the truck in the Minneapolis area. Complainant consequently deems this to be a "late" inspection. In this connection complainant claims that re-

spondent also misrepresented the availability of inspection by informing complainant that January 14 (a Monday) was the earliest that federal inspection was available. Complainant points out that 72 cartons of the cucumbers were inspected on January 12, at the place of business of Northwest Produce Co., Inc., and also states that complainant telephoned the inspection service in Minneapolis and was informed that inspection was available seven days per week. Respondent replied to these allegations by alleging that Northwest Produce Co., Inc., where the 72 cartons were inspected on January 12, employs a full time inspector on Saturdays and that such inspector was not normally available to inspect produce belonging to firms other than Northwest Produce Co. Respondent also alleges that while federal inspection may be available seven days a week there are various factors which make such inspection difficult to obtain. It is not necessary for us to determine whether respondent misrepresented the availability of an inspection since we have already determined that respondent misrepresented the extent of the inspection made on January 14.

Complainant urges that the inspection of January 14, 1985, must be further discounted in that it is stated to cover only 468 crates of cucumbers. Respondent alleges that the inspection in fact covered 576 crates of cucumbers, and that the wording therein "applicant states 468 crates" is misleading. Respondent explains that when it deducted the 108 crates of super select cucumbers unloaded at Northwest Produce Co. from the total of 684 super select cucumbers on the truck, it accidentally touched the calculator subtraction button twice thus yielding the 468 crate figure. Again it is not necessary for us to decide this issue since the inspection, even though restricted, and even though made two days following arrival of the cucumbers, shows condition defects extensive enough to nevertheless indicate that the cucumbers did not make good delivery.

In arguing that the cucumbers did make good delivery complainant urges that the temperatures disclosed by the federal inspection were abnormal, and also complains that respondent did not supply the tape from the Ryan temperature recorder. Respondent replied that the recorder was not on the truck when it first gained access to such truck, and that inquiry of the truckdriver and at the prior unloading point, was unfruitful in disclosing the whereabouts of the temperature recorder. Complainant points out that it specified on the bill of lading that temperatures were to be maintained between 38° and 40°F while the truck was in route. Complainant also submitted the sworn affidavit of its dock foreman stating that he was responsible for taking the cucumbers from complainant's cooler for loading into the truck, and that the cucumbers "had

best copy available

been maintained in complainant's cooler at approximately 40°." The publication *Protecting Perishable Foods During Transport By Motor Truck*, Agriculture Handbook, No. 105, states that the desired transit temperature of cucumbers is 45° to 50°F. Such publication also states "cucumbers are subject to chilling injury if held or transported for longer than two days at temperatures below 45°F., even though their highest freezing point is 31.1°F." The publication *Market Diseases of Cabbage, Cauliflower, Turnips, Cucumbers, Melons, and Related Crops*, Agricultural Handbook No. 184, states in regard to "Low Temperature Breakdown" in cucumbers that:

> Cucumbers held for one week or longer at temperatures of 32° to 40°F. are subject to low-temperature breakdown soon after they are removed from storage. This injury is recognized by the presence of numerous sunken spots over the surface of the fruits . . ., the total area of which may cover half to three-quarters of the cucumber surface. Frequently the tissues immediately at the base of the spines are first affected; likewise those about the lenticels appear to be involved in most cases. The sunken areas soon become spotted with molds and affected with shallow decays caused by species of *Fusarium* and other fungi.

It is certainly possible in this case that the decay in the cucumbers was a secondary infection resulting at least in part from low temperature breakdown. In any event there is no indication in this record that temperatures in the trucks were too high, and if indeed the temperatures to which these cucumbers were exposed were too low, such low temperatures are a direct result of the storage in complainant's warehouse prior to shipment, and the temperatures specified by complainant for shipment. The amount of decay and other damage indicated by the restricted inspection at destination is such that we are warranted in concluding that a preponderance of the evidence shows a breach of contract on the part of complainant.

This brings us to the difficult question of damages. Respondent states in its answer that 576 crates of the cucumbers were repacked, and that a total of 138 crates were lost in repacking, leaving 438 crates to be sold. These figures of course do not include the 72 select cucumbers, and 108 super select cucumbers, which were first unloaded at the place of business of Northwest Produce Co. on January 12, 1985. During the informal stages of this proceeding respondent stated in a letter to the Department that:

> After all was said and done, we had 468 cartons that were rejected back to us. Of the 468 cartons 216 were sent to

> one repacking house and 252 cartons to another to be repacked for resale. After they were repacked I had them picked up by another truck and delivered again. The remaining 108 were accepted off of the original truck with the condition of sale being with a credit for labor and shrinkage.

While these two statements seem inconsistent they are not necessarily so. However, there is a serious inconsistency in respondent's documentation. Respondent submitted invoices covering the cucumbers which form the basis of an "account of sales" which it rendered in connection with its answer. These invoices are to the various firms that received cucumbers from respondent and show the following:

Firm	Quantity	Price	Total
Twin City Produce	122	$11.55	$1,409.10
Northwest Produce	252	3.45	869.40
S. Baglis Fruit	36	11.55	415.80
Continental Minn.	72	11.55	831.60
Zuccaros Produce	10	13.55	135.50
Double E. Produce	36	12.30	442.80
Northwest Produce	108	11.55	1,247.40
Northwest Produce	72	9.55	687.60

The last two entries for Northwest Produce, $1,247.40 and $687.60, total $1,935.00. On the relevant invoice respondent had substituted for this total, a total of $517.05. Thus the total of all the invoices amounted to $4,621.25. Respondent's expenses included $3,091.55, being the payment made to complainant; transportation costs of $1,900.00; federal inspections in the amount of $47.96, and repacking charges of $356.40, for a total of $5,395.91. Thus respondent claimed a loss of $744.66. The inexplicable part of this accounting concerns the quantity of packages shown on all the invoices. The invoices show a total of 708 crates of cucumbers sold to the various firms at the various prices. However, this would indicate that only 48 crates of cucumbers could have been lost in repacking, whereas respondent claims that 138 were lost. We are bound to conclude that this accounting cannot be used as a basis for assessing damages.

Although it will result in the assessment of minimal damages, we feel that in this case it is proper to use the percentage of decay reflected in the federal inspections as the basis for damages. See *Elggren & Sons Co.* v. *Wood Co.*, 11 Agric. Dec. 1032 (1952). Since 2% decay could be present and the cucumbers still make good de-

livery, such percentage should be subtracted. In reference to the 72 cartons of select cucumbers covered by the inspection made on January 12, such inspection shows an average of 10% Bacterial Soft Rot. Accordingly we will allow 8% of the delivered cost as respondent's damages relative to such cucumbers. The contract price of these cucumbers was $6.00 per crate, plus 65 cents for palletizing and cooling. To this should be added freight in the amount of $2.51 per carton, or a total of $9.16. The delivered cost of the 72 cartons was thus $659.52. Computing damages on the basis of an 8% loss for these cucumbers results in damages of $52.76. For the purpose of computing damages we deem the federal inspection made on January 14, to be representative of all of the super select cucumbers. These cucumbers were sold at a contract price of $7.00 per carton, plus 65 cents per carton for palletizing and cooling. Adding freight to this amount results in a delivered cost of $10.16, or a total of $6,949.44. The federal inspection showed total average condition defects of 16% of which 12% was decay. Calculating on the basis of a 14% loss results in damages of $972.92. We conclude that respondent's total damages on the load should be computed at $1,025.68. This amount deducted from the contract price of $5,733.90 leaves $4,708.22 as the total amount due from respondent to complainant. Of this amount respondent has already paid complainant $3,091.55 leaving a net amount due of $1,616.67. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

We note that respondent has asserted that the actual contract price was 15 cents per carton less than that claimed by complainant, and stated on complainant's invoice. We have concluded from all of the evidence herein that the amount stated on complainant's invoice is the correct amount.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, *$1,616.67*, with interest thereon at the rate of 13% per annum from *February 1, 1985*, until paid.

Copies of this order shall be served upon the parties.

VAN SOLKEMA FARMS, INC. *v.* ATLANTIC PRODUCE. PACA Docket No. 2-6923. Decided on August 13, 1986.

Failure to reply to allegation of payment in answer deemed admission—Rejection justified by failure of produce to make good delivery.

Respondent alleged in its answer that full payment had been made for a truck lot of mixed perishable produce. Complainant failed to reply to this allegation after having it pointed out by Presiding Officer, and was deemed to have admitted that payment had been made. Amount of decay in several lots of produce in a mixed load showed that such produce would not have made good delivery even had there been no delay in transit and if temperatures had been lower. Respondent's rejection was justified and complaint was dismissed.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $3,336.05 in connection with the shipment to respondent of two trucklots of mixed perishable produce in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complainant was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.2D) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Van Solkema Farms, Inc., is a corporation whose address is 8513 Harlow S. W., P.O. Box 308, Byron Center, Michigan.

2. Respondent is a partnership composed of Barrie Kellner and Karl Kellner, doing business as Atlantic Produce, whose address is

9500 NW. 82nd Street, Tamarac, Florida. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about July 31, 1984, complainant sold to respondent one truck lot of mixed perishable produce having a total value of $1,525.30. Complainant shipped this produce on July 31, 1984, from its place of business iu Byron Center, Michigan to respondent in Pompano Beach, Florida. Respondent accepted the produce on arrival, and has paid complainant the entire purchase price therefor.

4. On or about August 31, 1984, complainant sold to respondent one truck lot of mixed perishable produce having a total value of $1,810.75 on a f.o.b. basis. Delivery was scheduled for September 4, at 6:00 a.m. However, the driver was delayed at a prior destination, and did not make the produce available at respondent's place of business until September 5, at 11:00 a.m. Respondent visually inspected the produce, and rejected after determining that it was in poor condition. Complainant caused the produce to be resold in Miami, Florida.

5. On September 6, 1984, the produce referred to in paragraph 4, above, was federally inspected at Miami, Florida. The inspection showed temperatures to range from 50 to 55F in various containers, and showed condition to be as follows: "*Carrots:* Firm. Average 5% broken. Average 3% fresh cracks or (illegible); *Lettuce:* Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper Leaves:* No decay. *Head Leaves:* Average 2% damage by discoloration following bruising. Ranges 1 to 3 decayed heads per carton average 8% Bacterial Soft Rot affecting 1 to 2 outer head leaves. *Cucumbers:* Mostly firm. Decay ranges 20 to 70% average 45% Cottony Leak Rot in all stages, mostly collapsed and leaking. *Chicory:* 100% Bacterial Soft Rot affecting 1 to 5 leaves. *Parsley:* Mostly fresh and green. Decay ranges 42 to 45% average 44% Bacterial Soft Rot. *Celery:* Mostly Fresh and crisp. Tops are mostly light green, some slightly yellow. Decay ranges 13 to 54% average 34% Bacterial Soft Rot generally affecting tops."

6. The formal complaint was filed on January 18, 1985, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Respondent in its answer has specifically alleged that complainant has been paid in full for the load of mixed perishable produce shipped on July 31, 1984. In giving complainant an opportunity to file an opening statement the Presiding Officer pointed out to complainant that respondent claimed to have made such payment, and instructed complainant that it should make clear whether or not it

received the payment from respondent. Complainant did not file an opening statement, nor any other evidentiary submission in this proceeding. We conclude that the payment was made as alleged by respondent.

As to the second load of mixed perishable produce respondent complains that the truck arrived one day late. However, since the sale was f.o.b. any delay in delivery would be chargeable to respondent and not to complainant. Respondent also asserts that the produce did not make good delivery on arrival, and that consequently respondent's rejection of such produce was justified. In this contention we concur. Although the inspection was made one day following arrival, and two days following the scheduled arrival, and also revealed temperatures that were somewhat high, the amount of decay in the cucumbers, chicory, parsley, and celery shows that such produce would not have made good delivery at the scheduled time for arrival. Consequently, respondent's rejection was justified, and the complaint should be dismissed. See *Heggeblade-Marguleas-Tenneco* v. *Fisher Foods*, 33 Agric. Dec. 1443 (1974); *Bud Antle* v. *Bohack Corp.*, 32 Agric. Dec. 1961 (1973); and *Anonymous*, *8 Agric. Dec. 967 (1949)*.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

ANTHONY FARMS, INC. *v.* BUSHMAN'S, INC. PACA Docket No. 2-6965. Decided on August 13, 1986.

Change in contract terms, seller failed to prove—Rejection not established, improper notice—Burden on buyer to prove breach of warranty—Warranty of merchantability not breached—Damages limited to amount claimed.

Complainant sold "off-grade" potatoes to respondent, with no specific percentage of hollow heart contemplated. Complainant failed to prove that the contract terms were changed so as to reduce the contract price to a specific figure. Respondent did not give proper notice of rejection and thus found to have accepted the potatoes. As respondent failed to prove a breach of the warranty of merchantability, it is liable for the entire contract price. However, reparation award limited to damages claimed in the complaint.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,142.50 in connection with the sale of a truckload of potatoes to respondent in contemplation of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and complainant submitted a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Anthony Farms, Inc., is a corporation whose address is P.O. Box 4, Scandinavia, Wisconsin.

2. Respondent, Bushman's, Inc., is a corporation whose address is P.O. Box 8, Rosholt, Wisconsin. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately August 29, 1984, complainant sold to respondent, in contemplation of interstate commerce, a truckload of potatoes consisting of 860 fifty pound bags of ten ounce minimum Russet Bakers at $4.375 per bag, for $3,762.50, f.o.b. It was agreed that the potatoes were "off-grade" because of the presence of hollow heart. There was never a firm agreement as to the percentage of hollow heart to be contained by the potatoes.

4. On August 29, 1984, respondent prepared a "Confirmation of Purchase" which reflected the contract terms set forth in Finding of Fact 3. The confirmation also stated the grade as being "off-grade russets."

5. The potatoes were shipped to respondent's customer, who refused to accept them. Respondent than contacted a brokerage company who found a receiver, Wood Bros. Produce, Columbia, South Carolina. The potatoes were accepted by respondent.

6. Wood Bros. Produce had the potatoes inspected on September 5, 1984, which revealed the following, in relevant part:

Products Inspected: . . . Applicant's agent states 860 bags.

Condition of Load: Stacked on pallets applicant's warehouse, State Farmers Market, Columbia, S.C.

Temperature of Product: Various locations ranges from 49 degrees F., to 52 degrees F.

* * * * * * *

Quality: *Each lot:* Mature, clear, fairly bright, well to well shaped. Internal grade defects range from 10 to 40%, average 22% Hollow Heart.

Condition: *Each lot:* Firm. No soft rot.

Grade: *Each lot:* Fails to grade U.S. No. 2 account grade defects.

Remarks: Inspection made on basis of U.S. No. 2 at applicant's request.

7. Wood Bros. Produce bought the potatoes from respondent for $2,150.00, from which respondent deducted $1,397.50 for freight, $100.00 for extra freight for diversion to the second receiver, $107.50 for brokerage for Wood Bros. Produce, and $107.00 for respondent's brokerage. Respondent paid complainant the balance of $437.50.

8. Respondent has failed to pay complainant the difference between the contract price of $3,762.50 and the $437.50 remitted, or $3,325.00.

CONCLUSIONS

It is undisputed that respondent purchased from complainant, on approximately August 29, 1984, 860 fifty pound bags of russet potatoes at $4.375 per bag, for a total of $3,762.50. The parties agree that it was understood at the time of sale that the potatoes were off-grade because of the presence of hollow heart. This is indicated in respondent's Confirmation of Purchase (Finding of Fact 4). However, the employees of each firm who took part in the contract negotiations, complainant's Victor Anthony and respondent's Darrell Koehler, have made contradictory sworn statements concerning the percentage of hollow heart which they agreed the potatoes would contain; Anthony claiming 20 to 25% and Koehler 5 to 10%. Other than these sworn statements, there is no evidence supporting the position of either party regarding the issue of the percentage of hollow heart contemplated by the contract. Therefore, we find that the only contract term relating to the quality of the potatoes was that they were to be off-grade.

Complainant contends that when the potatoes arrived, it was informed that they contained an average of 40% hollow heart. Based on this representation, complainant asserts, it agreed to a change in the contract price to $3.00 per bag. Respondent denies that such a change was ever agreed to. Complainant has submitted an invoice which shows a new price of $3.00 per bag, but respondent claims it never received it. Further, complainant does not allege that such invoice was ever sent. The burden of proving a change in the contract terms is upon the party asserting it. *Joe Phillips, Inc.* v. *G & T Terminal Packaging Co., Inc.*, 42 Agric. Dec. 1199 (1983). We conclude that complainant has failed to meet its burden, and consequently that the original price terms were never changed.

Although respondent claims that it informed complainant of the problem with the potatoes when they arrived at its receiver's warehouse, respondent has not alleged that it specifically informed complainant that it was rejecting the potatoes. A rejection must be in clear unmistakable terms (*Farm Market Service, Inc.* v. *Altertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983)), and there is no evidence in the record that such a rejection was made by respondent. Therefore, respondent accepted the potatoes, and became liable for the contract price, less damages resulting from any breach of warranty. It is respondent's burden to prove the breach

and damages by a preponderance of the evidence. *Stonoca Farms Corporation* v. *S & S Produce Inc.*, 42 Agric. Dec. 937 (1983).

Respondent is claiming that there was a breach of warranty because the potatoes were affected by a percentage of hollow heart greater than that called for by the contract. A federal inspection of the potatoes upon arrival at the place of business of respondent's customer, Wood Bros. Produce, shows an average of 22% hollow heart (Finding of Fact 6). We have determined that the parties agreed only that the potatoes were to be off-grade, without contemplating any specific percentage of hollow heart. The condition of the potatoes upon arrival was certainly off-grade and thus in compliance with this contract term. However, in all contracts for the sale of produce there is also an implied warranty of merchantability, which means that the goods must be of merchantable quality. *LaMantia-Cullum-Collier Enterprises, Inc.* v. *Syndex Corp. a/t/a Schoenmann Produce Company*, 42 Agric. Dec. 651 (1983); U.C.C. § 2-314. It is our conclusion that potatoes shipped as off-grade with 22% average hollow heart at destination are merchantable. There was thus no breach of the implied warranty of merchantability by complainant.

Since there was no breach of warranty by complainant, respondent became liable for the entire contract price of $3,762.50. Respondent has remitted $437.50, reducing its liability to $3,325.00. However, as complainant has only claimed $2,142.50 in its formal complaint, the reparation awarded herein will be limited to this amount.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, *$2,142.50*, with interest thereon at the rate of 13 percent per annum from *October 1, 1984*, until paid.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

LESTER DISTRIBUTING COMPANY *v.* BRUNO DISPOTO COMPANY. PACA Docket No. 2-6924. Decided on July 9, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,192.86 in connection with a transaction involving the shipment of nectarines in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated June 12, 1986, complainant notified the Department that an amicable settlement had been reached. Complainant, in its letter of June 12, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FOUR STAR TOMATO, INC. *v.* TOMATOES, INC. PACA Docket No. 2-6834. Decided on July 16, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued on May 16, 1986, requiring respondent to pay complainant $2,124.00, with 13% interest from June 1, 1984, until paid. By letter dated June 2, 1986, and received on June 5, 1986, respondent has asked us to reconsider the order of May 16, 1986. We have reviewed the May 16, 1986, Decision and Order and the record in the light of respondent's June 2, 1986, letter. Upon review, we are of the opinion that respondent's claims are without merit, and we conclude that our order of May 16, 1986, is amply supported by the evidence and by the law applicable thereto. Accordingly, respondent's petition for reconsideration is dismissed without prior service upon complainant.

The order of May 16, 1986, is reinstated, except that the reparation awarded therein shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

FRUIT MARKETING, INC. *v.* LOFCHIE, INC., a/t/a BRUCE CO. PACA Docket No. 2-6857. Decided on July 16, 1986.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) in which a Decision and Order was issued on May 1, 1986, awarding reparation against the respondent in the amount of $3,486.90 plus interest. Respondent has filed a timely petition for reconsideration, which automatically operated to stay the May 1, 1986, order.

In its petition, respondent claims that the Decision and Order did not reflect its payment to complainant of $1,810.00. While such payment was noted in Finding of Fact 8, it was not reflected in the order. Therefore, the amount awarded complainant should be reduced by $1,810.00 to $1,676.90.

Respondent argues that the Decision and Order should have utilized the Market News quotations supplied by respondent in determining the value of the peaches at issue if they had been as warranted, instead of relying on the contract price plus freight. Respondent acknowledges that there were no prices quoted for the date of acceptance, September 14, 1984, but claims that the average prices for September 12, and 19, 1984, should have been used. However, the Market News figures put forward by respondent are not a sufficiently accurate reflection of the value the peaches should have had if they had been as warranted to justify their use. The peaches shipped were 660 lugs, 48/50 count, of California origin. The September 12 quotation, two days before respondent accepted the peaches at issue, shows California peaches, 48/50 count, in fair condition, at $7.00 to $10.00 per carton. The September 19 quotation shows only one lot of 48/50 count peaches in fair condition, at $7.00 to $8.00 per carton, which is obviously based on too few sales to have any legitimacy. The September 12 quotation, standing alone, is not an adequate indication of the market price on the date of acceptance. Therefore, the Decision and Order properly applied the contract price Plus freight.

ORDER

The Decision and Order issued on May 1, 1986, is hereby amended to reduce the award of reparation from respondent to complainant by $1,810.00, to $1,676.90, plus interest. This amount shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING, INC. *v.* BERRYMAN PRODUCE, INC. PACA Docket No. 2-7171. Decided on July 16, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,272.20 in connection with transactions involving the shipment of mixed vegetables in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated June 17, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of June 17, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

THOMAS G. VALENZUELA, d/b/a T.G. VALENZUELA PRODUCE *v* TEDDY BERTUCA, d/b/a TEDDY BERTUCA COMPANY. PACA Docket No. 2-6710. Decided on August 7, 1986.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on June 23, 1986, awarding complainant $5,735.36 plus interest. Respondent has filed a petition for reconsideration on July 2, 1986, which automatically stayed the Decision and Order.

In its petition, respondent claims that the Decision and Order erroneously found that a border inspection of transaction 4 did not take place. Respondent contends that the inspection did occur, as indicated by the inspection report in evidence. However, as stated in the Decision and Order, such report "on close examination, is merely a photocopy of respondent's exhibit 22, the inspection pertaining to transaction 3." Conclusive proof of this is that both reports have the same certificate number, 106931. Therefore, there is no merit to the petition for reconsideration and it is hereby dismissed.

The automatic stay of the Decision and Order is hereby vacated and the Decision and Order is reinstated. The amount awarded therein, plus interest, shall be paid within 30 days from the date of this order.

PRODUCE SPECIALITIES, INC., d/b/a FRIEDA'S FINEST *v.* ORGANIC FARMS, INC. PACA Docket No. 2-7137. Decided on August 7, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,512.00 in connection with a transaction involving the shipment of melons in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated June 23, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of June 23, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

BUD-RICH POTATO, INC. *v.* SPADA DISTRIBUTING CO., INC. PACA Docket No. 2-6855. Decided on August 12, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In February of 1986, the Presiding Officer in this reparation proceeding under the Perishable Agricultural Commodities Act of 1930 received an unsigned draft copy of what purported to be a settlement of the cause of action which gave rise to this proceeding. Citing that material in a letter to the parties dated March 24, 1986, the Presiding Officer gave 30 days in which to show cause why the complaint in this proceeding should not be dismissed. No response to that letter has been received from the parties. Accordingly, the complaint and any and all counterclaims should be and are hereby dismissed.

Copies of this order shall be served upon the parties.

MUZKO VEG., INC. *v.* SPADA DISTRIBUTING CO., INC., and/or MURPHY'S OVERSEAS U.S.A., INC., a/t/a MURPHY'S OVERSEAS. PACA Docket No. 2-6887. Decided on August 12, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In February of 1986, the Presiding Officer in this reparation proceeding under the Perishable Agricultural Commodities Act of 1930 received an unsigned draft copy of what purported to be a settlement of the cause of action which gave rise to this proceeding. Citing that material in a letter to the parties dated March 24, 1986, the Presiding Officer gave 30 days in which to show cause why the complaint in this proceeding should not be dismissed. No response to that letter has been received from the parties. Accordingly, the complaint and any and all counterclaims should be and are hereby dismissed.

Copies of this order shall be served upon the parties.

MIKAMI BROS., a/t/a MIKAMI BROTHERS POTATOES *v.* MURPHY'S OVERSEAS U.S.A., INC., and/or SPADA DISTRIBUTING CO., INC. PACA Docket No. 2-6888. Decided on August 12, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In February of 1986, the Presiding Officer in this reparation proceeding under the Perishable Agricultural Commodities Act of 1930 received an unsigned draft copy of what purported to be a settlement of the cause of action which gave rise to this proceeding. Citing that material in a letter to the parties dated March 24, 1986, the Presiding Officer gave 30 days in which to show cause why the complaint in this proceeding should not be dismissed. No response to that letter has been received from the parties. Accordingly, the complaint and any and all counterclaims should be and are hereby dismissed.

Copies of this order shall be served upon the parties.

P.J. TAGGARES COMPANY *v.* SPADA DISTRIBUTING CO., INC., and/or MURPHY'S OVERSEAS U.S.A., INC. PACA Docket No. 2-6913. Decided on August 12, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In February of 1986, the Presiding Officer in this reparation proceeding under the Perishable Agricultural Commodities Act of 1930 received an unsigned draft copy of what purported to be a settlement of the cause of action which gave rise to this proceeding. Citing that material in a letter to the parties dated March 24, 1986, the Presiding Officer gave 30 days in which to show cause why the complaint should not be dismissed. On April 11, 1986, the Presiding Officer received a duplicate copy of a letter from counsel for complainant herein addressed to one of the parties to this litigation which noted complainant had yet to receive its share of the settlement proceeds. On May 15, 1986, the Presiding Officer contacted by telephone counsel for complainant who said receipt of the settlement proceeds was imminent. Inasmuch as nothing to the contrary has been received to date, the complainant and any and all counterclaims should be and are hereby dismissed.

Copies of this order shall be served upon the parties.

ROBERT L. MEYER, d/b/a MEYER TOMATOES *v.* RAY & MASCARI, INC. PACA Docket No. 2-6762. Decided on August 13, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $22,710.28 in connection with a transaction involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated June 27, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of June 27, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TONY D. LOVE and PATRICK H. ROSALES, d/b/a L&R ORCHARDS *v.* IMPERIAL BRANDS, INC. PACA Docket No. 2-6901. Decided on August 14, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER (CONTINUANCE)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in connection with transactions in interstate commerce involving shipments of produce. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, Tony D. Love and Patrick H. Rosales d/b/a L&R Orchards, is a partnership whose address is P.O. Box 971, Moultrie, Georgia. Respondent, Imperial Brands Inc., is a corporation whose address is P.O. Box Drawer 312, Lake Wales, Florida. Respondent

was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Decision and Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Middle District of Florida, a voluntary petition for liquidation pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. §§ 701-766).

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 7 proceeding now pending in the United States Bankruptcy Court has been closed or dismissed.

Copies hereof shall be served upon the parties.

J. MAURICE SMITH, JR., d/b/a SMITH FARMS *v.* IMPERIAL BRANDS, INC. PACA Docket No. 2-7017. Decided on August 14, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $76,633.12 against respondent in connection with transactions in interstate commerce involving shipments of peaches. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, J. Maurice Smith, Jr. d/b/a Smith Farms, is a corporation whose address is P.O. Box 397, Johnston, South Carolina. Respondent, Imperial Brands Inc., is a corporation whose address is P.O. Box 312, Lake Wales, Florida. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Decision and Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Middle District of Florida, a voluntary petition for liquidation pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. §§ 701-766).

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C.

§ 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 7 proceeding now pending in the United States Bankruptcy Court has been closed or dismissed.

Copies hereof shall be served upon the parties.

AGRI-PAK FRUIT CO. *v.* NICHO PRODUCE CO., INC. and/or SO. CENTRAL BROKERAGE, INC. PACA Docket No. 2-6723. Decided on August 18, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on June 27, 1986, awarding reparation to complainant in the amount of $2,232.00 with interest thereon at the rate of 13% per annum from December 1, 1983, until paid, against respondent Nicho Produce Co., Inc. By undated letter, received on July 16, 1986, by the Department, respondent Nicho Produce Co., Inc., has requested an extension of time to file for reconsideration, and indicated that it intended to file further evidence. It is noted that the Rules of Practice do not permit the taking of further evidence at this time, *see* 7 CFR 47.24(b). However, the respondent may file a petition to rehear, reargue, and reconsider pursuant to 7 CFR 47.24(a). Its undated letter is treated as a request for time to prepare such a petition.

Accordingly, the order of June 27, 1986, is hereby stayed. Respondent's petition shall be file within 15 days of its receipt of this order, and must be filed in quadruplicate.

Copies of this order shall be served upon the parties. A copy of respondent's undated letter shall be served upon complainant and respondent So. Central Brokerage, Inc.

RITCLO PRODUCE, INC. *v.* MICHIGAN REPACKING AND PRODUCE CO. PACA Docket No. 2-6774. Decided on August 18, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on July 9, 1986, awarding reparation to the complainant in the amount of $11,709.00. By motion received July 23, 1986, respondent has moved that this matter be reconsidered.

Accordingly, the order of July 9, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

ANTHONY PODESTA, INC. *v.* FOPPIANO PACKING CO., INC. a/t/a JMB PACKING CO. PACA Docket No. 2-6916. Decided on August 18, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on July 9, 1986, awarding reparation to the complainant in the amount of $5,449.91 By letter received August 1, 1986, respondent has moved that this matter be reopened and reconsidered.

Accordingly, the order of July 9, 1986, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen and reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

HALF MOON FRUIT & PRODUCE CO. *v.* JAY-KEN DISTRIBUTORS INC. PACA Docket No. RD-86-302. Decided July 1, 1986.

Respondent was ordered to pay complainant, as reparation, $8,042.00 plus 13 percent interest per annum from October 1, 1985, until paid.

WM. N. FEINSTEIN & CO. INC. *v.* S & K FARMS INC. PACA Docket No. RD-86-303. Decided July 1, 1986.

Respondent was ordered to pay complainant, as reparation, $271.00 plus 13 percent interest per annum from August 1, 1985, until paid.

ORO FRUIT CO. *v.* FICOR MANUFACTURING COMPANY a/t/a BEATRICE CARAMEL APPLE. PACA Docket No. RD-86-304. Decided July 1, 1986.

Respondent was ordered to pay complainant, as reparation, $4,259.75 plus 13 percent interest per annum from October 1, 1985, until paid.

MAZZIE FARMS SALES INC. *v.* WAYNE M. HATANAKA d/b/a HATANAKA PRODUCE. PACA Docket No. RD-86-305. Decided July 1, 1986.

Respondent was ordered to pay complainant, as reparation, $1,977.50 plus 13 percent interest per annum from August 1, 1985, until paid.

THE TOBI COMPANY INC. *v.* UNITED PACKING CO. PACA Docket No. RD-86-306. Decided July 1, 1986.

Respondent was ordered to pay complainant, as reparation, $3,305.27 plus 13 percent interest per annum from November 1, 1985, until paid.

MILLS DISTRIBUTING COMPANY *v.* BEN VASQUEZ PRODUCE INC. PACA Docket No. RD-86-307. Decided July 2, 1986.

Respondent was ordered to pay complainant, as reparation, $31,014.60 plus 13 percent interest per annum from July 1, 1985, until paid.

J-B DISTRIBUTING CO. *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-308. Decided July 2, 1986.

Respondent was ordered to pay complainant, as reparation, $44,775.00 plus 13 percent interest per annum from January 1, 1986, until paid.

WILLIAM H. CLAPP d/b/a TOP BILLING *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-309. Decided July 2, 1986.

Respondent was ordered to pay complainant, as reparation, $3,533.96 plus 13 percent interest per annum from July 1, 1985, until paid.

FELTHAM GROWERS INC. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-310. Decided July 2, 1986.

Respondent was ordered to pay complainant, as reparation, $12,523.00 plus 13 percent interest per annum from May 1, 1985, until paid.

HUNTER BROTHERS INC. *v.* BRANTZ WHOLESALE FOODS INC. PACA Docket No. RD-86-311. Decided July 2, 1986.

Respondent was ordered to pay complainant, as reparation, $5,940.80 plus 13 percent interest per annum from June 1, 1985, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE *v.* MARTIN MONTES d/b/a M & M PRODUCE BROKERAGE. PACA Docket No. RD-86-312. Decided July 3, 1986.

Respondent was ordered to pay complainant, as reparation, $922.50 plus 13 percent interest per annum from April 1, 1985, until paid.

HARVEY KAISER INC. *v.* NAVARRA FARM PRODUCE CO. INC. PACA Docket No. RD-86-313. Decided July 3, 1986.

Respondent was ordered to pay complainant, as reparation, $11,385.00 plus 13 percent interest per annum from January 1, 1985, until paid.

BALLANTINE PRODUCE COMPANY INC. *v.* PANCHO'S PRODUCE CO. PACA Docket No. RD-86-314. Decided July 3, 1986.

Respondent was ordered to pay complainant, as reparation, $1,366.80 plus 13 percent interest per annum from September 1, 1985, until paid.

COLTON & WOOD *v.* GEORGE'S PRODUCE INC. a/t/a MUNARI PRODUCE CO. PACA Docket No. RD-86-315. Decided July 3, 1986.

Respondent was ordered to pay complainant, as reparation, $1,744.68 plus 13 percent interest per annum from July 1, 1985, until paid.

HOMER NOEL ELLIOTT *v.* I.R. JEROME COMPANY LTD. PACA Docket No. RD-86-316. Decided July 3, 1986.

Respondent was ordered to pay complainant, as reparation, $42,960.56 plus 13 percent interest per annum from August 1, 1985, until paid.

SARAS INC. *v.* KENNETH A. DUMONT d/b/a TRADEMASTERS INTERNATIONAL SERVICES CO. PACA Docket No. RD-86-317. Decided July 7, 1986.

Respondent was ordered to pay complainant, as reparation, $17,599.80 plus 13 percent interest per annum from July 1, 1985, until paid.

MT. PLEASANT GROWERS & PACKERS INC. a/t/a ISLAND TOMATO PACKERS *v.* BRUCE PRODUCE BROKERAGE CO. INC. PACA Docket No. RD-86-318. Decided July 7, 1986.

Respondent was ordered to pay complainant, as reparation, $1,911.25 plus 13 percent interest per annum from July 1, 1985, until paid.

DEL MONTE BANANA COMPANY *v.* MUSHROOM GROWERS ASS'N SALES CO. PACA Docket No. RD-86-319. Decided July 7, 1986.

Respondent was ordered to pay complainant, as reparation, $790.58 plus 13 percent interest per annum from August 1, 1985, until paid.

PACIFIC COAST FRUIT CO. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-320. Decided July 10, 1986.

Respondent was ordered to pay complainant, as reparation, $7,174.70 plus 13 percent interest per annum from September 1, 1985, until paid.

G & K DISTRIBUTING INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-321. Decided July 10, 1986.

Respondent was ordered to pay complainant, as reparation, $10,722.45 plus 13 percent interest per annum from January 1, 1986, until paid.

HAWMAN FARMS INC. and PHILLIP A. HAWMAN d/b/a HERMISTON POTATO *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-322. Decided July 10, 1986.

Respondent was ordered to pay complainant, as reparation, $1,457.50 plus 13 percent interest per annum from November 1, 1985, until paid.

SUNKIST GROWERS INC. *v.* Walla Walla Produce Company. PACA Docket No. RD-86-323. Decided July 10, 1986.

Respondent was ordered to pay complainant, as reparation, $3,060.00 plus 13 percent interest per annum from October 1, 1985, until paid.

ORANGE COAST PRODUCE INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-324. Decided July 10, 1986.

Respondent was ordered to pay complainant, as reparation, $11,465.90 plus 13 percent interest per annum from December 1, 1985, until paid.

RICHARD S. BROWN INC. *v.* WEINSTEIN PRODUCE SALES INC. PACA Docket No. RD-86-325. Decided July 11, 1986.

Respondent was ordered to pay complainant, as reparation, $1,836.00 plus 13 percent interest per annum from October 1, 1985, until paid.

CALAVO GROWERS OF CALIFORNIA *v.* A. J.'S PRODUCE CO. INC. PACA Docket No. RD-86-326. Decided July 11, 1986.

Respondent was ordered to pay complainant, as reparation, $3,483.00 plus 13 percent interest per annum from September 1, 1985, until paid.

OLD ORCHARD BRANDS INC. *v.* FICOR MANUFACTURING COMPANY a/t/a BEATRICE CARAMEL APPLE. PACA Docket No. RD-86-327. Decided July 11, 1986.

Respondent was ordered to pay complainant, as reparation, $4,536.00 plus 13 percent interest per annum from December 1, 1985, until paid.

GRIFFIN & BRAND OF MCALLEN INC. a/t/a INTERNATIONAL FROZEN FOODS *v.* AG-MARKETING INC. PACA Docket No. RD-86-328. Decided July 11, 1986.

Respondent was ordered to pay complainant, as reparation, $690.00 plus 13 percent interest per annum from January 1, 1986, until paid.

KIPP VALENTINE d/b/a VALENTINE FARMS *v.* LA BET FARMS INC. PACA Docket No. RD-86-329. Decided July 11, 1986.

Respondent was ordered to pay complainant, as reparation, $29,830.00 plus 13 percent interest per annum from June 1, 1985, until paid.

J.C. WATSON COMPANY *v.* NORTHEAST PRODUCE DEALERS. PACA Docket No. RD-86-330. Decided July 21, 1986.

Respondent was ordered to pay complainant, as reparation, $13,748.00 plus 13 percent interest per annum from December 1, 1985, until paid.

HANSHAW SALES *v.* FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-86-331. Decided July 21, 1986.

Respondent was ordered to pay complainant, as reparation, $1,540.00 plus 13 percent interest per annum from October 1, 1985, until paid.

M.J. DUER & COMPANY *v.* FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-86-332. Decided July 21, 1986.

Respondent was ordered to pay complainant, as reparation, $5,120.50 plus 13 percent interest per annum from August 1, 1985, until paid.

RICHARD E. BROWN INC. *v.* WAYNE M. HATANAKA d/b/a W.H. DISTRIBUTING. PACA Docket No. RD-86-333. Decided July 21, 1986.

Respondent was ordered to pay complainant, as reparation, $4,110.24 plus 13 percent interest per annum from June 1, 1985, until paid.

COLORADO POTATO GROWERS EXCHANGE *v.* JOSEPH LICCIARDELLO SONS INC. PACA Docket No. RD-86-334. Decided July 21, 1986.

Respondent was ordered to pay complainant, as reparation, $1,376.16 plus 13 percent interest per annum from June 1, 1985, until paid.

JOHN W. STONE INC. *v.* SAM COMPTON PRODUCE CO. INC. PACA Docket No. RD-86-335. Decided July 23, 1986.

Respondent was ordered to pay complainant, as reparation, $118,733.50 plus 13 percent interest per annum from July 1, 1985, until paid.

SAULSBURY BROS. INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-336. Decided July 23, 1986.

Respondent was ordered to pay complainant, as reparation, $12,800.00 plus 13 percent interest per annum from October 1, 1985, until paid.

GRIFFIN & BRAND OF MCALLEN INC. a/t/a INTERNATIONAL FROZEN FOODS *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-337. Decided July 23, 1986.

Respondent was ordered to pay complainant, as reparation, $10,342.92 plus 13 percent interest per annum from February 1, 1986, until paid.

DANNY DANENBERT *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-338. Decided July 23, 1986.

Respondent was ordered to pay complainant, as reparation, $4.725.00 plus 13 percent interest per annum from July 1, 1985, until paid.

DAVID FAGERBERG, JR. d/b/a FAGERBERG PROD. CO. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-339. Decided July 23, 1986.

Respondent was ordered to pay complainant, as reparation, $7,400.00 plus 13 percent interest per annum from September 1, 1985, until paid.

C.H. ROBINSON COMPANY *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-340. Decided July 25, 1986.

Respondent was ordered to pay complainant, as reparation, $84,610.37 plus 13 percent interest per annum from May 1, 1985, until paid.

CASCADIAN FRUIT SHIPPERS INC. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-341. Decided July 25, 1986.

Respondent was ordered to pay complainant, as reparation, $3,002.20 plus 13 percent interest per annum from April 1, 1985, until paid.

WALKER PRODUCE INC. *v.* FAIR WAY PACKING INC. PACA Docket No. RD-86-342. Decided July 25, 1986.

Respondent was ordered to pay complainant, as reparation, $21,437.50 plus 13 percent interest per annum from June 1, 1985, until paid.

INTERNATIONAL FRUITS AND VEGETABLES INC. *v.* M & M DISTRIBUTORS. PACA Docket No. RD-86-343. Decided July 25, 1986.

Respondent was ordered to pay complainant, as reparation, $14,192.00 plus 13 percent interest per annum from July 1, 1985, until paid.

RICHARD S. BROWN INC. *v.* PACIFIC COAST PRODUCE BROKERAGE. PACA Docket No. RD-86-344. Decided July 25, 1986.

Respondent was ordered to pay complainant, as reparation, $20,284.50 plus 13 percent interest per annum from December 1, 1985, until paid.

J.R. BROOKS & SON INC. *v.* SOUTH FLORIDA GROWERS ASSOCIATION INC. PACA Docket No. RD-86-346. Decided July 28, 1986.

Respondent was ordered to pay complainant, as reparation, $89,444.99 plus 13 percent interest per annum from May 1, 1985, until paid.

GERALD E. MANN *v.* BRUCE PRODUCE BROKERAGE CO. INC. PACA Docket No. RD-86-347. Decided July 28, 1986.

Respondent was ordered to pay complainant, as reparation, $2,994.60 plus 13 percent interest per annum from August 1, 1985, until paid.

U I GROUP INC. *v.* CENTRAL PRODUCE and/or NATIONAL PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-348. Decided July 28, 1986.

Respondent was ordered to pay complainant, as reparation, $10,168.41 plus 13 percent interest per annum from May 1, 1985, until paid.

MARTIN PRODUCE CO. INC. *v.* GENE GUERRA PRODUCE CO. and/or GUERRA BROTHERS PRODUCE. PACA Docket No. RD-86-349. Decided July 28, 1986.

Respondent was ordered to pay complainant, as reparation, $7,290.00 plus 13 percent interest per annum from May 1, 1985, until paid.

ANDERSON PRODUCE INT'L. INC. *v.* BRUCE PRODUCE BROKERAGE CO. INC. PACA Docket No. RD-86-352. Decided July 31, 1986.

Respondent was ordered to pay complainant, as reparation, $2,784.03 plus 13 percent interest per annum from May 1, 1985, until paid.

J.S. McMANUS PRODUCE CO. INC. *v.* BRUCE PRODUCE BROKERAGE CO. INC. PACA Docket No. RD-86-353. Decided July 31, 1986.

Respondent was ordered to pay complainant, as reparation, $8,477.95 plus 13 percent interest per annum from March 1, 1985, until paid.

WORLEY AND McCULLOUGH INC. *v.* EUFEMIO GUERRA and TOMAS GUERRA, JR. d/b/a GUERRA BROTHERS PRODUCE. PACA Docket No. RD-86-354. Decided July 31, 1986.

Respondent was ordered to pay complainant, as reparation, $2,709.70 plus 13 percent interest per annum from April 1, 1985, until paid.

CROSETTI FROZEN FOODS INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-355. Decided August 1, 1986.

Respondent was ordered to pay complainant, as reparation, $9,804.48 plus 13 percent interest per annum from December 1, 1985, until paid.

MILTON POULOS INC. *v.* PACIFIC DYNASTY FOODS INC. PACA Docket No. RD-86-356. Decided August 1, 1986.

Respondent was ordered to pay complainant, as reparation, $7,087.50 plus 13 percent interest per annum from December 1, 1985, until paid.

TEXAS DISTRIBUTING CO. INC. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-357. Decided August 1, 1986.

Respondent was ordered to pay complainant, as reparation, $18,837.60 plus 13 percent interest per annum from June 1, 1985, until paid.

CACTUS DISTRIBUTORS INC. *v.* NORTHWEST PRODUCE DEALERS INC. PACA Docket No. RD-86-359. Decided August 1, 1986.

Respondent was ordered to pay complainant, as reparation, $2,109.75 plus 13 percent interest per annum from November 1, 1985, until paid.

SIX L'S PACKING COMPANY INC. *v.* BOLER FARMS. PACA Docket No. RD-86-362. Decided August 4, 1986.

Respondent was ordered to pay complainant, as reparation, $1,851.25 plus 13 percent interest per annum from July 1, 1985, until paid.

H & R FARMS *v.* JAMCO FARMS. PACA Docket No. RD-86-363. Decided August 4, 1986.

Respondent was ordered to pay complainant, as reparation, $7,932.88 plus 13 percent interest per annum from June 1, 1985, until paid.

INTERNATIONAL A.G. INC. *v.* PATRICK H. SINGLETARY d/b/a P.H. SINGLETARY & SONS. PACA Docket No. RD-86-365. Decided August 4, 1986.

Respondent was ordered to pay complainant, as reparation, $9,884.50 plus 13 percent interest per annum from May 1, 1985, until paid.

COASTAL BERRY CORP. *v.* JOHN H. MONCOVICH d/b/a JOHN MONCOVICH CO. PACA Docket No. RD-86-366. Decided August 4, 1986.

Respondent was ordered to pay complainant, as reparation, $1,238.40 plus 13 percent interest per annum from July 1, 1985, until paid.

GREEN VALLEY FARMS INC. *v.* TRAYMAN INC. PACA Docket No. RD-86-358. Decided August 7, 1986.

Respondent was ordered to pay complainant, as reparation, $12,240.00 plus 13 percent interest per annum from July 1, 1985, until paid.

J-B DISTRIBUTING CO. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-368. Decided August 18, 1986.

Respondent was ordered to pay complainant, as reparation, $6,987.10 plus 13 percent interest per annum from September 1, 1985, until paid.

WALKER PRODUCE INC. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-369. Decided August 18, 1986.

Respondent was ordered to pay complainant, as reparation, $80,381.25 plus 13 percent interest per annum from May 1, 1985, until paid.

HELMS POTATO CO. *v.* OWEN PRODUCE INC. PACA Docket No. RD-86-371. Decided August 18, 1986.

Respondent was ordered to pay complainant, as reparation, $447.29 plus 13 percent interest per annum from August 1, 1985, until paid.

HERBERT L. STELLY PRODUCE *v.* DARBY'S PRODUCE. PACA Docket No. RD-86-373. Decided August 18, 1986.

Respondent was ordered to pay complainant, as reparation, $11,928.10 plus 13 percent interest per annum from January 1, 1986, until paid.

T & M PRODUCE FOOD CORPORATION *v.* GREEN VALLEY CO. INC. PACA Docket No. RD-86-374. Decided August 19, 1986.

Respondent was ordered to pay complainant, as reparation, $10,048.65 plus 13 percent interest per annum from November 1, 1985, until paid.

TOM LANGE COMPANY INC. *v.* ANNICELLI FRUIT & PRODUCE CO. PACA Docket No. RD-86-375. Decided August 19, 1986.

Respondent was ordered to pay complainant, as reparation, $50,165.35 plus 13 percent interest per annum from November 1, 1985, until paid.

FRUDDEN PRODUCE INC. *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-376. Decided August 19, 1986.

Respondent was ordered to pay complainant, as reparation, $5,062.50 plus 13 percent interest per annum from November 1, 1985, until paid.

MILLS DISTRIBUTING COMPANY *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-377. Decided August 19, 1986.

Respondent was ordered to pay complainant, as reparation, $580.00 plus 13 percent interest per annum from November 1, 1985, until paid.

SANTO TOMAS PRODUCE ASSOCIATION *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-378. Decided August 20, 1986.

Respondent was ordered to pay complainant, as reparation, $1,655.00 plus 13 percent interest per annum from November 1, 1985, until paid.

ZINNO FARMS INCORPORATED *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-379. Decided August 20, 1986.

Respondent was ordered to pay complainant, as reparation, $4,865.00 plus 13 percent interest per annum from December 1, 1985, until paid.

DYNASTY FARMS INC. *v.* ANTHONY J. MOREALE, JR. d/b/a PACIFIC COAST PRODUCE BROKERAGE. PACA Docket No. RD-86-380. Decided August 20, 1986.

Respondent was ordered to pay complainant, as reparation, $7,846.25 plus 13 percent interest per annum from November 1, 1985, until paid.

VIC MAHNS INC. *v.* FARMER SMITH'S WHOLESALE INC. PACA Docket No. RD-86-381. Decided August 20, 1986.

Respondent was ordered to pay complainant, as reparation, $24,648.75 plus 13 percent interest per annum from September 1, 1985, until paid.

GERAWAN FOODS INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-382. Decided August 21, 1986.

Respondent was ordered to pay complainant, as reparation, $36,809.73 plus 13 percent interest per annum from August 1, 1985, until paid.

PANDOL BROS. INC. *v.* NORTHEAST PRODUCE DEALERS INC. PACA Docket No. RD-86-383. Decided August 21, 1986.

Respondent was ordered to pay complainant, as reparation, $10,518.30 plus 13 percent interest per annum from December 1, 1985, until paid.

MID-VALLEY SALES CORPORATION *v.* NORTHEAST PRODUCE DEALERS INC. PACA Docket No. RD-86-384. Decided August 21, 1986.

Respondent was ordered to pay complainant, as reparation, $1,467.60 plus 13 percent interest per annum from January 1, 1986, until paid.

FLORIDA CITY PRODUCE INC. *v.* FRANK W. DELEGAL, JR. d/b/a FRANK DELEGAL, JR. PACA Docket No. RD-86-385. Decided August 21, 1986.

Respondent was ordered to pay complainant, as reparation, $15,037.75 plus 13 percent interest per annum from December 1, 1985, until paid.

STANDARD FRUIT & VEGETABLE CO. INC. *v.* DANIEL & SON FRUIT CO. PACA Docket No. RD-86-387. Decided August 22, 1986.

Respondent was ordered to pay complainant, as reparation, $7,664.20 plus 13 percent interest per annum from December 1, 1985, until paid.

TONY VITRANO COMPANY *v.* INTERSTATE PRODUCE INC. PACA Docket No. RD-86-388. Decided August 22, 1986.

Respondent was ordered to pay complainant, as reparation, $11,378.25 plus 13 percent interest per annum from May 1, 1985, until paid.

DEW-GRO INC. a/t/a CENTRAL WEST PRODUCE *v.* VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. PACA Docket No. RD-86-389. Decided August 22, 1986.

Respondent was ordered to pay complainant, as reparation, $5,459.69 plus 13 percent interest per annum from November 1, 1985, until paid.

BONITA PACKING CO. a/t/a BETTERAVIA FARMS *v.* VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. PACA Docket No. RD-86-390. Decided August 25, 1986.

Respondent was ordered to pay complainant, as reparation, $3,023.50 plus 13 percent interest per annum from November 1, 1985, until paid.

SEABROOK BROTHERS & SONS INC. *v.* BAKKER SALES INC. PACA Docket No. RD-86-391. Decided August 25, 1986.

Respondent was ordered to pay complainant, as reparation, $13,621.44 plus 13 percent interest per annum from September 1, 1985, until paid.

DEW-GRO INC. a/t/a CENTRAL WEST PRODUCE *v.* LEGEIS PRODUCE CORP. PACA Docket No. RD-86-392. Decided August 25, 1986.

Respondent was ordered to pay complainant, as reparation, $24,585.00 plus 13 percent interest per annum from December 1, 1985, until paid.

SOURCE PRODUCE DISTRIBUTING CO. *v.* AMIGO PRODUCE CO. INC. PACA Docket No. RD-86-394. Decided August 26, 1986.

Respondent was ordered to pay complainant, as reparation, $178.68 plus 13 percent interest per annum from May 1, 1985, until paid.

AL HARRISON COMPANY DISTRIBUTORS *v.* DIXIE PRODUCE SALES. PACA Docket No. RD-86-396. Decided August 26, 1986.

Respondent was ordered to pay complainant, as reparation, $9,892.65 plus 13 percent interest per annum from February 1, 1986, until paid.

SUN WORLD INTERNATIONAL INC. *v.* RONALD G. MUSTO d/b/a MUSTO PRODUCE COMPANY. PACA Docket No. RD-86-370. Decided August 28, 1986.

Respondent was ordered to pay complainant, as reparation, $6,597.50 plus 13 percent interest per annum from January 1, 1985, until paid.

C&C ENTERPRISES INC. *v.* PATRICK H. SINGLETARY d/b/a P.H. SINGLETARY & SONS. PACA Docket No. RD-86-397. Decided August 28, 1986.

Respondent was ordered to pay complainant, as reparation, $24,587.87 plus 13 percent interest per annum from April 1, 1985, until paid.

TOM LANGE COMPANY INC. *v.* MELON PRODUCE INC. PACA Docket No. RD-86-398. Decided August 28, 1986.

Respondent was ordered to pay complainant, as reparation, $95,331.50 plus 13 percent interest per annum from February 1, 1986, until paid.

NORTHWEST PRODUCE EXPRESS *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-399. Decided August 28, 1986.

Respondent was ordered to pay complainant, as reparation, $14,405.22 plus 13 percent interest per annum from February 1, 1986, until paid.

DIMARE BROS. INC./NEW ENGLAND FARMS *v.* S. NAIMAN & SONS INC. PACA Docket No. RD-86-400. Decided August 29, 1986.

Respondent was ordered to pay complainant, as reparation, $1,818.50 plus 13 percent interest per annum from November 1, 1985, until paid.

TAGUS RANCH PACKING COMPANY INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-401. Decided August 29, 1986.

Respondent was ordered to pay complainant, as reparation, $13,010.80 plus 13 percent interest per annum from February 1, 1986, until paid.

SUNSPICED INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-402. Decided August 29, 1986.

Respondent was ordered to pay complainant, as reparation, $941.25 plus 13 percent interest per annum from December 1, 1985, until paid.

NORTON BROKERAGE COMPANY INC. *v.* LYCO FOOD PRODUCTS. PACA Docket No. RD-86-403. Decided August 29, 1986.

Respondent was ordered to pay complainant, as reparation, $5,785.00 plus 13 percent interest per annum from September 1, 1985, until paid.

MISCELLANEOUS REPARATION DEFAULT DECISIONS

NIKADEMOS DISTRIBUTING COMPANY, INC. *v.* BOLIVAR G. GAMEZ d/b/a ROBIL INTERNATIONAL. PACA Docket No. RD-86-295. Decided on July 30, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on June 18, 1986, awarding reparation to the complainant in the amount of $12,327.75. By telegram received July 8, 1986, respondent has moved that this matter be reopened.

Accordingly, the order of June 18, 1986 is hereby stayed. Complainant may have ten (10) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with the order.

VAL-MEX FRUIT COMPANY, INC. *v.* LA PREFERIDA OF TEXAS, INC. PACA Docket No. RD-86-294. Decided on August 12, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed with a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and respondent will have 15 days from the receipt of this order to submit an answer.

Copies of this order shall be served upon the parties.

HORACE T. HOLMES AND SONS *v.* IMPERIAL BRANDS, INC. PACA Docket No. RD-86-364. Decided on August 14, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER (CONTINUANCE)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $280,000.00 against respondent in connection with transactions in interstate commerce involving shipments of peaches. A copy of the formal complaint was served upon respondent, and respondent has not filed an answer thereto.

Complainant, Horace T. Holmes and Son, is a partnership whose address is Route 2, Box 111-B, Trenton, South Carolina. Respondent, Imperial Brands Inc., is a corporation whose address is P.O. Drawer 312, Lake Wales, Florida. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Default Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Middle District of Florida, a voluntary petition for liquidation pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. §§ 701-766).

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 7 proceeding now pending in the United States Bankruptcy Court has been closed or dismissed.

Copies hereof shall be served upon the parties.

THE TOBI COMPANY, INC. *v.* UNITED PACKING CO. PACA Docket No. RD-86-306. Decided on August 15, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on July 1, 1986, awarding reparation to the complainant in the amount of $3,305.27. By motion received July

30, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of July 1, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

SUNRISE PRODUCE INC. *v.* AL L. VOGT d/b/a VOGT PRODUCE CO.
PACA Docket No. RD-86-345. Decided on August 27, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER (CONTINUANCE)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $9,922.50 against respondent in connection with transactions in interstate commerce involving shipments of onions. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, Sunrise Produce, Inc., is a corporation whose address is P.O. Box 345, Payette, Idaho. Respondent, Al L. Vogt d/b/a Vogt Produce Co., is an individual whose address is 706 Arthur Street, Caldwell, Idaho. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Default Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, District of Idaho, a voluntary petition for bankruptcy pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. § 701 *et seq.*).

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 7 proceeding now pending in the United States Bankruptcy Court has been closed or dismissed, or that the debts have been discharged.

Copies hereof shall be served upon the parties.

ADAMS PACKING ASSOCIATION INC. *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-350. Decided on August 27, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER (CONTINUANCE)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $12,791.85 against respondent in connection with transactions in interstate commerce involving shipments of fruits. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto and is in default.

Complainant, Adams Packing Association, Inc., is a corporation whose address is P.O. Box 37, Auburndale, Florida. Respondent, Premium Produce Corp., is a corporation whose address is 161 Hunts Point Terminal Market, Bronx, New York. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the Default Order in this proceeding, the Department was advised that there had been filed in the United States Bankruptcy Court, Southern District of New York regarding respondent. an involuntary petition pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. §§ 701 *et seq.*).

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a petition under the Bankruptcy Code has been filed. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 7 proceeding now pending in the United States Bankruptcy Court has been closed, or dismissed.

Copies hereof shall be served upon the parties.

VEG-A-MIX *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-351. Decided on August 27, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER (CONTINUANCE)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $4,102.55 against respondent in connection with transactions in

interstate commerce involving shipments of vegetables. A copy of the formal complaint was served upon respondent, and respondent has failed to filed an answer thereto and is in default.

Complainant, Veg-A-Mix, is a corporation whose address is P.O. Box 1186, Castroville, California. Respondent, Premium Produce Corp., is a corporation whose address is 161 Hunts Point Terminal Market, Bronx, New York. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the Default Order in this proceeding, the Department was advised that there had been filed in the United States Bankruptcy Court, Southern District of New York regarding respondent, an involuntary petition pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. §§ 701 *et seq.*).

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code has been filed. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 7 proceeding now pending in the United States Bankruptcy Court has been closed, or dismissed.

Copies hereof shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: PENINSULA SHIPPING INC., and GLENN L. GIRO. P.Q. Docket No. 215. Decided on July 7, 1986.

Movement of pork, originating in Spain, into Louisiana—Violation of Animal and Plant Health Inspection Act—Civil penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AS TO PENINSULA SHIPPING INC. AND GLENN. L. GIRO

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Peninsula Shipping, Inc. and Glenn L Giro, violated the Act and regulations promulgated thereunder (9 C.F R. Part 94). Peninsula Shipping Inc., Glenn L. Giro, and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth below and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Peninsula Shipping Inc. and Glenn L. Giro, admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegation in the complaint, sdmit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Peninsula Shipping Inc and Glenn L. Giro, also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S C. § 504 *et seq.*) for fees and other expenses incurred by them in connection with this proceeding.

FINDINGS OF FACT

1. Peninsula Shipping Inc., respondent, is a company whose address is 4612 Magazine Street., New Orleans, Louisiana 70115.

2. Glenn L Giro, respondent is an individual whose address is 307 West Street, Jean Baptist' Charlmette, Louisiana 70043.

3. On or about March 15, 1985, the respondents entered into Baton Rouge, Louisiana, pork products, that is, ham, which originated from Spain.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Peninsula Shipping Inc. is assessed a civil penalty of seven hundred fifty dollars ($750) and respondent Glenn L. Giro is assessed a civil penalty of one hundred twenty five dollars ($125). The civil penalties shall be paid by certified checks or money orders payable, to "The Treasurer of the United States," and shall be sent to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, on or before June 30, 1986.

This Order shall become effective on the day it is filed by the administrative law judge with the Hearing Clerk.

In re: MIDAS NAVIGATION, LTD. P.Q. Docket No. 170. Decided on July 9, 1986.

British ship—Delinquent in foreign garbage containment—Violation of Plant Quarantine Act—Civil penalty—Answer to complaint not filed.

Andrea Bateman, for complainant.
Angelakos, Ltd. Barbican, London, for respondent.

Decision by Donald A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is a proceeding under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120), the Plant Quarantine Act, as amended (7 U.S.C. § 151 *et seq.*), and the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), in which Administration Law Judge Edward H. McGrail (ALJ) filed an initial Decision and Order on April 23, 1986, assessing a civil penalty of $500 against respondent after respondent failed to file a timely answer.

On May 10, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR

§ 2.35).[1] On July 2, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow Judge McGrail's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and the Act of August 20, 1912 (Plant Quarantine Act), as amended (7 U.S.C. §§ 151–164a and 167) (Acts) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on December 27, 1985. The complaint alleged that the respondent violated sections 330.400(b)(1) and 94.5(b)(1) of the regulations (7 CFR § 330.400(b)(1) and 9 CFR § 94.5(b)(1)).

Copies of the complaint and the Rules of Practice governing proceedings under the Acts were served by the Hearing Clerk, by certified mail, upon respondent on January 7, 1986. On February 3, 1986, respondent was sent, by regular mail, a notice that its answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursu-

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Midas Navigation, Ltd., herein referred to as the respondent, is a company whose address is City Bank House, 3rd Floor, 16122 Baltic Street, London, EC1 Y-OXA, England, and who is the owner of the ship CY M/V Guardian.

2. Midas Navigation, Ltd.'s *agent for the purpose of service of process* of this decision and order is Barber Steamship Lines, Inc., whose address is 307 Tchoupitoulas Street, New Orleans, Louisiana 70130.

3. On or about October 8, 1985, the respondent, on its ship the CY M/V Guardian, which arrived in New Orleans, Louisiana after being in Alexandria, Egypt, violated section 330.400(b)(1) of the regulations (7 CFR § 330.400(b)(1)) and section 94.5(b)(1) of the regulations (9 CFR § 94.5(b)(1)), because the ship had foreign origin garbage on board which was not contained in tight, leakproof covered receptacles, as required.

CONCLUSION

By reason of the facts in the finding of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file an answer with the Hearing Clerk within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)–(c), .139):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and

shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra,* and advised respondent that complainant was seeking a $500 civil penalty. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, as follows (Complaint at 2):

> WHEREFORE, it is hereby ordered that for the purpose of determining whether or not respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the applicable Rules of Practice (7 CFR § 380.1, 7 CFR § 1.136, and 9 CFR § 70.1). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer with the Hearing Clerk within 20 days. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and three copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

The return receipt card shows that respondent was served with a copy of the complaint on January 7, 1986. Respondent's answer was, therefore, required to be filed with the Hearing Clerk by January 27, 1986. However, respondent's letter which it sought to have considered as an answer was not received by the Hearing Clerk until March 14, 1986, well beyond the allotted time. Since respondent failed to file an answer within the specified time period, the default Decision and Order was properly issued in this case. Although on rare occasions default decisions have been set aside for

good cause shown or where complainant did not object,[2] respondent has shown no basis for setting aside the default decision here.[3]

In addition, respondent's (untimely) answer does not deny the allegations of the complaint, but, rather, "accept[s] the allegations of the Complaint" (Answer at 2). Hence the answer, even if timely filed, would have warranted the issuance of the default decision, under the rules quoted above.

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a $10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date

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[2] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3] *See In re Gutman*, 45 Agric. Dec.____ (June 17, 1986); *In re Daul*, 45 Agric. Dec.____ (Mar. 6, 1986); *In Eastern Air Lines, Inc.*, 44 Agric. Dec.____ (Sept. 23, 1985); *In re Cuttone*, 44 Agric. Dec.____ (Aug. 20, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec.____ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec.____ (June 26, 1984); *In re Buzun*, 43 Agric. Dec.____ (June 13, 1984); *In re Mayer*, 43 Agric. Dec.____ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec.____ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

for this respondent, who did not file a timely answer and did not contest the allegations of the complaint in its untimely answer.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" [4] If respondent were permitted to present alleged mitigating circumstances at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present these matters at this time. But even if respondent were permitted to present the alleged mitigating circumstances at this late date, the same order would be issued.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent is hereby assessed a civil penalty of $500, which shall be paid within 30 days from the date of service of this order. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U.S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D.C. 20250-1400.

In re: GEORGE MORIKAWA. P.Q. Docket No. 210. Decided on July 16, 1986.

Airline employee failed to have bags inspected in Hawaii—Violation of Plant Quarantine Act—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint filed hy the Administrator of the Animal and Plant Health Inspection Service alleging

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[4] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

that George Morikawa violated the PQA and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*) George Morikawa and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth below and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, George Morikawa, admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint admits to the Finding of Fact set forth below, and waives:

(a) Any further procedure:

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. George Morikawa waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDING OF FACT

1. George Morikawa, respondent, is an individual and at all times material an employee of World Airways, Inc., whose address for purposes of service of process is, c/o World Airways, 7001 World Way West, Room 310, Los Angeles, California 90009.

2. On or about October 31, 1985, in Honolulu, Hawaii, the respondent failed to present his baggage and other personal effects for inspection by an inspector of the U.S. Department of Agriculture.

CONCLUSIONS

Respondent George Morikawa, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent George Morikawa, is assessed a civil penalty of one hundred eighty-five dollars ($185) which shall be payable to, "The Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Depart-

ment of Agriculture, Washington, D.C. 20250-1400, on or before July 31, 1986.

This Order shall become effective on the day of service upon the respondent.

In re: AARD DE BOER, INC. P.Q. Docket No. 246 and 265. Decided on July 18, 1986.

Importation of orchid plants and other growing media—Violation of Endangered Species Act—Civil penalty—Consent.

C. McGovern, for complainant (246).
Andrea Bateman, for complainant (265).
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a § 167) and the Endangered Species Act (16 U.S.C. 1538 (c) and (g), 1540(a)) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Aard de Boer, Inc., respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.37 *et seq.*) and the parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Aard de Boer, Inc., respondent, is a corporation whose business address is 42 Ingram Terrace, Wayne, New Jersey 07470.

2. On or about June 20, 1985, respondent imported into the United States at J.F.K. International Airport, Jamaica, New York, a growing media containing 24 orchid plants.

3. On or about January 10, 1986, respondent imported into the United States at J.F.K. International Airport, Jamaica, New York, three boxes of Prunus spp. and Salix ssp. cuttings.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondents is assessed a civil penalty of eight hundred and seventy-five dollars ($875.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: KREVATAS IMPORT EXPORT, INC. P.Q. Docket No. 186, Decided on July 23, 1986.

Importer Export firm—Airport possession of 300 pounds of soursops—Violation of Federal Plant Pest Act—Civil penalty—Consent.

Clement McGovern, for complainant.
Larry Schatzman, Miami, Florida, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent, violated the Act and regulations promulgated thereunder (9 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by

entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 5O4 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Krevatas Import Export, Inc., respondent, is a corporation incorporated under the laws of the State of Florida and having its principal place of business at 2101 N.W. 15th Avenue, Miami, Florida 33142.

2. On or about November 20, 1985, respondent was in possession of 300 pounds of ANNOA MURICATA (soursops) at Miami International Airport.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of six hundred dollars ($600.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this Order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: ALLIED AVIATION SERVICES INTERNATIONAL CORP. P.Q. Docket No. 269. Decided on August 1, 1986.

Airline services company—Removal of foreign origin garbage from airplane—Violation of Plant Pest and Plant Quarantine Acts—Civil penalty—Consent.

Kris Ikejiri, for complainant.
Thomas C. Etter, New York, New York, for respondent.

Decided by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111 and § 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*) and the Plant Quarantine Act, as amended (7 U.S.C. § 151 *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Allied Aviation Services International Corp. violated the Acts and regulations promulgated thereunder (7 CFR Part 330) and 9 CFR Part 94). Respondent Allied Aviation Services International Corp. and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth below and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Allied Aviation Services International Corp. admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegation in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure:

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Allied Aviation Services International Corp. waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

3. Complainant agrees that the terms and facts in this consent decision shall not be considered a violation or a breach of the consent decision filed on April 11, 1986 in P.Q. Docket No. 162, *In re Allied Aviation Services International Corp.*

FINDINGS OF FACT

1. Allied Aviation Services International Corp., respondent, is a corporation whose address for purposes of service of process is 25th Floor, 2 Penn. Plaza, New York, New York 10121.

2. On or about April 7, 1986, at John F. Kennedy International Airport, Jamaica, New York the respondent unloaded foreign origin garbage from a Tower Airlines flight.

CONCLUSIONS

Respondent Allied Aviation Services International Corp. having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order will be issued.

ORDER

Allied Aviation Services International Corp., Inc., is assessed a civil penalty of eight hundred dollars ($800.00) which shall payable to, "The Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, DC 20250-1400, on or before August 8, 1986.

This Order shall become effective on the day this Order is served upon the respondent.

In re: MARIANA CEVALLOS. P.Q. Docket No. 180. Decided on May 16, 1986.

Importation of potatoes and passion fruit—Violation of permit regulations—Civil penalty.

Respondent imported potatoes and passion fruit pulp into the United States from Ecuador. This is prohibited unless imported under permits as required by regulations. Civil penalty of $250.00 assessed.

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 C.F.R. §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on February 6, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that on or about August 12, 1985, the respondent imported potatoes and passion fruit pulps into the United States at Miami, Florida, from Ecuador, in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the potatoes and passion fruit pulps were not imported under permit as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

On March 6, 1986, the respondent filed an Answer responding to and admitting the allegations contained in the Complaint. This admission of the allegations contained in the Complaint constitutes a waiver of hearing (7 C.F.R. § 1.139).

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139)

FINDINGS OF FACT

1. Respondent, Mariana Cevallos, is an individual whose address is 840-55th Street, Brooklyn, New York 11220.

2. On or about August 12, 1985, the respondent imported potatoes and passion fruit pulps into the United States at Miami, Florida, from Ecuador, in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the potatoes and passion fruit pulps were not imported under permit as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

CONCLUSIONS

By reason of the facts contained in the Findings of Fact above, the respondent has violated scction 319.56(c) of the regulations (7 C.F.R. § 319.56(c)).

Therefore, the following Order is issued.

ORDER

The respondent, Mariana Cevallos, is hereby assessed a civil penalty of two hundred fifty dollars ($250.00) which shall be paid at the rate of fifty dollars ($50.00) per month, with the first payment due no later than thirty (30) days from the effective date of this order, and the remaining payments due on the same date of each of the following four months. This penalty shall be payable to the "Treasurer of the United States" by certified checks or money orders, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final on August 5, 1986-ED.]

In re: MADELINE RAMJEWANSINGH. P.Q. Docket No. 154. Decided on May 12, 1986.

Importation of fruit from Trinidad—Importation permit required—Civil penalty. Respondent imported eight (8) mangoes into the United States from Trinidad, in violation of regulations which require accompanying permit. Civil penalty of $500.00 assessed.

Fronda C. Woods, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-2(e) of the regulations promulgated thereunder (7 CFR § 319.56-2(e)).

The Office of the Hearing Clerk mailed to respondent, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act. The Postal Service returned the documents marked "Unclaimed." The Hearing Clerk then remailed

the documents by regular mail. This constitutes service under section 1.147(b)(3) of the Rules of Practice applicable to this proceeding (7 CFR § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 CFR § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Madeline Ramjewansingh, respondent, is an individual whose address is 111-58 43rd Avenue, Corona, New York 11368.

2. On or about March 22, 1985, at John F. Kennedy International Airport, respondent imported eight mangoes from Trinidad into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By her silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Madeline Ramjewansingh is hereby assessed a civil penalty of five hundred dollars ($500), which shall be payable to

the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final on August 11, 1986–ED.]

In re: HAWAIIAN AIRLINES, INC. and ROBERT T. YOSHIZUMI. P.Q. DOCKET NO. 76. *Decided on August* 13, 1986.

Shipment of fruit from Hawaii to the United States—Violation of Plant Quarantine Act—Civil penalty—Consent.

Joe Pembroke, for complainant.
Terrance Yoshizumi, Hilo, Hawaii, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AS TO ROBERT T. YOSHIZUMI

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (7 CFR § 318.13-12 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Robert T. Yoshizumi, herein referred to as the respondent, is an individual whose mailing address is 227 Ainada Drive, Hilo, Hawaii 96720.

2. On or about October 11, 1984, the respondent offered for shipment to a common carrier from Hilo, Hawaii, to San Francisco, California, two cardboard boxes containing 20 pounds of avocados and 13 pounds of star fruit.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Robert T. Yoshizumi, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred dollars ($100.00). The respondent shall send a certified check or money order for $100.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: VICTORIA MUIR. P.Q. Docket No. 168. Decided on August 15, 1986.

Shipment of fruit from Hawaii—Violation of Plant Quarantine Act—Civil penalty—Consent.

Robert Broussard, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. § 161 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek the judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Victoria Muir, respondent, is an individual whose address is 1316 Ardmore, Manhattan Beach, California 90266.

2. On or about February 14, 1985, respondent was in possession of several pieces of luggage at Honolulu International Airport.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred and twenty five dollars ($125.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money

order to Robert L. Broussard, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, DC 20250-1400, within thirty (30) days from the effective date of this order.

The order shall become effective on the day upon which service of this order is made upon the respondent.

In re: KLM ROYAL DUTCH AIRLINES, INC. P.Q. Docket No. 196. Decided on August 15, 1986.

Importation of plant and animal products from Tanzania—Violation of quarantine acts and regulations—Civil penalty—Consent.

Kris Ikejiri, for complainant.
Sarah MacDonald, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended. (21 U.S.C § 111 and § 120) and Plant Quarantine Act (7 U.S.C. § 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that KLM Royal Dutch Airlines, Inc. violated the Acts and regulations promulgated thereunder (7 CFR § 151 *et seq.* and 9 CFR § 95.1 *et seq.*) KLM Royal Dutch Airlines, Inc. and the complainant agree that this proceeding should be terminated be entry of the Consent Decision set forth below and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, KLM Royal Dutch Airlines, Inc., admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, has no objection to the Finding of Fact set forth below, and waives:

(a) Any further procedure:

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. KLM Royal Dutch Airlines, Inc., waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

1. KLM Royal Dutch Airlines, Inc., is a corporation doing business in the United States, whose address for purposes of service of process is, KLM Royal Dutch Airlines, Inc., Legal Department, 437 Madison Avenue, New York, New York 10022.

2. On or about April 26, 1985, the respondent imported from Tanzania to Chicago, Illinois, under Air Waybill number 074-5308-7123, untanned hides or skins, hair, bristles, bones, horns, and hoofs of hartebeest, gazelle, gerenuk, impa!la, reedbuck, roan antelope, klipspringer, dik dik, kudi, wi!debeest (gnu), oryx, sable, eland, warthog, oribi, and duiker.

3. On or about April 26, 1985, the respondent imported from Tanzania to Chicago, Illinois, under Air Waybill number 074-5308-7145, untanned hides or skins, hair, bristles, bones, horns, and hoofs of kudu, klipspringer, oribi, duiker, gazelle, gerenuk, harteheest, steinhok, impalla, oryx, wildebeest (gnu), eland, sable, and warthog.

4. On or about April 26, 1985, the respondent imported from Tanzania to Chicago, Illinois, under Air Waybill number 074-5308-7134, untanned hides or skins, hair, bristles, bones, horns, and hoofs of steinbok, duiker, klipspringer, dik dik, oribi, grenuk, land, gazelle, hartebeest, wildebeest (gnu), roan, kudu, antelope, oryx, bushbuck, impalla, reedbuck, sable, hush pig and warthog.

5. On or about July 13. 1985, the respondent imported from the Netherlands to Chicago, Illinois, under Air Waybill number 074-5407-6046, cut flowers.

6. On or about September 2, 1985, the respondent imported from the Netherlands to Chicago, Illinois, under Air Waybill number 074-5827-4764, cut flowers.

7. On or about September 2, 1985, the respondent imported from the Netherlands to Chicago, Illinois, under Air Waybill number 074-5920-4666, cut flowers.

CONCLUSIONS

Respondent KLM Royal Dutch Airlines, Inc., having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent KLM Royal Dutch Airlines is assessed a civil penalty of three thousand dollars ($3,000) which shall be payable to, "The Treasurer of the United States" by certified check or money order, and which shall be forwarded to Thomas E. Bundy, Office of the

General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, DC 20250–1400, on or before August 15, 1986.

This Order shall become effective on the day of service upon the respondent.

In re: ANTONIO MARTINEZ. P.Q. Docket No. 198. Decided on June 12, 1986.

Importation of fruit from Mexico—Violation of Plant Quarantine Act—Civil penalty—Default.

Respondent imported one (1) lime from Mexico into California. Importation of Mexican limes is prohibited. Civil penalty of $500.00 assessed.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act, as amended, (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Antonio Martinez violated the PQA and section 319.27 of the regulations promulgated thereunder (7 CFR § 319.27).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk upon the Antonio Martinez according to section 1.147 of the Rules of Practice (7 CFR § 1.147).

Antonio Martinez was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegation in the complaint and requesting an oral hearing would constitute an admission of such allegation and waiver of such hearing. More than twenty (20) days have elapsed since Antonio Martinez was served with the complaint. Mr. Martinez has not filed an answer or any other document to date. This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by Mr. Martinez's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Antonio Martinez, respondent herein, is an individual whose mailing address is 692 Holt, El Centro, California 92243.

2. On or about September 22, 1985, the respondent imported from Mexico into Calexico, California, approximately one (1) Mexican lime, in violation of section 319.27 of the regulations (7 CFR § 319.27) because the importation of Mexican limes is prohibited.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent Antonio Martinez is hereby assessed a civil penalty of five hundred dollars ($500.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Esq., Office of the General Counsel, Room 2422 South Building, Washington, United States Department of Agriculture, Washington, D.C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Default Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final on August 29, 1986–ED.]

In re: AERO MAYFLOWER TRANSIT CO., INC. P.Q. Docket No. 254. Decided on August 29, 1986.

Interstate movement of outdoor articles—Violation of Plant Quarantine Act and Federal Plant Pest Act—Civil penalty—Consent.

Kevin Thiemann, for complainant.
W.G. Lowry, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 151-164a and 167, and 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Aero Mayflower Transit Co., Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Aero Mayflower Transit Co., Inc., respondent, is a corporation doing business at P.O. Box 107, Indianapolis, Indiana 46206-0107.

2. On or about September 7, 1985, the respondent moved interstate outdoor household articles from Huntington, New York, a gypsy moth high risk area, to Downers Grove, Illinois, a gypsy moth non-regulated area.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to the "Treasurer of the United States", by certified check or money order and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Ave., S.W. Washington, D.C. 20250–1400, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: JOSE JESUS MEDINA ELIZALDE. P.Q. Docket No. 150. Decided on July 10, 1986.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complaint counsel's Motion to Dismiss Complaint, filed July 8, 1986, *IT IS ORDERED*, that the complaint issued in this matter on November 15, 1985, be, and hereby is, dismissed without prejudice.

In re: AER LINGUS CARGO OPERATIONS AND AIRPORT TRUCK SERVICE. P.Q. Docket No. 250. Decided on August 4, 1986.

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

ORDER DISMISSING AIRPORT TRUCK SERVICE

For good cause shown, the complainant's motion to dismiss the complaint as to respondent, Airport Truck Scrvice, is granted.

In re: JESSICA SOLOMON. P.Q. Docket No. 217. Decided on August 26, 1986.

Clement McGovern, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's Motion to Dismiss, filed August 22, 1986, *IT IS ORDERED*, that the complaint issued in this matter on March 17, 1986, be, and hereby is, dismissed.

In re: PEVIANI SPA AND NORTHERN PRODUCE COMPANY. P.Q. Docket No. 225. Decided on August 27, 1986.

Jaru Ruley, for complainant.
Respondents, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

Complainant filed a motion to dismiss the complaint on the ground of additional information provided to complainant.

IT SHOULD BE AND HERE BY IS ORDERED that the complaint is dismissed without prejudice.

In re: AERO MAYFLOWER TRANSIT CO., INC. AND SANTINI VAN CO. P.Q. Docket No. 254. Decided on August 27, 1986.

Kevin Thiemann, for complainant.
Respondents, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown by complainant, the complaint that was filed herein against Santini Van Co., on May 20, 1986, is herewith dismissed.

In re: DARRELL MCDONALD d/b/a BOX CANYON FARMS. PRPA Docket No. D-3. Decided on July 18, 1986.

Producer—Handler of seed—Failure to pay assessments—Violation of PRP Act—Civil penalty—Default.

Respondent as producer of seed potatoes failed to file reports and pay required assessments to National Potato Promotion Board based on volume of potatoes handled. Respondent ordered to pay $3,072.09 in assessments for years 1980-1984 and is assessed a civil penalty of $4,000.00. Respondent did not file an answer to the complaint.

John D. Griffith, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Potato Research and Promotion Act, as amended, 7 U.S C. §§ 2611-2627, herein referred to as the Act, instituted by a complaint filed by the Administrator, Agricultural Marketing Service, United States Department of Agriculture, charging that the respondent willfully violated the Act, the Potato Research and Promotion Plan, 7 CFR §§ 1207.301-.366 and the Rules and Regulations issued pursuant to the Act, 7 CFR §§ 1207.500-.550.

Copies of the complaint and Rules of Practice governing proceedings under the Act, 7 CFR §§ 1.130-1.151, were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. 7 CFR § 1.139.

FINDINGS OF FACT

1. Darrell McDonald, hereafter referred to as respondent, is an individual doing business as Box Canyon Farms at P.O. Box 102, Arco, Idaho 83212.

2. At all material times, respondent was engaged in business as a producer-handler handling seed potatoes of his own production and was subject to the Act, Plan, and Regulations.

3. Respondent is a designated handler as defined in the Plan, 7 CFR § 1207.308, and the Regulations, 7 CFR § 1207.512. As such, respondent was and is required to submit reports and pay assessments to the National Potato Promotion Board based on the volume of potatoes handled for ultimate consumption as human food and seed. 7 CFR §§ 1207.510 and .513.

4. Since January 1, 1980, respondent has violated the Act, Plan and Regulations by failing to:

(a) submit handler reports as required by 7 U.S.C. § 2619 and 7 CFR §§ 1207.350 and .513; and

(b) pay assessments as required by 7 U.S.C. § 2619 and 7 CFR §§ 1207.342 and .513 in the amount of $3,072.09.

CONCLUSIONS

By reason of the facts set forth in the Findings of Fact above, the respondent has willfully violated section 2619 of the Act, 7 U.S.C. § 2619, sections 1207.342 and 1207.350 of the plan, 7 CFR §§ 1207.342, 1207.350 and section 1207.513 of the rules and regulations.

ORDER

Respondent Darrell McDonald, his agent and employees, directly or through any corporate or other device, shall cease and desist from:

(1) violating the Act, Plan and Regulations by failing to file handler reports and pay assessments in the sum of $3,072.09 for the years 1980 through 1984;

(2) violating the Act, Plan and Regulations by failing to file all future handler reports and pay all future assessments as they become due.

The respondent Darrell McDonald is assessed a civil penalty of $4,000.00 which shall be paid by a certified check or money order made payable to the Treasurer of the United States. The check or money order shall be mailed to John D. Griffith, Office of the General Counsel, United States Department of Agriculture, Room 2014-South, Washington, D.C. 20250-1400.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in

section 1.142 and 1.145 of the Rules of Practice, 7 CFR §§ 1.130-1.151, unless appealed within 30 days after service.

Copies hereof shall be served upon the parties.

[This Decision and Order became final on August 28, 1986-ED.]

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AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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In re: FLOYD UMPHLETT and REBBA UMPHLETT, respondents. I&G Docket No. 82. Decided September 17, 1986.

Victor W. Palmer, Administrative Law Judge.
Robert Frisby, Mktg. Div., for complainant.
Pro se, for respondents.

CONSENT DECISION

This proceeding was instituted under the Agricultural Marketing Act of 1946, 7 U.S.C. §§ 1621–1627, and the regulations, 7 CFR §§ 51.1–51.6005, promulgated thereunder by a complaint filed by the Administrator, Agricultural Marketing Service, United States Department of Agriculture, alleging that the respondents knowingly and willfully violated the Act and the regulations promulgated under the Act by making fraudulent or unauthorized alterations on inspection notesheets and certificates prepared pursuant to the regulations promulgated under the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice Governing Withdrawal of Inspection and Grading Services, 7 CFR § 50.21.

The respondents admit the jurisdictional allegations of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Floyd Umphlett and Rebecca Umphlett, hereinafter referred to as the respondents, are individuals and their mailing address is 1428 Greenway Road, Suffolk, Virginia 23438.

2. Respondents, at all times material herein, were Virginia peanut buyers who applied for and received inspection and grading services pursuant to the regulations promulgated under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

All grading and inspection services provided pursuant to the Agricultural Marketing Act of 1946 and the regulations promulgated thereunder are denied to respondents Floyd Umphlett and Rebecca

Umphlett, their agents and employees, to any firm, establishment or facility operated or managed by respondents, and to any firm, establishment or facility in which either of them serves as an owner, officer, or director, for a period of two (2) years from the effective date of this decision. During this two-year period, respondents shall not participate, directly or indirectly, in the operation or management of any firm, establishment or facility which receives grading and inspection services provided pursuant to the Act and the regulations.

The provisions of this order shall be effective from June 1, 1987, to May 31, 1989.

Copies of this decision shall be served upon the parties.

In re: PACKERLAND PACKING COMPANY and STEVEN C. DEMARAY.
A.Q. Docket No. 283. Decided September 8, 1986.

Victor W. Palmer, Administrative Law Judge.
Jaru Ruley, Reg. Div., for complainant.
Pro se, for respondent.

CONSENT DECISION AS TO PACKERLAND PACKING CO.

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Packerland Packing Company specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Packerland Packing Company, herein referred to as the respondent, is a corporation having a place of business at North 7th Street, P.O. Box 768, Gering, Nebraska 69341.

2. On or about the time period between June 1 and June 28, 1985, the respondent moved interstate various shipments of cattle from South Dakota, Montana, and Colorado, to Scottsbluff, Nebraska.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Packerland Packing Comany, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of five thousand five hundred dollars ($5,500.00). The respondent shall send a certified check or money order for $5,500.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: WAYNE J. BLASER. A.Q. Docket No. 246. Decided September 9, 1986.

Interstate cattle movement without certificate. Brucellosis prevention.

The Judicial Officer affirmed Judge Weber's order assessing civil penalties totalling $2,000 against respondent for moving cattle interstate on four occasions that were not accompanied by a certificate, as required, in violation of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR § 78.9(a)). Respondent's answer, which failed to deny or otherwise respond to the allegations of the complaint as to the violations, constitutes an admission of the allegations in the complaint and a waiver of hearing. Accordingly, the default decision was properly issued. Importance of Brucellosis Eradication Program explained.

Donald A. Campbell, Judicial Officer.
Clement McGovern, Reg. Div., for complainant.
Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR §§ 71.18 and 78.1 *se seq.*). An initial Decision and Order was issued on June 24, 1986, by Administrative Law Judge William J. Weber (ALJ) assessing civil penalties totalling $2,000.

On August 1, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR

§ 2.35).[1] The case was referred to the Judicial Officer for decision on August 28, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR §§ 71.18 and 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was initiated by a complaint filed on March 12, 1986, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on four separate occasions the respondent moved cattle interstate from West Concord and Leroy, Minnesota, to Lake Mills, Iowa, in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)).

On or about the dates of May 17, 1985, July 1, 1985, and on two occasions during May and June of 1985, the respondent moved a total of 22 cattle interstate which were not accompanied by a certificate containing the prescribed information. In his answer to the complaint, the respondent admitted moving cattle from Leroy, Minnesota to Lake Mills, Iowa. The respondent also failed to respond to the alleged movement from West Concord, Minnesota to Lake Mills, Iowa.

The respondent's failure to deny or otherwise respond to the material allegations contained in the complaint is deemed an admission of such allegations and a waiver of hearing under the regulations (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this Deci-

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

sion is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Wayne J. Blaser, herein referred to as the respondent, is an individual whose address is 806 N. 3rd Avenue East, Lake Mills, Iowa 50450.

2. On or about May, 1985, respondent moved interstate 10 cows from Leroy, Minnesota to Lake Mills, Iowa in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)), because the cows were not accompanied by a certificate, as required.

3. On or about May 17, 1985, respondent moved interstate 4 cows from West Concord, Minnesota to Lake Mills, Iowa in violation of the regulations (9 CFR § 78.9(a)), because the cows were not accompanied by a certificate, as required.

4. On or about June, 1985, respondent moved interstate one cow from Leroy, Minnesota to Lake Mills, Iowa in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)), because the cows were not accompanied by a certificate, as required.

5. On or about July 1, 1985, respondent moved interstate 7 cows from Leroy, Minnesota to Lake Mills, Iowa in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)), because the cows were not accompanied by a certificate, as required.

CONCLUSION

By reason of the facts contained in the findings of Fact above, the respondent has violated section 78.9(a) of the regulations (9 CFR 78.9(a)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to deny or otherwise respond to the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)–(c), .139, .141(a)):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * * * *

§ 1.141 *Procedure for Hearing.*

> (a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra*, and advised respondent that complainant was seeking a $2,000 civil penalty. The complaint advised respondent that failure to deny or otherwise respond to any allegation shall constitute an admission of such allegation, as follows (Complaint at 2):

> WHEREFORE, it is hereby ordered that for the purpose of determining whether or not respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file answers with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-1400, in accordance with the applicable Rules of Practice (9 CFR § 70.1 and 7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to plead specifically to any allegation of the complaint. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny, or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent's answer fails to request a hearing, does not deny the material allegations of fact relating to the movement from Le Roy, Minnesota, and ignores the allegations relating to the movement from West Concord, Minnesota. The answer states in its entirety:

> I did move some cattle from my farm in LeRoy, MN. to Lake Mills, IA. I have lived on the state line all my life and did not give it a thought when I moved the cattle. We went from one half mile inside the Minnesota border to six miles across the Iowa border.
>
> I have already paid a fine in the state of Iowa on one count. The others were thrown out because there were no dates. I was turned in a month after-the-fact. I had the cattle tested after they had been moved and they all tested OK.
>
> I do not feel that there is sufficient reason to fine or charge me with this again.

Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued.[2]

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and eco-

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[2] *See In re Northwest Orient Airlines*, 45 Agric. Dec. ___ (Sept. 9, 1986); *In re Schwartz*, 45 Agric. Dec. ___ (Aug. 12, 1986); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ___ (July 9, 1986); *In re Gutman*, 45 Agric. Dec. ___ (June 17, 1986); *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ___ (Sept. 23, 1985); *In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984); *In re Buzun*, 43 Agric. Dec. ___ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

nomical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a $10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not contest the allegations of the complaint in his answer.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [3] If respondent were permitted to contest some of the allegations of fact at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

The civil penalties assessed here are modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. ____, slip op. at 67 (Jan. 31, 1986):

> The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of $1 billion. It costs about $150 million a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. ____, slip op. at 4-5 (Oct. 31, 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

> 4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.[4] (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).

[4] Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and

[3] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).

For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32–33, 1059–63). For example, in 1980, the Federal Government spent $73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239–41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent, Wayne J. Blaser, is hereby assessed a civil penalty of $2,000, which shall be paid within 30 days after service of this order. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Clement J. McGovern, Esq., U.S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D.C. 20250–1400.

In re: BOB HUNTINGTON and DON HUNTINGTON. A.Q. Docket No. 272. Decided September 12, 1986.

Dorothea A. Baker, Administrative Law Judge.
Clement McGovern, for complainant.
Pro se, for respondent.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint

filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (CFR § 78.1 *et seq.*).

The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

FINDINGS OF FACT

1. Bob Huntington, herein referred to as a respondent, is an individual whose address is Route 1 Box 22, Chatfield, Minnesota 55923.

2. Don Huntington, herein referred to as a respondent, is an individual whose address is Riceville Sale Pavilion, Riceville, Iowa 50466.

3. On or about May 25, 1985, respondent Bob Huntington moved interstate 13 cattle from Ettrick, Wisconsin to Chatfield, Minnesota.

4. On or about May 25, 1985, respondent Don Huntington moved interstate 6 cattle from Chatfield, Minnesota to Riceville, Iowa.

5. On or about July 7, 1985, respondent Bob Huntington moved interstate 6 cattle from Chatfield, Minnesota to Riceville, Iowa.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and decision will be issued.

ORDER

Respondent Bob Huntington, is assessed a civil penalty of five hundred ($500.00), and Respondent Don Huntington is assessed a civil penalty of two hundred and fifty dollars ($250) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondents.

In re: FRED WEBB. A.Q. Docket No. 180. Order issued September 26, 1986.

John A. Campbell, Administrative Law Judge.
Kevin Thiemann, for complainant.
Pro se, for respondent.

ORDER GRANTING MOTION TO DISMISS

On June 6, 1985, the Complainant filed a complaint against the Respondent with the Office of the Hearing Clerk. It has since been determined that formal adjudication will not be necessary in this matter in order to effectuate the purposes of the program. Therefore, the Complainant respectfuly requests that the complaint herein be dismissed.

In re: ALAN RITCHEY. A.Q. Docket No. 277. Decided September 29, 1986.

Victor W. Palmer, Administrative Law Judge.
Clement McGovern, for complainant.
Pro se, for respondent.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 78.1 *et seq.*).

The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Alan Ritchey, herein referred to as a respondent, is an individual doing business as Alan Ritchey Trucking and whose address is Box 246, Valley View, Texas 76272.

2. On or about August 11, 1984, respondent moved interstate 38 cattle from Pilot Point, Texas to Yuba, Oklahoma.

3. On or about September 11, 1984, respondent moved interstate 37 cattle from Pilot Point, Texas to Yuba, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand ($1,000.00), which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: J. MELVIN FARRAR, JOE H. PEOPLES, and RONALD B. PITCHFORD. A.Q. Docket No. 259. Decided October 17, 1986.

William J. Weber, Administrative Law Judge.
Robert Broussard, Reg. Div., for complainant.
Eldon F. Coffman, Fort Smith, AR., for respondents.

CONSENT DECISION AS TO JOE H. PEOPLES

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*). The complainant and the respondent, Joe H. Peoples, have agreed that this proceeding should be terminated with respect to Joe H. Peoples by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Mr. Joe H. Peoples, respondent, is an individual whose address is Route 1, Box 196, Greenwood, Arkansas 72936.

2. On or about January 1, 1985, the respondent moved interstate approximately 24 cattle from Rock Island, Oklahoma to Greenwood, Arkansas.

3. On or about March 29, 1985, the respondent moved interstate approximately 24 cattle from Greenwood, Arkansas to Rock Island, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars ($1,000.00), payable to the "Treasurer of the United States," by certified check or money order to be mailed to USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: J. MELVIN FARRAR, JOE H. PEOPLES, and RONALD B. PITCHFORD. A.Q. Docket No. 259. Order issued October 17, 1986.

William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT AS TO J. MELVIN FARRAR

On complainant's Motion to Dismiss the Complaint insofar as it pertains to respondent J. Melvin Farrar, the complaint should be and hereby is dismissed without prejudice.

In re: RANDALL J. MOORE. A.Q. Docket No. 207. Decided September 5, 1986.

William J. Weber, Administrative Law Judge.
Sally Stratmoen, for complainant.
Aaron Frank McGee, Eunice, Louisiana, for respondent.

DECISION AND ORDER

Respondent is charged with moving nine (9) brucellosis reactor cattle and fourteen (14) brucellosis-exposed cattle in interstate commerce without required documentation in violation of certain statutory and regulatory requirements.[1]

The evidence establishes these violations occurred as charged.

FINDINGS AND CONCLUSIONS

1. Randall J. Moore, respondent herein, is an individual whose address is Route 2, Box 714, Eunice, Louisiana 70535.

2.(a) Respondent Moore directed that nine (9) brucellosis reactor cattle be moved interstate from Lake Charles, Louisiana, to Lufkin, Texas on or about September 27, 1984.

(b) The interstate movement of these nine (9) brucellosis reactor cattle was in violation of § 78.7 of the regulations (9 CFR 78.7) because the cattle were not accompanied by the required permit.

3.(a) Respondent Moore also directed that thirteen (13) brucellosis-exposed cattle be moved interstate from Lake Charles, Louisiana to Lufkin, Texas about September 27, 1984.

(b) The interstate movement of these thirteen (13) brucellosis-exposed cattle was in violation of § 78.8 of the regulations because the cattle were not accompanied by the VS form 1-27 permit or "S" brand permit.

4.(a) The cattle in this shipment were not "steers and spayed heifers" which could be moved interstate without documentation. (9 CFR § 78.6)

(b) The cattle in this shipment were all brucellosis reactor or brucellosis-exposed cattle subject to the regulatory restrictions under § 78.7 and § 78.8. (9 CFR § 78.7 and § 78.8)

DISCUSSION

The evidence substantiates the charges in the complaint that the respondent violated the regulations. The respondent is an experienced cattle dealer and aware of the requirements for the interstate movement of cattle.

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[1] Act of February 2, 1903 as amended (Act), 21 U.S.C. 111 and 120, and implementing regulations 9 CFR 78.1, *et. seq.*, in particular § 78.7 and § 78.8.

The evidence establishes that the cattle were diseased with (or exposed to) brucellosis, which is highly communicable and contagious, not only to cattle, but also to people, causing undulant fever. Brucellosis is not only a problem for the cattle industry, it is a public health problem.

The Department is involved in a brucellosis eradication program. The program is based, in part, on the ability to monitor and trace the interstate movement of cattle. The respondent's movement of the cattle without proper documentation thwarted that program. A "paper trail" is vital.

The cattle here were all handled as brucellosis reactor or exposed cattle, and tagged or branded accordingly. In fact, respondent admits in his answer that the "cattle were either brucellosis reactor or were brucellosis-exposed cattle, and as such, appropriate instructions" were given by respondent for their shipment. (Paragraph 5 of respondent's Answer)

Respondent contended that errors occurred in the preparation and handling of the permits, and that they were neither his fault nor his responsibility.

To the contrary, the picture is clear that respondent is indifferent to his obligations in handling diseased (or potentially diseased) cattle. Further, respondent's testimony is not persuasive and is of doubtful credibility in his description of "stack[s]" of permits (VS 1-27) lying weeks without concern at the sales barn. (TR p. 131)

On brief, respondent argues that there was no proof that the subject cattle were not "steers and spayed heifers" exempted by § 78.6 (9 CFR § 78.6) from the shipment restrictions applied here.

Neither the pleadings nor the evidence offer any support for respondent's argument. No questions existed concerning the status of the cattle as subject to § 78.7 and § 78.8 until the post-trial brief.

Complainant has sustained the burden of proof on that and all other points. Testimony and documentation provided by complainant is persuasive. The respondent's alternative and contradictory defenses are each without merit. Finally, respondent's credibility was not worthy of much weight.

The sanction sought by complainant is warranted and appropriate. Complainant gave appropriate consideration to the fact that the cattle were promptly slaughtered and therefore, the risk of spreading the disease was minimized.

ORDER

Randall J. Moore, respondent, is assessed a civil penalty of one thousand dollars ($1,000). The civil penalty shall be payable to, "The Treasurer of the United States", by certified check or money

order and shall be forwarded to the Assistant General Counsel, Regulatory Division, Office of the General Counsel, Room 2422-South Building, U.S. Department of Agriculture, Washington, D.C. 20250-1400. This civil penalty shall be paid not later than six (6) months from the date this Decision and Order become final.

This Decision and Order shall be final and effective 35 days after service hereof, unless appealed to the Judicial Officer within 30 days of service (7 CFR § 1.142(c) and § 1.145(a)).

[The Decision and Order became final on October 20, 1986.—Ed.]

In re: J.W. GUFFY A.Q. Docket No. 234. Decided October 20, 1986.

Interstate cattle movement without certificate. Brucellosis prevention.

The Judicial Officer affirmed Chief Judge Campbell's order assessing civil penalties totalling $2,000 against respondent for moving seven cattle interstate without a certificate or a permit for entry, as required under the regulations governing the interstate movement of cattle because of brucellosis. Respondent's answer was filed after the 20-day time limit, did not deny the allegations of the complaint and did not request a hearing. Accordingly, a default decision was properly issued. Importance of Brucellosis Eradication Program explained. Even if respondent's answer had been timely filed, respondent argues only that he signed a statement admitting that he was in technical violation of the regulations after he was assured that the matter would end at that point. However, even if equitable estoppel would be applicable to those facts if private litigants were involved, it does not apply to the exercise of the Secretary's disciplinary authority under regulatory statutes.

Donald A. Campbell, Judicial Officer.
Clement McGovern, for complainant.
Jim Short, Salem, Arkansas, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR § 78.1 *et seq.*). An initial Decision and Order was issued on July 7, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) assessing civil penalties totalling $2,000.

On August 11, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on September 19, 1986.

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg.

Continued

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with trivial changes. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR § 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR § 70.1 *et seq.* and 7 CFR § 1.130 *et seq.*

This proceeding was initiated by a complaint filed on February 6, 1986, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent transported cattle interstate from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iii) and 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iii) and 78.9(d)(3)(iv)). On or about June 11, 1985, the respondent moved seven (7) cattle interstate without a certificate or a permit for entry which contained the prescribed information. The respondent filed a late response to the complaint, and failed to deny or otherwise respond to any of the material allegations contained in the complaint. Therefore, for the purposes of this proceeding, the allegations in the complaint are deemed to have been admitted and the right to a hearing is deemed waived. (See 7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

I

J. W. Cuffy, herein referred to as the respondent, is an individual whose address is Route 2, Box 141, Viola, Arkansas 72583.

3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

II

On or about June 11, 1985, the respondent moved interstate six cattle from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), in that the six cattle were not accompanied by a certificate, as required.

III

On or about June 11, 1985, the respondent moved interstate six cattle, from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), in that the six cattle were not accompanied by a permit for entry, as required.

IV

On or about June 11, 1985, the respondent moved one cow, which was two years of age or older, from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iv)), in that the cow was not accompanied by a certificate, as required.

V

On or about June 11, 1985, the respondent moved a cow, which was two years of age or older, from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iv)), in that the cow was not accompanied by a permit for entry, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 78.9(d)(3)(iii) and (iv) of the regulations (9 CFR § 78.9(d)(3)(iii) and (iv)).

Therefore, the following order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file an answer with the Hearing Clerk within 20 days after service of the complaint, or a respondent's failure to deny or otherwise respond to the allegations of the complaint, constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)–(c), .139, .141(a)):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objec-

tions are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra*, and advised respondent that complainant was seeking a $2,000 civil penalty. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, and that failure to deny or otherwise respond to any allegation shall constitute an admission of such allegation, as follows (Complaint at 2):

WHEREFORE, it is hereby ordered that for the purpose of determining whether or not respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the applicable Rules of Practice (9 CFR § 70.1 and 7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer with the Hearing Clerk within 20 days, or failure to plead specifically to any allegation of the complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which

> to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny, or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent's answer was filed 10 days after the 20-day period permitted by the rules of practice, fails to request a hearing, and does not deny the allegations of the complaint. Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued.[2]

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a $10,000 civil penalty for 14 separate livestock vio-

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[2] *See In re Blaser*, 45 Agric. Dec. ___ (Sept. 9, 1986); *In re Northwest Orient Airlines*, 45 Agric. Dec. ___ (Sept. 9, 1986); *In re Schwartz*, 45 Agric. Dec. ___ (Aug. 12, 1986); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ___ (July 9, 1986); *In re Gutman*, 45 Agric. Dec. ___ (June 17, 1986); *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ___ (Sept. 23, 1985); *In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984); *In re Buzun*, 43 Agric. Dec. ___ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondent's contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

lations based on circumstantial evidence). In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not contest the allegations of the complaint in his answer.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [3] If respondent were permitted to contest some of the allegations of fact at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

The civil penalties assessed here are modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. ____, slip op. at 67 (Jan. 31, 1986):

> The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of $1 billion. It costs about $150 million a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. ____, slip op. at 4-5 (Oct. 31, 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

> 4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.[4] (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).
>
> [4] Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).

For many years the Federal Government has maintained a vigorous and costly program directed to the con-

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[3] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

trol and eradication of this disease (Tr. 32-33, 1059-63). For example, in 1980, the Federal Government spent $73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

In addition, even in respondent's appeal, respondent does not challenge the allegations of fact contained in the findings of fact herein, which are virtually identical to those alleged in the complaint. Instead, respondent contends that he signed a statement admitting that he was in technical violation of the regulations because he was assured that the matter would end at that point if he signed the statement. However, the statement referred to by respondent is not part of the record in this proceeding and is totally irrelevant to the issues involved on this appeal. In addition, even if the matter had proceeded to a hearing, there is no way of knowing whether the statement would have been offered in evidence by complainant. Furthermore, it has consistently been held that even if the facts would make equitable estoppel applicable if private litigants were involved, it does not apply to the exercise of the Secretary's disciplinary authority under the Department's regulatory statutes. E.g., *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1144-46 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re Ruster*, 41 Agric. Dec. 845, 855-57 (1982); *In re Unionville Sales Co*, 38 Agric. Dec. 1207, 1210 (1979) (remand order), *final decision*, 40 Agric. Dec. 736 (1981); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977). In the *M. & H.* case, just cited, it is stated (34 Agric. Dec. at 760-61):

Even if we were to assume that the facts in this case presented a case for equitable estoppel, I adhere to the traditional view that equitable estoppel does not apply to the Government acting in its sovereign capacity.

As stated in *United States* v. *Georgia-Pacific Company*, 421 F.2d 92, 100–101 (C.A. 9):[25]

[25] See also *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383–386; Davis, *Administrative Law Treatise* (1958 ed. and 1970 supp.), §§ 17.01–17.04.

> Numerous cases reflect the position that equitable estoppels may be found against the Government in certain situations. Thus the courts have held that an equitable estoppel may be found against the Government (1) if the Government is acting in its proprietary rather than sovereign capacity; and (2) if its representative has been acting within the scope of his authority.
>
> (1) While it is said that the Government can be estopped in its proprietary role, but not in its sovereign role, the authorities are not clear about just what activities are encompassed by each. In its proprietary role, the Government is acting as a private concern would; in its sovereign role, the Government is carrying out its unique governmental functions for the benefit of the whole public.

Similarly, in *United States* v. *State of Florida*, 482 F.2d 205, 209 (C.A. 5), the Court stated:

> Whether the defense of estoppel may be asserted against the United States in actions instituted by it depends upon whether such actions arise out of transactions entered into in its proprietary capacity or contract relationships, or whether the actions arise out of the exercise of its powers of government. The United States is not subject to an estoppel which impedes the exercise of the powers of government, and is not estopped to deny the validity of a transaction or agreement which the law does not sanction. Sanitary Dist. v. United States, 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925); Utah Power & L. Co. v. United States, 243 U.S. 389, 37 S. Ct. 387, 61 L. Ed. 791 (1916). Nor does an estoppel arise through an act or representation made by an officer or agent without authority to act for the government in the premises. Wilber Nat. Bank. v. United States, 294 U.S. 120, 55 S. Ct. 362, 79 L. Ed. 798 (1935); Jeems Bayou

Fishing & Hunting Club v. United States, 260 U.S. 561, 43 S. Ct. 205, 67 L. Ed. 402 (1922).

There is, however, some support for the view that in recent years, "the doctrine of sovereign immunity has begun to crumble, and so have the rules insulating the government from estoppel." *Gestuvo* v. *District Dir. of U.S. Immigration & Nat. Serv.*, 337 F. Supp. 1093, 1098 (C.D. Cal. 1971). It has been said that estoppel now "hinges on only two considerations: estoppel is available if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel" (*id.*, at 1099). See, also, *United States* v. *Lazy FC Ranch*, 481 F.2d 985, 989 (C.A. 9), in which the Court said that—

> estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. Gestuvo *v.* District Dir. of I.N.S., 337 F. Supp. 1093 (C.D. Cal. 1971). This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity. *See Georgia-Pacific, supra.*

I believe that the older, traditional view best protects the public interest and should be adhered to. I would deal with wrongful conduct by Government employees through disciplinary actions, if their conduct warrants punishment, rather than by damaging the public interest to any degree.

But even if we were to apply the test set forth in the *Gestuvo* and *Lazy FC Ranch* cases, *supra*, the public interest would be "unduly damaged" by the imposition of estoppel here.

Here as in the *M. & H.* case, just quoted, even if equitable estoppel could be applicable to this proceeding in which the Government is acting in its sovereign role rather than its proprietary role, (i) respondent's appeal fails to show any serious injustice, and (ii) the public interest would be "unduly damaged" if the Secretary were estopped from issuing an appropriate disciplinary order here, which is needed to serve as an effective deterrent to future violations by respondent and other potential violators.

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent, J. W. Guffy, is hereby assessed a civil penalty of $2,000, which shall be paid within 30 days after service of this order. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Clement J. McGovern, Esq., U.S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D.C., 20250-1400.

In re: LADNER FARMS. A.Q. Docket No. 273. Decided October 28, 1986.

Victor W. Palmer, Administrative Law Judge.
Kevin Thiemann, for complainant.
Richard Fitzpatrick, Poplarville, Miss., for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Ladner Farms, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act

of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ladner Farms, respondent, is a business whose address is Route 4, Box 271, Poplarville, Mississippi 39470.

2. On or about September 19, 1984, the respondent moved three (3) cows interstate from Linden, Alabama, a Class B state, to Poplarville, Mississippi.

3. On or about October 3, 1984, the respondent moved five (5) cows interstate from Frisco City, Alabama, a Class B state, to Lucedale, Mississippi.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars ($1,000.00) which shall be payable to the "Treasurer of the United States", by certified check or money order and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403" within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 273.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: BERT SMITH, A.Q. Docket No. 270. Decided October 31, 1986.

Dorothea A. Baker, Administrative Law Judge.
Kevin Thiemann, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regu-

lations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bert Smith, respondent, is an individual whose address is Box 725, Church Hill, Tennessee 37642.

2. On or about May 24, 1984, the respondent moved approximately fifty-eight (58) cows interstate from Abingdon, Virginia, a Class A state, to Church Hill, Tennessee.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty dollars ($250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403," within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check

or money order that payment is in reference to A.Q. Docket No. 270.

This Order shall become effective on the day upon which service of this Order if made upon the respondent.

In re: DONALD D. FOSTER, d/b/a WHITE GATE KENNELS, AWA Docket No. 375. Order issued September 5, 1986.

John A. Campbell, Administrative Law Judge.
Robert Frisby, for complainant.
Pro se, for respondent.

SUPPLEMENTAL ORDER

On June 18, 1986, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a dealer under the Act ". . . for thirty days and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder."

The respondent has demonstrated to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued June 18, 1986, is terminated. The order shall remain in effect in all other respects.

In re: DEAN LEWIS, AWA Docket No. 390. Decided September 5, 1986.

Edward H. McGrail, Administrative Law Judge.
Howard Haas, for complainant.
Pro se, for respondent.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint and order to show cause filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and order to show cause and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

The respondent Dean Lewis is an individual with address at 4063 71st Street, S.E., Salem, Oregon 97301. The respondent, at all times material herein, was a dealer within the meaning of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The respondent, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Operating in any capacity for which a license is required under the Animal Welfare Act and the regulations issued thereunder without having applied for and obtained a license in accordance with the Act and the regulations.

(2) Operating as a licensee under the Act without submitting an annual license fee in accordance with 9 CFR § 2.6.

(3) Operating as a licensee under the Act without submitting an annual report in accordance with 9 CFR § 2.7.

(4) Operating as a licensee under the Act without promptly notifying the Veterinarian in Charge of any change in the name, address, management or substantial control or ownership of his business or operation within ten days after making such change, in accordance with 9 CFR § 2.8.

(5) Operating as a licensee under the Act without allowing access to and inspection by Animal and Plant Health Inspection Service Officials of his animal holding containers, animal transport, animal facilities, and records as required under the Act and regulations section 2.126 of the regulations (9 CFR § 2.126).

The respondent agrees that if he is issued a license under the Act, then for the three (3) years from the date of the issuance of a license he will file a quarterly report (a report every three months) with the Veterinarian in Charge in addition to the annual filing required by 9 CFR § 2.7(a).

The respondent is assessed a civil penalty of $5,000.00 of which $2,000.00 shall be paid by a certified check or money order made payable to the Treasurer of the United States. The remaining $3,000.00 is hereby suspended and shall be held in abeyance, provided the respondent does not violate any of the provisions of this

order within three (3) years from the date this order becomes effective.

The respondent's application for a license under the Animal and Welfare Act and the regulations issued thereunder is hereby denied until the respondent demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act and the regulations issued thereunder. When the respondent demonstrates to the Animal and Welfare Inspection Service that the respondent is in strict compliance with the Act and the regulations issued thereunder, a license will be issued in accordance with the Act and the regulations issued thereunder.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: EFTON PENDERGRASS, AWA Docket No. 385. Order issued September 18, 1986.

John A. Campbell, Administrative Law Judge.
John Griffith, for complainant.
Joseph D. Woodcock, Auror, Missouri, for respondent.

SUPPLEMENTAL ORDER

On July 31, 1986, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent's license (43-A047) starting on August 1, 1986, for thirty days and thereafter until respondent complied with the Act and the regulations and standards issued thereunder.

The respondent has demonstrated to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued July 31, 1986, is terminated. The order shall remain in effect in all other respects.

In re: MAIMONIDES MEDICAL CENTER, AWA Docket No. 403. Decided September 18, 1986.

John A. Campbell, Administrative Law Judge.
Robert Frisby, for complainant.
Pro se, for respondent.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Maimonides Medical Center, hereinafter referred to as the respondent, is a New York corporation and its mailing address is 4802 Tenth Avenue, Brooklyn, New York 11219.

B. The respondent, at all times material herein, operated as a research facility as defined in the Act and was registered as a research facility (Registration Number 21-76) under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Maimonides Medical Center shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondent, its agents and employees, shall ensure that:

1) The walls of its facility are in good repair as required by 9 CFR §§ 3.1(a) and 3.50(a);

2) Pests are controlled adequately as required by 9 CFR §§ 3.7(d) and 3.56(d);

3) Resting boards for dogs are substantially impervious to moisture as required by 9 CFR § 3.2(d);

4) Resting boards for dogs are sanitized properly as required by 9 CFR § 3.7(b);

5) Dog cage doors and dog runs are in good repair as required by 9 CFR § 3.4(a);

6) Cages for rabbits are rust-free as required by 9 CFR § 3.53(a);

7) Rabbit cages are properly sanitized as required by 9 CFR § 3.56(b);

8) Leaking battery acid is removed from the floor of its facility as required by 9 CFR §§ 3.7(c) and 3.56(c); and

9) Adequate post-operative veterinary care is provided for dogs as required by 9 CFR § 3.10.

Respondent is hereby assessed a civil penalty of $500 to be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: HAROLD S. TAYLOR and ETHEL TAYLOR, AWA Docket No. 274.
Decided September 24, 1986.

Dorothea A. Baker, Administrative Law Judge.
Robert Frisby, for complainant.
Richard L. Hilton, Wichita, Kansas, for respondent.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondents admit the jurisdictional allegations in the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree,

for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Harold S. Taylor and Ethel Taylor are individuals and their mailing address is Box 248, Douglass, Kansas 67039.

B. The respondents, at all times material herein, operated as a dealer as defined by the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Harold S. Taylor and Ethel Taylor shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondents shall cease and desist from engaging in any business for which a license is required under the Act without first obtaining a license as required by the Act and the regulations.

Respondents are hereby assessed a civil penalty of $5,000, $3,000 of which is suspended provided the respondents do not engage in any business for which a license is required under the Act for period of five (5) years. The respondents may apply for a license after this 5-year period has expired. The remaining $2,000 of the civil penalty is payable by certified check or money order made to the order of the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: MRS. F.W. BOEBEL, d/b/a BOEBEL VETERINARY RESEARCH CENTER & CLINIC and SLEEPY HOLLOW KENNEL & CATTERY. AWA Docket No. 404. Decided September 30, 1986.

John A. Campbell, Administrative Law Judge.
Robert Frisby, for complainant.
Pro se, for respondent.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Mrs. F.W. Boebel, hereinafter referred to as the respondent, is an individual doing business as Boebel Veterinary Research Center & Clinic and Sleepy Hollow Kennel & Cattery. Her mailing address is 21797 W. Highway 176, Mundelein, Illinois 60060.

2. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (33-B-48) issued under the Act. The respondent is also registered as a research facility (Registration Number 33-75).

3. On July 9, 1986, the respondent demonstrated that her facility is in compliance with the Act and the regulations and standards issued thereunder.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Mrs. F.W. Boebel shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondent, her agents, employees, directly or through any corporate device, shall ensure that:

1) Animal feed is stored properly as required by 9 CFR § 3.1(c);

2) Adequate heating is provided in her facility housing cats as required by 9 CFR § 3.2(a);

3) Adequate ventilation is provided in her facility housing cats as required by 9 CFR § 3.2(b);

4) Interior surfaces are substantially impervious to moisture as required by 9 CFR § 3.2(d).

5) Cat cages and dog runs are in good repair as required by 9 CFR § 3.4(a);

6) Sufficient space is provided for cats as required by 9 CFR § 3.4(b);

7) Adequate feed and clean feed receptacles are provided for dogs as required by 9 CFR § 3.5;

8) Clean, rust-free water receptacles are provided for dogs and cats as required by 9 CFR § 3.6;

9) Cat litter pans are cleaned sufficiently as required by 9 CFR § 3.7(a);

10) Her facility is free of accumulations of junk and debris as required by 9 CFR § 3.7(c);

11) Rodents are controlled as required by 9 CFR § 3.7(d); and

12) Adequate veterinary care is provided for cats as required by 9 CFR § 3.10(b).

Respondent is hereby assessed a civil penalty of $500 to be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: ROY J. MORDAUNT and BIO-LAB CORPORATION. AWA Docket No. 392. Decided October 10, 1986.

Edward H. McGrail, Administrative Law Judge.
John D. Griffith, for complainant.
James Hamilton, Minneapolis, Minn., for respondent.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1–3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Roy J. Mordaunt is an individual whose mailing address is Post Office Box 10589, 5228 Centerville Road, St. Paul, Minnesota 55110.

2. Bio-Lab is a corporation whose mailing address is Post Office Box 10589, 5228 Centerville Road, St. Paul, Minnesota 55110.

3. Respondent Bio-Lab Corporation, is, and all times material herein was owned, managed, and controlled by respondent Mordaunt. Respondent Mordaunt established its policies and directed its activities, including those which constitute the violations of the regulations and standards alleged herein.

4. Respondents at all times material herein were dealers within the meaning of that term as defined in the Act and subject to the provisions of the Act and the regulations and standards issued thereunder.

5. Respondent Bio-Lab Corporation at all times material herein was licensed as a Class A dealer under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. Specifically, the respondents shall cease and desist from failing to:

(a) Meet the necessary space requirements for primary enclosures as required by 9 CFR § 3.28;

(b) construct and maintain interior building surfaces in the wash room as required by 9 CFR §§ 3.26 and 3.31;

(c) Clean and sanitize cage holding racks as required by 9 CFR §§ 3.26 and 3.31;

(d) Clean and sanitize primary enclosures as required by 9 CFR § 3.31.

Respondents agree to make certain improvements to the facility. Said improvements shall be completed within a specified period of time as agreed to between the parties.

Respondents are hereby assessed a civil penalty of $3,000 to be paid by certified check or money order payable to the Treasurer of the United States.

Respondents' license is suspended for fourteen (14) days and thereafter until respondents demonstrate to the Animal and Plant Health Inspection Service (APHIS) that their facility complies with the Act and the regulations and standards issued thereunder. When respondents demonstrate to APHIS that they are in compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued upon the motion of APHIS in this proceeding terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: ELSIE MOUTRAY. AWA Docket No. 388. Decided October 14, 1986.

Edward H. McGrail, Administrative Law Judge.
Mary Hobbie, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2731 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint, and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(a) Respondent Elsie Moutray is an individual doing business at 3740 Pettis Road, St. Joseph, Missouri 04503.

(b) Respondent, at all times material herein, was engaged in business as a dealer within the meaning of the Act and was licensed under the Act with a Class B license No. 435x.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, her agents and employees, acting directly or indirectly, or through any corporation, trust, or other device, shall cease and desist from violating any and all provisions of the Animal Welfare Act, and the regulations and standards issued thereunder.

Respondent is assessed a civil penalty of $750.00, which shall be paid by certified check or money order made payable to the Treasurer of the United States.

Respondent's license as a dealer under the Animal Welfare Act is suspended for sixty (60) days and thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Act and the regulations and standards issued thereunder.

At the end of said sixty (60) days, Respondent shall request that the Animal and Plant Health Inspection Service (APHIS) reinspect her facilities. When Respondent demonstrates to APHIS that she is in full compliance with the Act and the regulations and standards issued thereunder, the Animal and Plant Health Inspection Service shall request that a motion for supplemental order be entered in this proceeding that will terminate the suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: FRONTIER AIRLINES, INC. AWA Docket No. 418. Order issued October 20, 1986.

John A. Campbell, Administrative Law Judge.
M. Bradley Flynn, for complainant.
Charles Hobbs, Denver, Colorado, for respondent.

ORDER DISMISSING COMPLAINT

The Complainant has moved to dismiss its complaint. For good cause shown, it is hereby ORDERED, that the Complaint in this proceeding be, and hereby is, dismissed.

In re: ALMAN WISE, d/b/a TARHEEL CATTERY. AWA Docket No. 407. Decided October 28, 1986.

Victor W. Palmer, Administrative Law Judge.
Robert Frisby, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent knowingly and willfully violated the Act and the regulations and standards issued thereunder 9 CFR §§ 1.1-3.142. This decision is en-

tered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Alman Wise, hereinafter referred to as the respondent, is an individual doing business as Tarheel Cattery and his mailing address is Rt. 1, Post Office Box 60-E, Benson, North Carolina 27504.

B. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (No. 55-B-37) issued pursuant to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Alman Wise, his agents and employees, shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondent, his agents and employees, directly or through any corporate device, shall cease and desist from failing to:

1) Identify all cats immediately upon acquisition in strict conformity with the requirements in 7 U.S.C. § 2141 and 9 CFR § 2.50;

2) Maintain complete records on all cats acquired in accordance with the requirements in 7 U.S.C. § 2140 and 9 CFR § 2.75(a);

3) Retain all cats acquired for at least the minimum five (5) day holding period in accordance with 7 U.S.C. § 2135 and 9 CFR § 2.101;

4) Transport cats in cages with sufficient litter to absorb and cover excreta in accordance with 9 CFR § 3.12(e);

5) Transport cats in cages with sufficient space for the cats to turn about freely in a standing position using normal body movements, to stand and sit erect, and to lie in a natural position in accordance with 9 CFR § 3.12(c); and

6) Provide receptacles containing litter for cats in enclosures with solid floors in accordance with 9 CFR § 3.4(a)(2)(i).

The respondent is hereby assessed a civil penalty of $6,000 to be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: GREAT AMERICAN VEAL COMPANY, INC. FMIA Docket No. 71. Decided September 9, 1986.

Bribery of certified meat inspectors—Fraud in food transactions

The Judicial Officer reversed Judge Baker's order withdrawing meat inspection service from respondent under the Federal Meat Inspection Act for 36 months, but suspending such withdrawal, except for 30 days, under certain conditions of compliance for 3 years. The Judicial Officer withdrew inspection indefinitely from respondent, but suspended the withdrawal if Mr. Burke, respondent's president and chief operating officer, becomes disassociated from respondent within 90 days and sells his stock within 1 year, and respondent is in compliance for 5 years. The order was issued under 21 U.S.C. § 671 as a result of Mr. Burke's conviction of 23 counts of contributing and supplementing the salary of the veterinarian medical officer of USDA assigned to respondent's plant, in connection with his official duties as the certified inspector. Convictions under 18 U.S.C. § 209(a) of supplementing the salary of the meat inspector assigned to a packing plant are necessarily based upon "fraud in connection with transactions in food," thereby affording a jurisdictional basis under 21 U.S.C. § 671 for a finding that the plant is "unfit" to receive meat inspection. Such convictions strike at the heart of the meat inspection program and *per se* render the plant "unfit" to receive meat inspection, regardless of any mitigating circumstances, unless the convicted individual is disassociated from the plant. USDA's *per se* approach is similar to the *per se* approach followed by the courts under the Sherman Act, under which price fixing and other antitrust violations are illegal *per se*. Prior cases involving the withdrawal of inspection or grading services summarized. Although the Judicial Officer believes that he correctly decided *In re Utica Packing Co.*, 43 Agric. Dec. ___ (Nov. 18, 1982) (decision on remand), in view of the subsequent *Utica* court decisions, he will construe the court of appeals' first *Utica* decision as requiring a consideration of the mitigating circumstances merely because the court was not sure whether the USDA proposition underlying its *per se* approach is correct or not. Assuming that the facts must be considered, the facts here show "fraud in connection with transactions in food" which render the plant "unfit" to receive meat inspection. Even if an inspector or grader used language that led the convicted individual to believe that a bribe was being solicited, that would not be significant in determining whether the packing plant is unfit to receive inspection.

Decision by Donald A. Campbell, Judicial Officer.

Harold Reuben, for complainant.
Harriet B. Rosen, Segal & Hundley, New York, N.Y., for respondent.

DECISION AND ORDER

This is an administrative action under the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), in which an initial Decision and Order was filed on December 19, 1985, by Administrative Law Judge Dorothea A. Baker (ALJ) withdrawing inspection service from respondent for 36 months, but suspending such withdrawal, except for a period of 30 days, under certain conditions of compliance for 3 years.

On February 28, 1986, complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Depart-

ment's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] Complainant seeks the indefinite withdrawal of inspection service from respondent, with the withdrawal suspended if Thomas J. Burke, respondent's president and chief operating officer, is disassociated from respondent, and respondent is in compliance for 5 years.

On March 3, 1986, respondent appealed to the Judicial Officer, seeking the dismissal of the complaint.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not complex, prior cases (while not directly in point) are persuasive as to the result here, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, I am issuing the order proposed by complainant, except that Mr. Burke is given 90 days within which to become disassociated from respondent and one year within which to sell his stock, and the provision activating the withdrawal of inspection if any of respondent's personnel commit "any felony" within 5 years is deleted. The first three findings of fact set forth below are taken verbatim from complainant's proposed findings filed before the ALJ on October 9, 1984 (Complainant's Corrected Proposed Findings, etc., at 2–3). These were the only findings of fact proposed by complainant, and they were stipulated to in respondent's proposed findings filed before the ALJ on December 5, 1984 (Respondent's Proposed Findings, etc., at 4). The fourth finding is an ultimate finding derived from Findings 1, 2 and 3.

FINDINGS OF FACT

1. Respondent is now, and at all times material was, a corporation which operates a cattle slaughtering and meat processing establishment in Newark, New Jersey, and is a recipient of Federal inspection services under Title I of the Act. Respondent's mailing address is 50 Avenue L, Newark, New Jersey 07105.

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

2. Thomas J. Burke is now, and at all times material was, the president of, chief operating officer of, and responsibly connected with, the respondent.

3. On or about May 19, 1983, in the United States District Court for the District of New Jersey, Thomas J. Burke was convicted of twenty-three (23) counts of contributing and supplementing, in various sums, the salary of Dr. Michael Gabriel, a veterinary medical officer of the United States Department of Agriculture, in connection with his official duties as the certified inspector assigned to the respondent, in violation of Title 18, United States Code, sections 209(a) and 2.

4. By reason of the facts set forth in Findings 1 through 3, *supra*, respondent is unfit to engage in any business requiring inspection under subchapter I of the Federal Meat Inspection Act.

CONCLUSIONS

I. Mr. Burke's 23 Misdemeanor Convictions Under 18 U.S.C. § 209(a) Are Based on "Fraud in Connection with Transactions in Food," and Render Respondent "Unfit" to Receive Meat Inspection Unless Mr. Burke Is Disassociated from the Plant.

The statutory provisions now designated as the Federal Meat Inspection Act were originally enacted in 1907 as part of the Department's Appropriation Act. The 1907 Act made it a felony for any person to give money or other thing of value to a meat inspector with intent to influence the inspector in the discharge of his duties. 21 U.S.C. § 622. The 1907 Act also authorized the Secretary to withdraw meat inspection services from establishments failing to maintain sanitary conditions or to destroy condemned carcasses, parts, meat or meat food products. 7 U.S.C. §§ 604, 606, 608.

The provisions of the Federal Meat Inspection Act were substantially strengthened in 1967 by the inclusion of the provisions under which the present proceeding was brought. In the 1967 amendatory legislation, the Congress set forth the following Congressional statement of findings (21 U.S.C. § 602; emphasis added):

> § 602. *Congressional statement of findings*
>
> Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is *essential* in the public interest that the health and welfare of consumers be protected by *assuring* that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwhole-

some, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

In order to further protect the "health and welfare of consumers" (7 U.S.C. § 602), Congress added the provisions under which this proceeding was brought, which state (21 U.S.C. § 671; emphasis added):

> *The Secretary may* (for such period, or indefinitely, as he deems necessary to effectuate the purposes of this chapter) refuse to provide, or *withdraw, inspection service* under subchapter I of this chapter with respect to any establishment *if he determines,* after opportunity for a hearing is accorded to the applicant for, or recipient of, such service, *that such* applicant or *recipient is unfit* to engage in any business requiring inspection under subchapter I of this chapter *because* the applicant or recipient, or *anyone responsibly connected with the* applicant or *recipient, has been convicted, in any Federal* or State *court, of* (1) any felony, or (2) *more than one violation of any law,* other than a felony, *based upon* the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon *fraud in connection with transactions in food.* This section shall not affect in any way other provisions of this chapter for withdrawal of inspection services under subchapter I of this chapter from establishments

failing to maintain sanitary conditions or to destroy condemned carcasses, parts, meat or meat food products.

The conviction of Thomas J. Burke, respondent's president and chief operating officer, of 23 misdemeanors involving contributing to and supplementing the salary of Dr. Gabriel, the Department's veterinary medical officer assigned to perform the Department's inspection service at respondent's plant, in connection with his official duties as the certified inspector assigned to respondent, inherently and necessarily (i) involves "fraud in connection with transactions in food," and (ii) renders respondent "unfit" to engage in business requiring the Department's meat inspection services (21 U.S.C. § 671).

The criminal statute under which respondent was convicted provides (18 U.S.C. § 209(a)):

> § 209. *Salary of Government officials and employees payable only by United States*
>
> (a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—
>
> Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

The provisions of 18 U.S.C. § 2, also involved in Mr. Burke's criminal convictions, merely make it clear that he was punishable as a principal.[2]

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[2] § 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

A. Convictions of Supplementing the Salary of the Meat Inspector Assigned to a Packing Plant in Connection with His Official Meat Inspection Duties Are Necessarily Based Upon "Fraud in Connection with Transactions in Food."

All of the work of a meat inspector at a packing plant relates to "transactions in food," and, therefore, when Mr. Burke, the president and chief operating officer of respondent's packing plant, was convicted of 23 counts of supplementing the salary of the Federal inspector assigned to inspect at the plant, in connection with his official duties as the certified inspector at the plant, the convictions are necessarily based upon "transactions in food." In addition, since Mr. Burke was convicted of violating a Federal conflict-of-interest statute, his convictions are necessarily based upon "fraud."

The provisions in 18 U.S.C. § 209(a) were added in 1962 to replace similar conflict-of-interest provisions previously in 18 U.S.C. § 1914 (62 Stat. 683, 793 (1948)), which, in turn, were derived from the Act of March 3, 1917 (39 Stat. 1070, 1106 (1917)). The Senate Report relating to the 1962 amendatory legislation expressly refers to the replaced provisions of 18 U.S.C. § 1914 as "relating to conflicts of interest" (S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Ad. News 3852, 3856). The Senate Report explains the provisions of 18 U.S.C. § 209(a) as follows (*id.* at 3863):

> *Section 209. Salary of Government officials and employees payable only by United States*
>
> Section 209 is similar to title 18, United States Code, section 1914. The latter prohibits a Government employee from receiving any salary in connection with his Government services from a private source. Subsection (a) of section 209 would reenact this prohibition in substance and, in addition, would make it an offense for anyone to make a payment to a Government employee the receipt of which would violate the section.
>
> The present statute's ban on the receipt of private payments "in connection with" an employee's Government services is replaced in section 209(a) with a ban on the receipt of such payments "as compensation for" such services. The new language is more precise in expressing what is clearly intended by the present broad phrase.
>
> * * * * * * *
>
> The maximum penalties authorized by section 209 are a fine of $5,000 or imprisonment for 1 year, or both.

The Senate Report as to the amendatory legislation concludes with the following language (*id.* at 3864):

> The committee is of the opinion that this legislation, as amended by the committee, is a long step forward in strengthening and revising the existing conflict-of-interest laws.

The House Report with respect to the 1962 amendatory legislation emphasizes that the criminal prohibition in 18 U.S.C. § 209(a) is against private payment made to a government employee expressly for services rendered to the Government. The report states (H.R. Rep. No. 748, 87th Cong., 1st Sess. 24-25 (1961)):

> *Salary of Government officials and employees payable only by United States (sec. 209)*
>
> Section 209 varies only to a minor extent in its substantive prohibitions from the section which it would replace, 18 U.S.C. 1914, which prohibits a Government employee from receiving compensation for his Government service from private sources and also prohibits any nongovernmental person or organization from paying or supplementing the employee's Government salary for such service.
>
> Section 1914 prohibits the receipt of private "salary" in connection with an employee's Government services. Section 209 prohibits the receipt of salary, "or any contribution to or supplementation of salary," to conform with the equivalent prohibition imposed upon the payor by section 209.
>
> Whereas the prohibition of section 1914 applies to private salary paid "in connection with" the Government services of the employee, section 209 substitutes the phrase "as compensation for" his services as an officer or employee in order to emphasize the intent that the prohibition is against private payment made expressly for services rendered to the Government. The phrase "in connection with" is vague and capable of an indefinitely broad interpretation.
>
> The enumeration of persons forbidden to pay a Government employee for his Government services is extended by section 209 to include a "partnership" and "other organization," and "an individual" is substituted for "a person." The modified enumeration is more comprehensive than in section 1914 and makes clear the intent that any kind of

organization, whether profit or nonprofit, should be subject to the prohibition of the section.

* * * * * * *

The inclusion of the specified exceptions is not to be construed as limiting the right of an employee to receive compensation from private sources except as payment for his services as a Government official. The section does not bar private employment or other activities not connected with the Government position of the official and not proscribed by other statutory prohibitions.

The penalty provision of section 1914 is increased in section 209 from a fine of not more than $1,000 or imprisonment for not more than 6 months, or both, to a maximum fine of $5,000 or maximum imprisonment of 1 year or both.

In *United States* v. *Pezzello,* 474 F. Supp. 462, 463 (N.D. Tex. 1979), the court concluded that where an employee of the Army and Air Force Exchange Service (AAFES), an instrumentality of the United States, received $13,000 as an illegal supplement to his Federal salary from individuals and corporations contracting with AAFES, the receipt of the payments constituted a breach of the employee's fiduciary duties and agency relationship. The court held (474 F. Supp. at 463):

2. The receipt of $13,000 by AAFES employee Anthony Pezzello from individuals and corporations doing business with AAFES constitued a breach of Pezzello's fiduciary duties and agency relationship with his employer, AAFES, and Defendant Pezzello is liable in this amount to AAFES.

3. Defendant Pezzello would be equally liable to return the sum of $13,000 he improperly received while in the employ of AAFES under the theory of unjust enrichment since he has received something of value at the expense of AAFES under circumstances which impose a legal duty of restitution.

In *Exchange National Bank of Chicago* v. *Abramson,* 295 F. Supp. 87, 89–90 (D. Minn. 1969), the court explained that 18 U.S.C. § 209(a) "is designed to prohibit outsiders from supplementing a government employee's salary," and that "[t]he evils of such, were it permitted, are obvious."

In *United States* v. *Raborn*, 575 F.2d 688, 691-92 (9th Cir. 1978), the court held that both 18 U.S.C. § 209 and 18 U.S.C. § 201(c) [3] seek to prevent the divided loyalty of public employees, but that the section 209 offense is not a lesser included offense because the section 201(c) offense could be committed without committing the section 209 offense. The court held (*ibid.*):

> Appellant also claims that the misdemeanor offense defined under 18 U.S.C. § 209 is a lesser included offense of § 201(c) and that the court erred in refusing to give an instruction to this effect. A crime is a lesser included offense of another crime if the lesser offense is necessarily presented as part of the showing of the greater offense, and both crimes relate to the protection of the same interests. *United States* v. *Stolarz, supra*, 550 F.2d at 491. "Stated differently, the [lesser] offense must not require some additional element not needed to constitute the greater offense." *Olais-Castro* v. *United States*, 416 F.2d 1155, 1157 (9th Cir. 1969). Under Fed.R.Crime.P. 31(c), when some of the elements of the crime charged constitute a lesser crime, the defendant is entitled to an instruction on the lesser included offense if the evidence will support such a charge. *Sansone* v. *United States*, 380 U.S. 343, 349, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965); *Olais-Castro* v. *United States, supra*.
>
> Comparing the essential elements of section 201(c) and section 209, we find that the latter is not a lesser included offense of the former. Section 209 prohibits (1) an officer or employee of the executive branch or an independent

[3] (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty . . .

. . . .

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

agency of the United States government from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States. 18 U.S.C. § 209. Section 201(c) requires proof that a (1) public official [1] (2) corruptly (3) asked, demanded, received, or agreed to receive an item of value (4) in return for being influenced in the performance of any official act or being influenced to commit or aid in committing a fraud on the United States, or being induced to act in violation of an official duty. 18 U.S.C. § 201(c). While both sections seek to prevent the divided loyalty of public employees, the section 201(c) offense could be committed without committing the section 209 offense. Both crimes require proof that a public employee received something of value from an outside source, but section 209 requires proof of an additional element that section 201(c) does not, namely that the public employee received salary or a supplement to salary "as compensation for services as an employee of the United States." Under section 201(c), the public official need not receive the item of value as compensation for services as a government employee, but only as a *quid pro quo* in return for influence or the commission of a wrongful act. We conclude that the court properly denied appellant's request for a lesser included offense instruction.

[1] Public official is defined in relevant part as "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof . . . in any official function, under or by authority of any such department, agency, or branch of Government. . . ." 18 U.S.C. § 201(a).

The conviction of Mr. Burke of 23 misdemeanor counts of supplementing the salary of the Department's veterinary medical officer in connection with the veterinarian's official duties as the certified inspector assigned to respondent's plant necessarily and inherently involves fraud.

In the world of Alice in Wonderland, it might be inferred that Mr. Burke supplemented the salary of the government veterinarian assigned to his plant in connection with the veterinarian's official duties as the inspector assigned to respondent's plant merely because Mr. Burke felt that all government employees are underpaid, and he wanted to do his part to correct that injustice. But in the real world in which we operate, I infer that Mr. Burke supplemented the inspector's salary in connection with his official duties as the certified inspector assigned to respondent's plant (at least) in

order to gain favor with the inspector, thereby obstructing or subverting (at least to some degree) the relationship between the inspector and the Government. Any such interference with the employment status of the Federal inspector vis-a-vis the Government is fraudulent.

The term "fraud" is not defined in the Federal Meat Inspection Act (21 U.S.C. 671). It is defined in Webster's Third New International Dictionary, Unabridged 904 (1981), as follows:

> fraud . . . 1a: an instance or an act of trickery or deceit esp. when involving misrepresentation: an act of deluding: . . . (2) *or* fraud in equity: an act, omission to act, or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another (as an act in violation of a relationship of trust and confidence)—called also *equitable fraud, legal fraud;* . . . b: a means used in trickery: a dishonest stratagem or a spurious thing passed off as genuine: . . . 2: the quality of being deceitful: the disposition to deceive. . . .

By way of analogy, the phrase "to defraud the United States" in a criminal conspiracy statute (now 18 U.S.C. § 371) was defined by the Court as follows:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.

Hammerschmidt v. *United States,* 265 U.S. 182, 188 (1924); *accord United States* v. *Richter,* 610 F. Supp. 480, 485–86 (N.D. Ill. 1985).

Mr. Burke's criminal convictions clearly involve fraud, as that term is ordinarily understood.

Respondent contends that there was no fraud because the loyalty of the government inspector was not subverted but, rather, he went to the Department's Inspector General, and with the concurrence of the Department of Justice, he was wired with a tape recorder, resulting in respondent's convictions. Although in a civil action under common law based upon fraud it might be necessary to prove that the plaintiff relied upon the fraud to his detriment, the term fraud in its ordinary usage is not restricted in that manner. It would be absurd to construe the word "fraud" in 21 U.S.C. § 671 to apply only to misdemeanor convictions where the inspector was

dishonest and accepted the supplement to his income without advising the Department of the criminal activity.

Under respondent's argument, the presidents of two meat packing plants could engage in the exact same conduct, and be convicted under 18 U.S.C. § 209(a) of the exact number of misdemeanors, but the misdemeanors in one case would be regarded as involving "fraud," so that the plant could be found "unfit" to receive inspection, whereas the misdemeanors in the other case would *not* be regarded as involving "fraud," so that the plant could *not* be found "unfit" to receive inspection, depending on whether the inspector at the plant happened to be honest or dishonest with respect to the income supplementation. Such a narrow and debilitating construction would completely thwart the congressional purpose of this remedial legislation.

For the foregoing reasons, I conclude that Mr. Burke's convictions involve "fraud in connection with transactions in food," which affords a statutory basis for a finding that respondent is "unfit" to continue to receive inspection service under the Federal Meat Inspection Act.

To summarize, the Department is following a *per se* approach in this case, which will be followed in all future cases involving convictions under 18 U.S.C. § 209(a). That is, since convictions of a packing plant official under 18 U.S.C. § 209(a) involving payments to the Federal meat inspector assigned to his plant require proof that the payments were made "as compensation for his services as an officer or employee of the executive branch of the United States Government," it will be inferred in *every* case, irrespective of the particular facts revealed by the record of the criminal proceeding, that the convictions are based upon "fraud in connection with transactions in food," which affords a jurisdictional basis for finding that the packing plant is "unfit" to receive inspection service.[4]

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[4] This jurisdictional issue does not arise where there has been a felony conviction for corrupt bribery under 18 U.S.C. § 201(b) or for an unlawful gratuity "for or because of any official act performed or to be performed" by an inspector under 18 U.S.C. § 201(f) since the Federal Meat Inspection Act (21 U.S.C. § 671) does not require that a felony involve fraud or food. *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 393-94 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982).

B. Convictions of Supplementing the Salary of the Meat Inspector Assigned to a Packing Plant in Connection with His Official Meat Inspection Duties Strike at the Heart of the Meat Inspection Program and Per Se Render the Plant "Unfit" to Receive Meat Inspection, Regardless of any Mitigating Circumstances, Unless the Convicted Individual Is Disassociated from the Plant.

The authority given to the Secretary of Agriculture by Congress to withdraw inspection service from a plant if he determines that, because of certain criminal convictions, the plant is unfit to receive inspection is not to provide additional punishment for the offenses involved in the convictions. Congress was well aware of the fact that when a person is convicted of a criminal offense in a state or federal court, the criminal sentence provides the punishment for the offense. In determining the punishment for the offense, no matter how serious the offense, mitigating circumstances are, of course, highly relevant.

But the withdrawal of inspection service because of criminal convictions is not to punish, but, rather, to protect the health and welfare of consumers by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled and packaged (21 U.S.C. § 602). Accordingly, in determining whether a plant is "unfit" to receive inspection because of criminal convictions, since punishment is not involved, we should not look to criminal standards.

The *only* reason why *any* type of criminal conviction might make a plant "unfit" to receive inspection is that, because of the conviction, the inspection service could no longer depend on the reliability and integrity of the plant's management. As stated in many previous cases discussed below in this section, since meat inspectors cannot observe every activity at a plant by every employee which affects the wholesomeness of the product, the inspection service must be able to depend on the reliability and integrity of the plant's management to be assured that the health and welfare of consumers will be protected. *See, e.g., In re Norwich Beef Co.*, 38 Agric. Dec. 380, 394-96 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982).

Specifically, the inspection service must be able to depend on the integrity of the plant's management not to attempt to subvert the loyalty of the inspector (through bribes or related offenses) or to thwart the inspection process, e.g., by sneaking prohibited chemicals or substances into meat or meat products behind the inspector's back, or surreptitiously using condemned products.

The official mark "U.S. INSP'D & P'S'D" is a symbol accepted throughout the United States as assurance that the meat is whole-

some and not adulterated or misbranded. Similarly, official Federal grade marks, such as "USDA Choice," are accepted throughout the United States as assurance that the meat is of a certain quality. Those marks will continue to be accepted as assurance of wholesomeness and quality only if government inspectors and graders continue to have competence and integrity, and packing plant operators continue to cooperate with, rather than attempt to subvert, the inspection and grading process.

The great majority of packing plant operators and inspectors and graders are competent and honest and, therefore, the public has good reason for accepting inspection and grading marks at face value. Unfortunately, however, there are a number of circumstances relating to the inspection and grading process that lend themselves to bribery and related offenses, and, therefore, the administrative officials charged with the responsibility for assuring the wholesomeness and proper quality designation of our Nation's meat supply maintain an ongoing program to prevent and eliminate such offenses. A number of the more obvious circumstances that lend themselves to bribery and related offenses are discussed immediately below.

First, the vast majority of government employees work in a government office surrounded by other government employees, with their supervisors nearby. However, meat inspectors and graders work in a meat plant, which is the property of the packing plant owners, surrounded by employees and officials of the packing plant. In many packing plants, such as respondent's plant, the inspector's supervisor is not located in the plant.

Second, meat inspectors, including some supervisors, are relatively low-paid employees, and packing plant officials have, at times, paid weekly (tax free) bribes to meat inspectors or graders equal to or more than their Federal take-home pay (see, *e.g., In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 171–72 (1978)).

Third, inspectors and graders make decisions that have a large financial impact on the packing plant. Many decisions are borderline, involving close judgment calls. Some decisions affect far more than an individual animal or carcass. For example, the meat inspector has the power (which was exercised at respondent's plant) to stop the entire production line, which means that all, or many, of the packer's employees (respondent had about 25 employees (PX 9, p. 95)) [5] are standing around idly, drawing full pay until the in-

[5] Numerous record references are included in this decision, but no attempt has been made to be exhaustive in the record citations. "Tr." references relate to the administrative proceeding and "PX" or "RX" references relate to the criminal record which was received in evidence (as exhibits) in the administrative proceeding.

spector permits the line to start again. Accordingly, "buying" the goodwill of the inspector or grader, or "buying" particular favors, is economically attractive, except for the penalties resulting from detection.

Bribery and related offenses are cancerous in nature which, unless stopped, can become the routine course of business among the inspectors and graders at a particular plant, or even in an entire area. See *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 172-73 (1978), in which it is explained (footnote omitted):

> In southern California between 1974 and 1976, 17 meatpacking houses and 35 employees of meatpackers were indicted and convicted of either bribery or illegally giving gratuity to meat graders. The involved plants constituted "a major part of the slaughtering companies or those using Federal grading service" in southern California (Tr. 19).
>
> Sixteen Federal meat graders were indicted and convicted of receiving money.

All of these circumstances are relevant in judging the reasonableness of USDA's policy, which calls for the withdrawal or denial of Federal inspection or grading services where there have been convictions for bribery or related offenses involving meat inspectors or graders, regardless of mitigating circumstances, unless the convicted individual is disassociated from the plant.

Another relevant circumstance is reflected in the congressional statement of findings with respect to the Federal Meat Inspection Act, *viz.* (21 U.S.C. § 602; emphasis added):

> It is *essential* in the public interest that the health and welfare of consumers be protected by *assuring* that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.

In addition, it should be noted that the Department of Agriculture has no crystal ball to enable it to determine which persons convicted of bribery or related offenses involving the inspection or grading staff will repeat such offenses in the future. The record of judges and parole boards in determining which criminals can safely be placed on probation or released on parole is far from perfect. We could not expect to have a better record at USDA. Where the health of the public is at stake, the only responsible course of action is for USDA to pursue a hard-nosed, *per se* approach, under which any plant is determined to be unfit to receive inspection so long as a person who has been convicted of bribery or a related of-

fense involving the inspection or grading staff remains associated with the plant.

Adopting such a *per se* approach, or approving such a *per se* approach, involves making a choice between the economic interest of the criminal and the health and welfare of the United States public. I believe that the decision should be made in favor of fully protecting the public interest.

If the determination were to be made case by case as to whether convictions for bribery or related offenses involving the inspection or grading staff make a packing plant "unfit" to receive meat inspection (so long as the convicted individual remains associated with the plant), packing plant officials contemplating bribery or related offenses would know, first, that it is very difficult for the government to detect such offenses, and second, that even if detected, they might be able to continue to remain with the plant and receive inspection or grading services if they can make a showing that mitigating circumstances outweigh their convictions.

Such a case-by-case approach would encourage bribery and related offenses. In addition, as stated above, no one has the ability to predict, with the assurance required to protect the Nation's health, which persons convicted of bribery or a related offense involving the inspection or grading staff are going to repeat the offense. Where the Nation's health is at stake, I believe that it would be irresponsible to follow a case-by-case approach in determining unfitness in cases where the criminal convictions strike at the heart of the meat inspection program. In all cases where the criminal convictions strike at the heart of the meat inspection program, it is impossible to protect the national health unless all the plants involved (regardless of the mitigating circumstances) are determined to be "unfit" to receive inspection unless the convicted individual disassociates himself from the plant.

A reviewing court determining whether this *per se* approach is arbitrary or capricious should recognize that, in addition to the distinction between the purpose of criminal proceedings (to punish) and the purpose of this proceeding (to protect the national health), discussed above, there is another important distinction. An important goal of the criminal justice system is to rehabilitate offenders. It is not feasible or desirable to lock up all serious offenders forever. Hence the rehabilitation of offenders is an important consideration in criminal proceedings.

Here, however, the concept of rehabilitation has no applicability. Where, as here, the sole purpose of the proceeding is to protect the national health, we are not concerned with rehabilitating a criminal in the meat packing business. There is no shortage of meat

packers in this country! There is no shortage of persons willing to assume responsible roles in meat packing companies! (A particular packing plant may be dependent upon one individual, but if that individual is no longer available, and there is an economic need for the packing plant in the area, which is not always the case, someone can be found to take over the interest and duties of that individual, if necessary.) Accordingly, there is no need in this proceeding to be concerned with rehabilitating in the meat industry a criminal who has been convicted of crimes that strike at the heart of the meat inspection system.

The only proper concern here is whether the inspection service can be assured of the reliability and integrity of the plant's management if the convicted individual remains associated with the plant. Where an individual responsibly connected with a meat plant is convicted of a felony, or more than one misdemeanor, that strikes at the heart of the meat inspection program, it is irresponsible to take any approach other than to withdraw inspection service from the plant indefinitely unless the criminal becomes disassociated from the plant. (For a vivid account of how deplorable meatpacking conditions can be in the absence of an effective inspection system, see Upton Sinclair's *The Jungle* (1906)).

The Department's *per se* approach in the case of bribery and related offenses is just as reasonable as the *per se* approach followed by the courts under the Sherman Act (15 U.S.C. § 1).[6] As stated in *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4–5 (1958):

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were

[6] See *Northern Pac. Ry. Co.* v. *United States,* 356 U.S. 1, 5 (1958); *United States* v. *McKesson & Robbins, Inc.,* 351 U.S. 305, 308–16 (1956); *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 386 (1951); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951); *United States* v. *Paramount Pictures,* 334 U.S. 131, 143 (1948); *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 400 (1948); *United States* v. *Line Material Co.,* 333 U.S. 287, 305–15 (1948); *United States* v. *Masonite Corp.,* 316 U.S. 265, 274–82 (1942); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 212-28 (1940); *Ethyl Gasoline Corp.* v. *United States,* 309 U.S. 436, 458 (1940); *United States* v. *Trenton Potteries Co.,* 273 U.S. 392, 395–401 (1927).

that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition. *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1; *Chicago Board of Trade* v. *United States,* 246 U.S. 231.

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 210; division of markets, *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, aff'd, 175 U.S. 211; group boycotts, *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U.S. 457; and tying arrangements, *International Salt Co.* v. *United States,* 332 U.S. 392.

The industry was advised of USDA's *per se* approach involving convictions for bribery and related offenses on June 26, 1979 (see subsection 1 immediately following). The *per se* approach is followed *only* where the convictions strike at the heart of the meat inspection or grading programs (see subsections 2–10, *infra*). The *per se* approach involving convictions that strike at the heart of the meat inspection program has been approved by two district judges, but rejected by another district judge and a court of appeals.

1. USDA's Per Se Policy Statement Involving Convictions for Bribery and Related Offenses.

On June 26, 1979, Donald L. Houston, Acting Administrator (now Administrator), Food Safety and Quality Service, USDA, published the following Policy Statement effective on publication (44 Fed. Reg. 37,322, 37, 322-24 (1979); emphasis added), which received widespread publicity in the meat packing industry:

> *Policy on Withdrawal or Denial of Federal Inspection or Grading and Acceptance Services Based Upon Convictions for Bribery and Related Offenses.*
>
> *Agency:* Food Safety and Quality Service, USDA.
>
> *Action:* Notice.
>
> *Summary:* This notice informs the public of the policy of the Food Safety and Quality Service relating to withdrawal or denial of Federal inspection or grading and acceptance service based upon convictions for bribery and related offenses.
>
> *Effective Date:* June 26, 1979.
>
> * * * * * * *
>
> SUPPLEMENTARY INFORMATION: In recent years, the Department has instituted a number of administrative actions seeking the withdrawal or denial of Federal Meat Inspection Services pursuant to section 401 of the Federal Meat Inspection Act (FMIA) (21 U.S.C. 671), withdrawal or denial of Poultry Products Inspection Services pursuant to section 18(a) of the Poultry Products Inspection Act (PPIA) (21 U.S.C. 467(a)), withdrawal or denial of Egg Products Inspection Services pursuant to section 18 of the Egg Products Inspection Act (EPIA) (21 U.S.C. 1047), and withdrawal or denial of Federal Meat, Poultry, Egg, Dairy, Fruit, or Vegetable Grading and Acceptance Services pursuant to regulations promulgated in order to effectuate the purposes of the Agricultural Marketing Act of 1946 (AMA) (7 U.S.C. 1621 *et seq.*; 7 CFR 2853.11; 7 CFR 2870.44; 7 CFR 2855.200; 7 CFR 2856.31; 7 CFR 2858.58; 7 CFR 2851.46; 7 CFR 2852.54). Such proceedings have been instituted in order to determine whether certain persons and establishments are unfit to engage in a business requiring egg, meat, or poultry products inspection services or have violated the law or regulations regarding the various grading and acceptance services of the Department.

These administrative proceedings have been instituted in order to effectuate the purposes of these statutes, the protection of the health and welfare of consumers, and the preservation of a sound and efficient system for distributing and marketing agricultural products. The Department's efforts in proceeding against such persons or establishments are based upon a recognition of the importance of maintaining public confidence in the integrity of the inspection and grading systems, and a recognition of the fact that the public interest in the safety of its food supply warrants the imposition of the strictest standard of care.

Recently, many of the Department's actions in this regard have been based upon criminal convictions obtained against federally inspected establishments and/or against individuals responsibly connected with such establishments for bribery and related offenses such as the giving of unlawful gratuities to public officials. In addition to evidencing a lack of basic integrity, such convictions must be considered especially serious in the specific context of the meat and poultry industries. While the FMIA, PPIA, and EPIA require the mandatory inspection of the slaughtering of certain livestock and poultry and processing of products thereof, and of the processing of egg products, *it is physically impossible for Federal inspection personnel to oversee all actions taken by operators and employees of federally inspected establishments. Great reliance must, therefore, be placed upon the integrity of these individuals.* Similar reliance must be placed upon the integrity of those involved in the grading process operated under the AMA in order to insure that grading decisions are as accurate as possible and that consumers are accurately informed of the proper grades of products. *When such criminal convictions are based upon the giving or offering of bribes or gratuities to Federal inspection or grading personnel, such actions also pose a direct and tangible threat to the integrity of the inspection and grading systems. The Department has recognized the seriousness of such offenses in dealing with its own personnel, who have been subjected to immediate suspension without pay upon being charged with such offenses, and have been dismissed based upon the conviction for such offenses.*

After considering these issues in a number of administrative proceedings, the Food Safety and Quality Service

(FSQS) now considers it appropriate and in the public interest to publish a statement of general policy with regard to administrative actions for the withdrawal or denial of Federal inspection and/or grading and acceptance services, based upon convictions for bribery and related offenses. *For the purposes of this statement, convictions for bribery and related offenses shall include, but not be limited to, convictions for violations of* 18 U.S.C. 201, *18 U.S.C. 209*, 7 U.S.C. 1622(h), 21 U.S.C. 622, and Federal, State, and municipal statutes of a similar nature.

The policy of FSQS in administrative actions brought for the withdrawal or denial of Federal inspection and/or grading and acceptance services, based upon convictions for bribery and related offenses, shall be as follows: *FSQS shall institute an administrative proceeding seeking the indefinite withdrawal or denial of Federal inspection and/or grading and acceptance services from any recipient of or applicant for such services when the Department's action is based upon a criminal conviction or convictions for bribery or related offenses.* FSQS will also exercise its authority, whenever it is deemed appropriate, to institute action to withdraw the benefits of such grading and acceptance services from individuals, as well as business entities, convicted of such crimes. Such proceedings shall be conducted in conformity with the applicable Rules of Practice, which afford the respondent the opportunity for a hearing before an Administrative Law Judge. Decisions rendered in such proceedings may then be appealed to the Judicial Officer of the Department, whose decisions may, in turn, be appealed to the Federal courts.

In the past, the Department has reached settlements in some proceedings of this nature which have included a provision for either the divestiture, by the convicted individual, of all interest in the respondent establishment, or the isolation by the convicted individual from all contact and communication with Federal grading and inspection personnel. *Isolation provisions will not be included in future settlements of such cases, but the Department may, under appropriate circumstances, reach settlements which include a provision which assures a complete divestiture, by all convicted individuals, of their entire ownership interest in and operational control or direction of the establishment in question, and the termination of all associations between*

the convicted individual or individuals and the establishment in question. FSQS will not enter into any specific settlements which does not have this effect. These settlements may also include a provision for actual withdrawal of services for a specified period of time. In addition, such settlement may contain such other terms and conditions as are determined to be appropriate on a case-by-case basis. For example, inspection or grading and acceptance services may be withdrawn immediately if the establishment in question or any of its officers, employees, or agents subsequently violates section 22 of the FMIA, or section 201 or *209 of Title 18* of the United States Code, or commits certain specified violations involving the preparation, sale, or transportation of adulterated or misbranded products. Such subsequent violations may be established either through conviction or final decision as to the facts in a formal adjudicatory proceeding before the Secretary. Further, nothing in this policy is intended to imply that a compromise settlement will be considered in all cases. Accordingly, the determination to consider such settlements will be made on a case-by-case basis.

Proceedings of this nature will be instituted by FSQS whenever the Secretary has jurisdiction to determine whether inspection or grading and acceptance services shall be withdrawn or denied based upon convictions for bribery and related offenses. FSQS will also continue to exercise its authority to institute proceedings for the withdrawal or denial of inspection or grading and acceptance services based upon other acts or offenses.

In instituting this policy, FSQS is aware that its application may have substantial impact upon affected individuals and establishments. However, after a full consideration of this issue, it has been determined that the institution of such a policy on a uniform basis is essential in order to protect the integrity of Federal Meat Inspection, Poultry Products Inspection, and Egg Products Inspection Programs, and the Federal Meat, Poultry, Egg, Dairy, Fruit, and Vegetable Grading and Acceptance Services. The Agency is, therefore, publishing this statement in order to notify all interested members of the public of its intention of pursuing the strongest possible sanction policy in this area. The intended effect of the adoption of such a policy will be the enhancement of the integrity of the industry

and the Federal programs, and the deterrence of bribery and related offenses in the future.

It should be noted that this Policy Statement expresses the Administrator's viewpoint that criminal convictions for bribery and related offenses involving the inspection staff establish *per se* that a plant is unfit to receive inspection, unless the convicted person is disassociated from the plant, regardless of any mitigating circumstances.[7]

This Policy Statement was issued only after the administrative officials had 11½ years' experience under the particular statutory provision at issue here, and many more years' experience relating to the general subject matter of bribery and related offenses. The Department had previously followed a number of approaches, including isolation provisions, which were found to be unworkable.

The administrative officials recognized the "substantial impact" of this *per se* policy upon affected individuals and establishments, but, "after a full consideration of this issue," the administrative officials "determined that the institution of such a policy on a uniform basis is essential in order to protect the integrity of Federal Meat Inspection" and other programs (44 Fed. Reg. at 37,324).

As I have indicated in prior decisions, I believe that the administrative, *per se* approach with respect to bribery and related offenses involving the meat inspection and grading staff is reasonable. In fact, I believe that it is the *only* policy that will achieve the congressional purpose of assuring the wholesomeness of the Nation's meat supply.

The packing industry has been on notice since June 26, 1979, that the administrative officials will seek the withdrawal of Federal inspection from any plant where there have been convictions for bribery or related offenses, including, specifically, convictions under 18 U.S.C. § 209(a), regardless of any mitigating circumstances, and the Department's Judicial Officer has consistently approved that policy. The relevant administrative and judicial cases as discussed below. (Since no case involves a conviction under 18

[7] The Policy Statement does no more than set forth the Administrator's policy that will be followed in the case of convictions for bribery and related offenses under statutory provisions that were not, and could not be, altered by the Administrator. It is not a regulation and, therefore, it is not subject to the requirements relating to regulations. It is also not a "significant" regulation, action or decision since it does not alter any "enforcement or compliance requirements," and was not "likely to raise significant controversy due to conflict over questions of fact or impact." Accordingly, there is no basis for respondent's argument based on Executive Order 12044 (Mar. 23, 1978) or Secretary's Memorandum No. 1955 (Aug. 25, 1978).

U.S.C. § 209(a), no case is squarely in point, but most of the cases discussed below are closely analogous to the case at hand.)

2. Norwich Beef Company.

In *In re Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982), *order modified*, 43 Agric. Dec. ___ (Nov. 15, 1984), the Judicial Officer withdrew inspection indefinitely from a packing plant, but suspended the sanction on condition that Alan Roessler was disassociated from the plant in 90 days and sold his stock within one year, and the plant did not commit designated offenses within 5 years.

Alan Roessler, respondent's president, treasurer and principal stockholder, had been convicted of the felony of receiving a truckload of hijacked beef and processing it through a packing plant which he managed (respondent's predecessor), with knowledge that it was stolen. Mr. Roessler was subsequently convicted of a misdemeanor because when he applied for Federal inspection for the newly established Norwich Beef Company, he answered "none" to questions with respect to whether he had previously been convicted of any crimes.

Since the felony relating to hijacked beef did not strike at the heart of the meat inspection program, the Judicial Officer considered all of the circumstances presented in the case, including mitigating circumstances, before concluding that respondent was unfit to receive inspection because of the felony conviction, so long as Alan Roessler was associated with the firm. (A similar, recent case is *In re Apex Meat Co.*, 44 Agric. Dec. ___ (September 5, 1985), *appeal docketed*, No. 85-3189 (D.D.C. Oct. 4, 1985)). When considering the other circumstances, he held that other unfavorable circumstances must be considered, as well as respondent's mitigating circumstances, including the fact that respondent had committed a single misdemeanor, which would not, by itself, afford a jurisdictional basis for withdrawing inspection. The Judicial Officer stated (38 Agric. Dec. at 394-96):

> However, inspection services are not to be withdrawn automatically because of the conviction of a felony. The felony must be of such nature as to support a finding that the recipient is "unfit to engage in any business requiring inspection" as a result of that felony (21 U.S.C. 671).
>
> Dr. Hatter explained that meat inspectors cannot continuously observe all of the processing activities at a plant and, therefore, the inspection service must be able to

depend upon the reliability and integrity of the plant management to be assured that the health and welfare of consumers will be protected. Such reliability and integrity are lacking here. Specifically, he testified (Tr. 23, 39–43):

> Q. Is there anything specifically about the way the meat inspection system works and the way the business works that creates a need for this type of integrity that you are talking about?
>
> A. Yes, because in this role we do not have and cannot have enough inspectors observing every operation that is going on, on a daily basis. We have inspectors that cover the sausage formulation, for example, where you have in one section the receiving cooler of fresh meats, then you have the formulation, you have the spice room, which is all taking place, and then emulsion and stuffers. These are all taking place simultaneously so, therefore, we have to have the reliability, the integrity of the plant management to be assured that when the inspector is not there to observe the actual procedure, that it will be carried out according to the rules and regulations.
>
> * * * * * * *
>
> Q. Dr. Hatter, the evaluation of these applications which come into our office, would an indication in response to these Blocks 19 and 20, that an individual associated with the organization was—would an indication that such an individual have been convicted of a crime of larceny who was associated with the orgainzation cause any particular concern on your part concerning the integrity of that facility and that operator?
>
> A. Yes, because the integrity, honesty and dependability of the applicants, including the operation of the plant itself, is solely dependent upon the individuals within that plant to abide by the rules and regulations of when and when not the inspector might be on the premises, so that the matter of records, the formulation, the restricted ingredients going [into] each product would be car-

ried out depending upon the integrity of plant management.

* * * * * * *

Q. If, on the same application, you were informed that an individual connected with the applicant had been convicted of the crime of selling and transporting meat under grant of inspection obtained through false representations, would this cause you any particular concern?

A. Yes, it would because of what I had mentioned previously, the dependability that we rely on plant management to carry out all the rules and regulations as far as their operations, both in sanitation and in their preparation of meat and meat food products, and unless we have this, we cannot depend on it, and this certainly would indicate that it was in doubt as far as the larceny type of situation.

* * * * * * *

Q. Now, Doctor Hatter, based on your familiarity with these documents, your understanding of the purpose of Section 401 of the Meat Inspection Act and your own experience and responsibilities within the Meat and Poultry Inspection Programs, have you formed an opinion as to whether the Respondent in this action should be allowed to continue to obtain the benefit of meat inspection services?

A. Yes, I do.

* * * * * * *

Q. And what is that opinion, Doctor?

A. That based on the evidence that we have before us, that the Norwich Beef Company as an operator under Federal inspection, puts the total program into jeopardy in that the consumer, who we service or protect as far as the final product reaching their table, loses confidence in the reliability when we permit the type of operation to be

operated by the individuals who have been so convicted of a felony and a misdemeanor in this case.

Q. When you talk about integrity, do you feel that because of these convictions, sir, that your program can place any reliability on Norwich Beef Company?

A. No, especially since the application was falsely made out, without giving us proper documentation. Certainly, we don't have the reliability or the integrity needed as far as the plant's operation.

Q. Doctor Hatter, is there any action which the Respondent in this action might take which, in your opinion, would allow them to continue to receive Federal inspection services?

* * * * * * *

A. Yes. Norwich Beef could continue if Mr. Alan Roessler, who was convicted of the felony and the misdemeanor, would remove himself from the stockholders plus any contact with the operation of Norwich Beef Company, and that Norwich Beef would be on probation for a period of time.

The Federal inspector who inspects meat products at respondent's plant is at the plant only about 80% of the time since he inspects at two other plants besides respondent (Tr. 45). Also, even when he is at respondent's plant, he cannot watch all operations at the same time. Hence unless the inspection service can depend upon the reliability and integrity of respondent's management, it cannot protect the "public interest * * * by assuring that meat and meat food products distributed to them [from respondent's plant] are wholesome, not adulterated, and properly marked, labeled, and packaged" (21 U.S.C. 602).

The convictions of Alan Roessler provide a reasonable basis for the view of the administrative officials that they cannot depend upon the reliability or integrity of respondent so long as Alan Roessler is associated with the firm.

Alan Roessler has been convicted of two crimes relating to the profitability of meatpacking companies. I infer that

the first crime was committed with the expectation of profit, and that restitution was later made to lessen the criminal penalty. The second crime obviously involved the profitability of respondent's meatpacking business since it was committed to obtain inspection, which is indispensable to the operation of respondent's plant.

Although only the felony conviction affords a jurisdictional basis for withdrawing inspection services from respondent, once the jurisdictional basis is met consideration can be given to any other relevant circumstances, favorable and unfavorable. Accordingly, it is appropriate to consider the evidence offered by respondent that aside from the two convictions, Alan Roessler's reputation in the community is good, and he has conducted himself and his business affairs in a responsible and exemplary manner. On the other hand, it is appropriate to consider that Alan Roessler was willing to commit a second crime to obtain inspection services for his plant.

Considering all of the circumstances, there is a reasonable basis for the belief of the administrative officials that respondent is unfit to receive inspection services because of Alan Roessler's felony conviction so long as Alan Roessler is associated with the firm.

On appeal, Chief Judge Clarie upheld the Decision and Order of the Judicial Officer *(Norwich Beef Co.* v. *Bergland*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982). The Chief Judge agreed with the Department's "logic, which equates lack of integrity and dependability with unfitness to engage in a business requiring inspection" (slip op. at 7). In upholding the Judicial Officer's Decision and Order, the court stated (slip op. at 6-8):

> Section 671 does not automatically disenfranchise all convicted felons from engaging in the meat processing business. It clearly defers to the discretion of the Secretary, who may withdraw inspection services if, after a hearing, he determines that the recipient of such services is unfit to engage in any business requiring inspection. The plaintiffs contend that the Secretary's decision in this case, as rendered by the Judicial Officer, was arbitrary, capricious, and an abuse of discretion. In support of this contention, the plaintiffs argue that a conviction, alone, will not justify a finding of "unfitness." The Court notes, first,

that although this inquiry is to be "searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). *See also Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285–86 (1974). Second, the Judicial Officer's decision did not simply equate a felony conviction with "unfitness." There was testimony at the hearing by the Regional Director of the USDA, to the effect that there is an insufficient number of inspectors to observe all of the processing activities at a given plant and, therefore, the inspection service relies heavily "upon the reliability and integrity of the plant management to be assured that the health and welfare of consumers will be protected." *In re Norwich Beef Company, Inc.*, FMIA Docket No. 29, at 23–24 (Mar. 7, 1979). The Court can find no fault with that logic, which equates lack of integrity and dependability with unfitness to engage in a business requiring inspection. The plaintiffs argue, in reply, "Hypothetically, a person may lack integrity and dependability and still sell an excellent and outstanding food product which poses no threat to the consuming public." While this proposition may well be true, the Secretary is not required to run the risk that it may, instead, be false. Nor is it an abuse of discretion for him to conclude that, at least, in this case, it is false; and that the consuming public will be safer if the plaintiff, Roessler, is not permitted to operate a meat processing business. The Court is cognizant of the public's great interest in the purity of food. *Smith* v. *California*, 361 U.S. 147, 152 (1959).

Next, the plaintiffs claim that the sanction imposed was unduly harsh, in view of previous sanctions. This same claim was made, unsuccessfully, in the case of *Butz* v. *Glover Livestock Commission Co., Inc.*, 411 U.S. 182 (1973). "The employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Id.* at 187. *See also Wright* v. *Securities & Exchange Commission*, 112 F.2d 89, 95 (2d Cir. 1940). The Secretary's decision, as rendered by the Judicial Officer, may seem overly harsh in that it may bar plaintiff Alan Roessler from employment with plaintiff Norwich Beef Company. However it is consistent with a principle

expressed by the United States Supreme Court in the case of *United States* v. *Park*,

> "The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are not more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them." *United States* v. *Park*, 421 U.S. 658, 672 (1975).

3. Wyszynski Provision Company.

In *In re Wyszynski Provision Co.*, 40 Agric. Dec. 17 (1981), *aff'd*, 538 F. Supp. 361 (E.D. Pa. 1982), the Judicial Officer withdrew meat inspection service indefinitely from respondent, but suspended the withdrawal on the condition that Walter J. Wyszynski became disassociated from respondent within 90 days and sold his stock within one year, and respondent did not violate the Meat Inspection Act within 3 years.

The withdrawal of inspection service was based on the fact that Walter J. Wyszynski was convicted of three felony counts, and respondent of eight felony counts, all involving the sale of adulterated meat. Sodium sulfite, a prohibited substance, had been surreptitiously added to sausage to make it appear fresher than it was. In *Wyszynski*, the Judicial Officer followed the *per se* approach set forth in *Utica* and *Toscony*, discussed in subsections 4 and 5, *infra*, and held that the felony convictions required a determination that respondent is unfit to receive inspection service, irrespective of mitigating circumstances, so long as Walter J. Wyszynski is associated with respondent. The Judicial Officer stated (40 Agric. Dec. at 22–24):

> In the *Utica Packing Company* case referred to above, it was held that where the respondent's president and half-owner was convicted under 18 U.S.C. § 201(b) of bribing the supervisor of the meat inspectors at respondent's plant on four separate occasions, a determination must be made that the respondent is unfit to receive inspection service. Specifically, it was held (39 Agric. Dec. at 602):
>
> * * * * * * *
>
> Although the felony convictions involved in the present case are not quite as serious as those involved in *Utica*,

the felony convictions here strike at the heart of the meat inspection program and similarly require a determination that the respondent is unfit to receive inspection service.

In the present case, sodium sulfite, a prohibited substance, must have been surreptitiously added by Mr. Walter J. Wyszynski when the inspector was not present. The inspector at respondent's plant inspects meat at two or three plants and therefore he is not at respondent's plant all day. Although there is no contention that the meat involved in the violations in this case was putrid or decomposed (the meat was not tested in this respect), the addition of sodium sulfite makes meat look fresh even after it is too old to be eaten safely. The retailer or ultimate consumer could mishandle a meat product containing sodium sulfite and be unaware that the product was no longer safe to eat because it would still look fresh (Tr. 37, 107).

. . . Because of the nature of the felonies involved in this case, I have no alternative but to conclude that respondent is unfit to engage in any business requiring inspection under the Federal Meat Inspection Act.

Here, as in the *Utica* case, in view of the nature of the felony convictions involved in this proceeding, it is not appropriate to consider other facts and circumstances as to respondent's reputation in the community or as to present conditions at their plant. As stated in *Utica* (39 Agric. Dec. at 602–03):

* * * * * * *

The same reasoning applies to the present felonies which occurred when Mr. Wyszynski surreptitiously added a prohibited substance to meat products when the inspector was not present.[4]

In addition, it is not appropriate to consider whether it is likely that respondent will again commit a similar felony. As stated in *Utica* (39 Agric. Dec. at 603–04):

[4] Perhaps the only felonies that would compel a finding that a plant is unfit to receive inspection under the Act without regard to any other circumstances are those involving bribery and related offenses or the surreptitious thwarting of the work of the Federal personnel. But I would not foreclose the possibility of other cases demonstrating that other felonies belong in the same category.

As shown in the quotation above, note 4, the Judicial Officer indicated that the *per se* approach was being followed at present only in cases "involving bribery and related offenses or the surreptitious thwarting of the work of the Federal personnel." Although the Judicial Officer applied the *per se* approach in *Wyszynski* without regard to respondent's mitigating circumstances, he stated in *dicta* that "even if the [mitigating] circumstances relied on by respondent were relevant, they would not lead me to change the order in this case" (40 Agric. Dec. at 25). The mitigating circumstances relied on by respondent included the fact that "neither the corporation nor its principals had previously or subsequently been arrested, convicted of any crime or involved in difficulty with the Department of Agriculture" (40 Agric. Dec. at 25); respondent had been "punished enough by its criminal fines and the adverse publicity resulting from the criminal convictions" (40 Agric. Dec. at 26); and the "meat in question was not contaminated or putrid" (40 Agric. Dec. at 26).

On appeal to the district court, the court referred to the fact that the Judicial Officer's *per se* approach had been upheld by the district court on appeal in the *Utica* case (discussed in subsection 5(b), *infra*), but the court disagreed with the district court's holding in *Utica* that mitigating circumstances were irrelevant and immaterial. *Wyszynski Provision Co.* v. *Sec. of Ag.*, 538 F. Supp. 361, 364 (E.D. Pa. 1982). The court, however, significantly undercut the importance of mitigating circumstances where the conviction strikes at the heart of the meat inspection program by holding (*ibid.T1*):

> However, whether or not a conviction is in and of itself "substantial evidence" varies with the nature of the predicate felony or the repeated violations of law. The more closely the conduct strikes at the policies of the Act, the more likely it alone will support a determination of unfitness regardless of mitigating facts.

The following excerpt summarizes the district court's views (538 F. Supp. at 362-65):

> The Administrative Law Judge ("ALJ") [who is the same ALJ involved in the present case] held the required hearing on complaint of the United States Department of Agriculture ("USDA") and found Wyszynski and the Company unfit within the meaning of the Act because of their felony convictions. . . . She granted the request of the USDA that inspection services be indefinitely withdrawn and denied to the Company provided that such withdrawal and denial would cease for so long as Wyszynski is not associat-

ed with the Company, its successors or assigns, directly or indirectly, as partner, officer, director, shareholder or employee and does not control it in any way, and the Company does not violate any provision of the Act within three years. However, the decision and order made clear that the ALJ, citing *In Re Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), deemed she had no discretion upon establishing the felony convictions for violating the Act other than to find respondent unfit, notwithstanding the discretionary authority invested in the Secretary by the Act. However, in the event on appeal it were decided that discretion did lie with the ALJ, she found various mitigating factors [2] on account of which she stated she would have otherwise recommended suspension of the indefinite withdrawal and denial of services so long as the Company and Wyszynski did not violate the Act individually or collectively.

[2] The ALJ deemed mitigating the following circumstances: adequate punishment in the criminal proceedings; the guilty pleas involved one isolated event of addition of sulfites to make meat appear fresher; the meat was not contaminated or putrid; the adverse publicity caused loss of business to the Company and humiliation to Wyszynski; none of the principals had been previously convicted of crime; this long established business had never been in difficulty with governmental authorities nor had licensing problems with the USDA; there are 25 employees, 12 of whom are non-family members, all employees of long standing; Wyszynski has resigned as officer, director and shareholder and is working in a non-executive menial capacity having no relation to meat preparation; the severance of Wyszynski from the Company is based only on the felony convictions and there is no evidence of record that this would further the purposes of the Act or serve as any further deterrent.

The Company appealed the ALJ's decision to the Judicial Officer ("JO") of the USDA. He affirmed the ALJ and held that in view of the felony convictions, mitigating circumstances could not be considered in a determination of fitness. He concluded in the alternative that even if the mitigating circumstances were relevant, they would not change his final determination on the facts of this case; FMIA Docket No. 41, Paper 19.

* * * * * * *

. . . The following errors of law are cited: (1) deeming a felony conviction to automatically compel a finding of unfitness within the meaning of the Act; (2) failing to consid-

er mitigating circumstances; and (3) substituting findings of fact by the JO for those by the ALJ.

* * * * * * *

Upon review of the whole record and separate consideration of each of these standards, see, *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974), we find that the Secretary's decision was neither arbitrary or capricious nor unsupported by substantial evidence. In light of plaintiff and Wyszynski's convictions for adulterating meat and the explicit provisions of § 671 regarding felony convictions as a basis for withdrawing meat inspection services, it is difficult to hold otherwise.

Congress has declared that conviction of either: "1) any felony, or 2) more than one violation of any law . . . based upon the acquiring, handling or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food" may provide the basis for a withdrawal of inspection services if the Secretary determines after opportunity for hearing that the recipient is unfit to engage in any business requiring inspection. 21 U.S.C. § 671. The JO found that plaintiff had been convicted of multiple felonies that "strike at the heart of the meat inspection program." These felonies were based upon distributing mislabeled food or fraud in connection with transactions in food. He found that Wyszynski added sodium sulfite to meat surreptitiously when inspectors were absent and considered that Wyszynski had been convicted of felonies with "intent to defraud." Plaintiff's actions of record provided adequate evidence to support a finding of unfitness under the standards set out in § 671.

Plaintiff argues that the action of the JO was arbitrary and capricious in failing to consider relevant mitigating circumstances, and illegal in determining that a finding of unfitness was mandated by plaintiff's convictions of felonies. But the JO made no automatic finding. He recognized that "not every felony conviction renders the recipient unfit to receive inspection service," but certain felony convictions in and of themselves justify a finding of unfitness as they did in this case. He relied on *In Re Utica Packing*

Co., 39 Agric. Dec. 590 (1980), an administrative decision ordering suspension of a meat packing company unless it dissociated with its President who had been convicted of bribing a federal inspection supervisor. The district court in *Utica*, affirming the decision of the Secretary, held that present compliance and good character were irrelevant, but that all plaintiff's evidence, even if relevant, was insufficient to render insubstantial the evidence on which the Secretary based his decision to suspend; *Utica Packing Co.* v. *Bergland*, 511 F.Supp. 655 (E.D.Mich.1981). We respectfully differ with the district court in *Utica* only to this extent: mitigating facts are not immaterial or irrelevant and may [8] be considered. However, whether or not a conviction is in and of itself "substantial evidence" varies with the nature of the predicate felony or the repeated violations of law. The more closely the conduct strikes at the policies of the Act, the more likely it alone will support a determination of unfitness regardless of mitigating facts.

In this case the JO considered the mitigating facts listed by the ALJ [4] although he accorded little or no weight to them. He decided to accord little weight to these mitigating facts because the felonies here involved wilful adulteration. He considered that sodium sulfite added to the meat makes it look fresh when it is not and this creates a danger that a retailer may sell or a consumer may eat a product no longer wholesome. In his view such action, even on one occasion (affecting more than one sale) was of such a nature and scale to warrant the administrative action sought by the Secretary. Therefore, the court cannot find that the final determination of the agency was arbitrary or capricious. While we might reach a different decision on these facts were we to consider the matter *ab initio*, where there is no clear error, we cannot substitute our judgment for that of the agency given discretionary authority. *Overton Park, supra.* The determination of the USDA, charged as it is with enforcement of the Act and

[8] The use of "may" was obviously euphemistic. Since the court differed with the Judicial Officer and the *Utica* district court's view that mitigating circumstances were irrelevant and did not have to be considered, the court obviously meant that mitigating circumstances "must" be considered. The court, however, gave no reasons for, in effect, holding that it is arbitrary and capricious to refuse to consider mitigating circumstances in those cases where the convictions strike at the heart of the meat inspection program.

the protection of the public health, is entitled to considerable deference. *See, Philadelphia Citizens in Action* v. *Schweiker, supra* at 886.

[4] Thus, the plaintiff's third argument, that the JO substituted his findings of fact for those of the ALJ, is without basis; he determined that on these facts the felony convictions alone warranted a finding of unfitness, but if there were agency discretion, he would exercise that discretion differently than would the ALJ on the facts found by the ALJ.

Accordingly, although the district court in *Wyszynski* disagreed with the Department's *per se* approach, it significantly undercut the effect of its disagreement by holding that the "more closely the conduct strikes at the policies of the Act, the more likely it alone will support a determination of unfitness regardless of mitigating facts" (538 F. Supp. at 364). In addition, as shown in the next subsection, the district court reviewing the *Toscony* decision expressly agreed with the Judicial Officer's *per se* approach in *Wyszynski*, and upheld the use of the *per se* approach in *Toscony* based upon the Judicial Officer's *Wyszynski* decision.

4. Toscony Provision Company.

In *In re Toscony Provision Co.*, 40 Agric. Dec. 533 (1981), *aff'd*, 538 F. Supp. 318 (D.N.J. 1982), *remanded by consent*, No. 82-5354 (3d Cir. Dec. 27, 1982), *decision on remand*, 43 Agric. Dec. ____ (May 18, 1984), *order denying late appeal*, 43 Agric. Dec. ____ (July 12, 1984), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished), the Judicial Officer withdrew meat inspection service indefinitely from respondent, but suspended the withdrawal on condition that Henry Dei became disassociated from respondent within 90 days and sold his stock within one year, and respondent did not violate the Meat Inspection Act within 2 years.

The withdrawal of inspection service was based on the fact that respondent and Henry Dei, its president and principal stockholder, were each convicted of a single felony, knowingly distributing adulterated meat food products, *viz.*, sausage to which an industrial chemical, imidazole, had been added. The chemical masks the aging or spoilage of the product, and, therefore, could cause harm if a retailer or consumer held the product too long because of its fresh appearance. The chemical was added without the knowledge of the meat inspector assigned to the plant.

In *Toscony*, the Judicial Officer adopted the decision of the ALJ, which followed the *per se* approach previously set forth by the Judicial Officer in *In re Wyszynski Provision Co.*, 40 Agric. Dec. 17 (1981), *aff'd on other grounds*, 538 F. Supp. 361 (E.D. Pa. 1982), dis-

cussed immediately above. Based on *Wyszynski* (and other cases), the ALJ held that the felony convictions, which strike at the heart of the meat inspection program, *required* a determination that respondent was unfit, irrespective of mitigating circumstances, so long as Henry Dei was associated with respondent. No consideration was given to Toscony's mitigating circumstances, even by way of *dicta*. The ALJ's decision, adopted by the Judicial Officer, states (40 Agric. Dec. at 535, 537-38):

> This case is controlled by recent decisions by the Judicial Officer: *In re Utica Packing Co.*, 39 Agric. Dec. 590 (1980); *appeal docketed*, No. CA-80-7242 (E.D. Mich., July 25, 1980); *In re Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), *affirmed*, H79-210 (D. Conn. Feb. 6, 1981); and *In re Wyszynski Provision Company*, [40] Agric. Dec. [17] (Feb. 13, 1981). [Footnote omitted.] *Wyszynski* is on all fours and requires the finding that respondent is unfit to engage in any business requiring inspection under the Federal Meat Inspection Act.
>
> * * * * * * *
>
> *Issue*
>
> Is respondent unfit to engage in any business requiring federal meat inspection services?
>
> *Conclusion*
>
> The respondent is unfit to engage in any business requiring federal meat inspection under the holding in *Wyszynski Provision Company, supra*, attached at Appendix "A".
>
> As was the case in *Wyszynski*, respondent and a principal corporate officer were convicted of felonies of the sort which "strike at the heart of the meat inspection program and . . . require a determination that the respondent is unfit to receive inspection service"; *ibid*, page 9.
>
> Both proceedings involve the surreptitious adulteration of sausages through the addition of chemicals to make "old" product look fresh. Such practices can result in the sale and consumption of product no longer safe to eat, *ibid*, page 10.
>
> > "(I)n view of the nature of the felony convictions involved in this proceeding, it is not appropriate

to consider other facts and circumstances as to respondents' reputation in the community or as to present conditions at their plant." *Ibid*, page 11.

"(I)t is not appropriate to consider whether it is likely that respondent will again commit a similar felony." *Ibid*, page 12.

"(T)he Act indicates that a single felony may be the basis for a finding of unfitness to receive inspection, and the felonies involved in this proceeding are of such a nature as to compel the determination that respondent is unfit to receive inspection." *Ibid*, page 14.

The first proceeding under the Act to result in the withdrawal of inspection services from a recipient because of a prior felony conviction was *Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), *affirmed*, H79-210 (D. Conn. Feb. 6, 1981). In affirming this decision, Chief Judge Clarie found it to be in keeping with a long and established line of federal cases which have upheld the exclusion of convicted felons from employment where the public interest requires insurance against corrupt practices (Appendix "B", page 5), and held, at page 7:

"The Court can find no fault with that logic, which equates lack of integrity and dependability with unfitness to engage in a business requiring inspection. The plaintiffs argue, in reply, 'Hypothetically, a person may lack integrity and dependability and still sell an excellent and outstanding food product which poses no threat to the consuming public.' While this proposition may well be true, the Secretary is not required to run the risk that it may, instead, be false. Nor is it an abuse of discretion for him to conclude that, at least in this case, it is false; and that the consuming public will be safer if the plaintiff . . . is not permitted to operate a meat processing business. The Court is cognizant of the public's great interest in the purity of food. *Smith* v. *California*, 361 U.S. 147, 152 (1959)."

In *Wyszynski*, the Secretary of Agriculture has decided, I believe most properly, to not subject the health of consum-

best copy available

> ers to the consequences of an imperfect act of contrition by a meat processor convicted of a felony involving wilful and knowing adulteration of meat food products.

On appeal, Senior Judge Whipple upheld the Department's *per se* approach, holding that since the felony convictions "clearly contravene the purposes of the Federal Meat Inspection Program, it is neither appropriate nor necessary to consider other facts and circumstances, such as the plaintiff's reputation in the community or conditions at the plant." *Toscony Provision Co.* v. *Block*, 538 F. Supp. 318, 321 (D.N.J. 1982).

The court's decision in *Toscony*, which was issued after the Judicial Officer's decision in *Wyszynski*, discussed immediately above, but before the district court upheld *Wyszynski* on other grounds, completely agrees with the Judicial Officer's *per se* ruling in *Wyszynski*. In affirming the Judicial Officer's *per se* approach in cases where the offenses "clearly contravene the purposes of the Federal Meat Inspection Program," the court held (538 F. Supp. at 320–21):

> The record is clear and simple and requires no further factual analysis to determine the basis of the Administrative Law Judge's and the Judicial Officer's decisions. The decisions were based upon the single fact of the convictions of Toscony and Henry Dei for distributing adulterated meat in violation of 21 U.S.C. § 602. Therefore, the only review that is required is whether that single factor is sufficient to support the finding that the respondent is unfit to engage in any business requiring federal meat inspection services.
>
> . . . . . .
>
> Finally, the Secretary relies most heavily upon *Wyszenski Provision Co., Inc.* v. *Bergland*, 39 Agric. Dec. (Feb. 13, 1981) *appeal pending*, No. 81-816 (E.D. Pa. 1982) which was cited as being "on all fours" with the case at hand.
>
> In *Wyszinski*, the company's vice-president, Walter Wyszinski, pled guilty to adding a prohibited "meat freshener" to sausage. The Secretary withdrew inspection services indefinitely, to be suspended upon Mr. Wyszinski's disassociation with the firm. The *Wyszinski* opinion clearly stands for the proposition that although it was never Congress' intent to disenfranchise someone soley because of any felony conviction, if the felony is one that "strikes at the

heart of the meat inspection program" it requires a determination of unfitness.

> Therefore, as in *Wyszinski*, because the nature of Mr. Dei's and Toscony's offenses is such that they clearly contravene the purposes of the Federal Meat Inspection Program, it is neither appropriate nor necessary to consider other facts and circumstances, such as the plaintiff's reputation in the community or conditions at the plant. *Wyszinski* at 11.
>
> Accordingly, the Administrative Law Judge's and Judicial Officer's reliance upon the fact of these convictions in order to find unfitness cannot be said to be arbitrary, or capricious or an abuse of discretion or in any way contrary to law. Furthermore, it cannot be said to be unsupported by substantial evidence in the record.

On appeal of *Toscony* to the United States Court of Appeals, the court granted a motion filed by the government (in which it was stated that counsel for Toscony joins in the motion) to remand the matter to USDA for consideration of mitigating circumstances. *Toscony Provision Co.* v. *Block*, No. 82-5354 (3d Cir. Nov. 19, 1982). The motion was filed by the Assistant United States Attorney handling the case for the Secretary of Agriculture and the United States because of an unpublished decision by the Sixth Circuit holding that mitigating circumstances must be considered. *Utica Packing Co.* v. *Bergland*, No. 81-1383 (6th Cir. Sept. 2, 1982), discussed in subsection 5(c), *infra*. The Assistant United States Attorney did not advise USDA that such a motion was to be filed. The court granted the motion filed by the government without ruling on whether a remand was necessary or appropriate. That is, the court expressed no opinion as to whether it agreed with the lower court opinion being reviewed or whether it agreed with the contrary view of the Sixth Circuit.

Based upon the voluntary decision of the Assistant United States Attorney to have the mitigating circumstances considered, and the court's remand order granting the government's request to have the proceeding remanded, the ALJ who issued the initial ruling in the case held that respondent was unfit to receive inspection because of the felonies, and that the mitigating circumstances were not sufficient to change the result in the case. *In re Toscony Provision Co.*, 43 Agric. Dec. ___ (May 18, 1984).

Toscony appealed to the Judicial Officer, but inasmuch as the appeal was filed late, after the ALJ's decision had become final and effective, the Judicial Officer held (in accordance with many prior

decisions) that he had no jurisdiction under the Department's rules of practice to hear the appeal. Nonetheless, in order to obviate the need for a further remand in case a reviewing court should disagree with the Judicial Officer's jurisdictional ruling as to the late appeal, the Judicial Officer indicated that if the appeal had not been filed late, he would have adopted the ALJ's initial decision. The Judicial Officer stated (*In re Toscony Provision Co.*, 43 Agric. Dec. ____, slip op. at 6-7 (July 12, 1984):

> Respondent has indicated that an appeal will be taken from an order denying permission to file a late appeal. Accordingly, in an effort to avoid undue delay in this proceeding (which involves the public health), in the event that a court should disagree with my order denying a late appeal, I have re-read the original record in this proceeding, and have read the supplementary record made after my original decision in this proceeding. If an appeal had been timely filed, I would have adopted Judge Palmer's initial Decision and Order as the final Decision and Order in this proceeding, adding additional conclusions emphasizing that I give little or no weight to any of the circumstances regarded by respondent as mitigating. Respondent has a great volume of evidence alleged to be mitigating, but the great volume is of no consequence since each item has little or no weight. Even a thousand times zero is still zero!
>
> This is not a close case. In fact, the circumstances regarded by respondent as mitigating are of such little weight that I would have regarded an appeal almost as frivolous, or solely for delay. Additional briefs on appeal would not have been helpful in view of the thorough briefing of the mitigation issue by counsel in the briefs filed below. Oral argument before the Judicial Officer, if requested, would have been denied. It is the practice of the Judicial Officer to hear oral argument on appeal only on very rare occasions where it is regarded as helpful.
>
> Accordingly, if a court should disagree with my procedural ruling, perhaps the case could be decided on the basis of the Administrative Law Judge's initial Decision without the delay incident to a further remand to the Department.

On appeal to the district court for the second time, but to a different United States District Judge (Judge Ackerman), the court

(erroneously, I believe) reviewed the merits despite respondent's late appeal to the Judicial Officer. The court affirmed the order withdrawing inspection services indefinitely, unless Henry Dei was disassociated from the plant, stating (*Toscony Provision Co.* v. *Block*, No. 81-1729, slip op. at 13-17 (D.N.J. Mar. 11, 1985)):

> On remand, after a full hearing on the question of mitigating circumstances, Judge Palmer reiterating his prior conclusion in this regard stated: The entire record, the briefs and arguments by Counsel have been fully considered to determine the appropriate sanction that should be imposed in this proceeding. I have concluded that respondent and Mr. Dei's felony convictions for knowingly distributing adulterated meat strike at the very heart of the Federal meat inspection program, and the mitigating circumstances of Mr. Dei's otherwise excellent reputation among business, professional, and social acquaintances and virtually blemish-free record both before and since the felonies is not sufficient to allow inspection service to continue at respondent's plant unless Mr. Dei disassociates himself from the corporation and divests himself of all its stock that he owns. See the transcript T-27 at Page 4.
>
> After making findings of fact and conclusions of law, Judge Palmer concluded as follows: I have followed the Department's policy and have determined that despite the fact that Henry Dei otherwise has an excellent reputation among his professional, social, and business associates, he has nonetheless committed one of the most egregious violations imaginable under the Meat Inspection Act. He endangered the physical health and well-being of respondent's customers by his surreptitious addition of a deleterious chemical substance to the sausage prepared and distributed by his company. The criminality of this conduct far outweighs his otherwise excellent reputation and respondent's otherwise good record both before and since. Therefore, Federal meat inspection should be withdrawn unless Henry Dei becomes disassociated with the plant. See the transcript T-27 at Page 10.

In dismissing plaintiffs' appeal and denying their Motion for leave to appeal out of time, the Judicial Officer, as noted supra, considered the merits so as to avoid the neces-

sity for a remand should a Federal Court reach the merits as I have. . . .

* * * * * * *

While I do not agree that Mr. Dei's reputation in the business community and among his family and friends as well as his "blemish-free record" both before and after the crimes for which he was convicted should be weighed as a "zero" against his conviction in determining fitness under the Act, I find that the Secretary's decision that plaintiff's job-related conviction outweighed the evidence of mitigating circumstances is neither arbitrary nor capricious on the record before me.

While the record is replete with evidence of Plaintiff Dei's good character, there can be no argument that the felony conviction in question is job-related and thus at the heart of any determination of fitness under the Act. Although the Act permits withdrawal of inspection services by the USDA upon conviction of any felony where there is a finding of unfitness, this is not just *any* felony. I agree that it would be improper for the Secretary to equate another sort of felony conviction with unfitness automatically. Here, however, the Secretary was presented with a felony conviction for willfully distributing adulterated meat products. More than impressive character testimony is necessary to outweigh the implications of unfitness which inhere in a job-related conviction such as the instant one.

I recognize that Plaintiff Dei is in the "twilight" of his business career at age 75. I recognize as well that Plaintiff Toscony Company needs Mr. Dei as much as he needs it. I recognize, too, that in light of these facts and the mitigating evidence introduced at the hearing the sanctions imposed are severe insofar as he is concerned. I am not unsympathetic to Mr. Dei, but I am compelled to conclude that the sanctions imposed are neither arbitrary or capricious in light of the record herein and the public's interest in health and maintaining high standards of food preparation and distribution which are reflected in the Act.

As shown above, the first district court decision in *Toscony* is a square holding affirming the Judicial Officer's *per se* approach where the felony conviction strikes at the heart of the meat inspec-

tion program. The second district court decision in *Toscony*, which resulted from a voluntary decision by the Assistant United States Attorney to have the case remanded for consideration of the mitigating circumstances, is a significant holding that it is not arbitrary or capricious for USDA to determine that more than impressive character testimony and blemish-free record before and after the felony involved is required to outweigh the implications of unfitness which inhere in a "job related" conviction that strikes at the heart of the meat inspection program.

5. Utica Packing Company.

The *Utica* case evoked seven separate decisions, which must be reviewed in sequence in order to understand fully and interpret properly the views set forth in later decisions.

(a) Judicial Officer's Original Utica Decision.

In *In re Utica Packing Co.*, 39 Agric. Dec. 590 (1980), *aff'd*, 511 F. Supp. 655 (E.D. Mich. 1981), *remanded*, 705 F.2d 460 (6th Cir. 1982) (unpublished), *decision on remand*, 43 Agric. Dec. ___ (Nov. 18, 1982), *final decision on reconsideration*, 43 Agric. Dec. ___ (Mar. 20, 1984), *aff'd*, No. 80-72742 (E.D. Mich. Mar. 12, 1985), *reversed and remanded*, No. 85-1324 (6th Cir. Jan 13, 1986), the Judicial Officer withdrew meat inspection service indefinitely from respondent, but suspended the withdrawal on the condition that David Fenster became disassociated from respondent within 90 days and sold his stock within one year.

The withdrawal of inspection was based on the fact that David Fenster, respondent's president and half owner, was convicted of four felonies under 18 U.S.C. § 201(b) [9] for corruptly giving $200 on

[9] § 201. *Bribery of public officials and witnesses*

. . . .

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty . . .

. . . .

Continued

four separate occasions to Dr. Reed, the supervisor of five or six lay meat inspectors, who, together with Dr. Reed, inspected meat at respondent's plant. *United States* v. *Fenster*, 449 F. Supp. 435 (E.D. Mich. 1978). The felony convictions involved proof that the payments were made to influence inspection at the plant, i.e., to reduce the number of line-stoppages by the inspectors, and to give respondent the benefit of the doubt with regard to hogs of questionable soundness. (As in the present case, Dr. Reed contacted other authorities and was equipped with a concealed tape recorder which recorded David Fenster's payment conversations.)

Even though the felonies occurred before the Department issued its *per se* Policy Statement relating to bribery and related offenses (see subsection 1, *supra*), the Judicial Officer applied a *per se* approach since the felonies struck at the heart of the meat inspection program, and refused to consider respondent's mitigating circumstances. Moreover, he did not indicate even by way of *dicta* his views as to the mitigating circumstances, so a remand would be necessary in the event a reviewing court disagreed with his *per se* approach.[10]

The Judicial Officer adopted, in part, the ALJ's findings and conclusions, which referred to respondent's mitigating evidence as follows (39 Agric. Dec. at 598):

> On the basis of a first reading of *Norwich*, respondent was permitted to introduce considerable evidence establishing that:
>
> 1. Mr. Fenster's reputation in his community, despite his conviction by the United States District Court, is excellent;
>
> 2. His bribing of the Veterinarian-Inspector was apparently aberrant behavior for him resulting from: a) serious health problems, b) exacerbation of old psychic injuries while a victim of the Nazi

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Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

[10] The omission of such *dicta* here and in the first *Toscony* decision was purposeful, so that the Department could seek certiorari if the *per se* approach was reversed on appeal. However, since the Department did not avail itself of that opportunity, to obviate the need for a remand if the *per se* approach is again disapproved, in this case and all future cases (until the legality of the *per se* approach has been definitively decided), I will indicate my views as to the mitigating circumstances (as was done in *Wyszynski*).

Holocaust, and c) misapprehensions concerning the motivation of various inspectors who had undertaken stricter enforcement of Federal Meat Inspection Act requirements; and,

3. The problems which led to his aberrant behavior have largely disappeared leading the U.S. Veterinarian who serves as Area Supervisor to file an official report, on October 15, 1979, advising the Director of Meat and Poultry Inspection that the respondent plant had, since December of 1978, established "a clean meat program" and "now is producing very clean hogs and plant management can be proud of their product."

On subsequent readings of *Norwich*, however, I have become convinced that its essential holding renders immaterial the consequent finding that recurrence is unlikely because of the general excellence of Mr. Fenster's character and reputation and the elimination of the conditions and motivations which led to the commission of the felony.

In holding that the felony convictions involved in *Utica* prove that respondent is unfit to receive meat inspection, so long as David Fenster is associated with respondent, the Judicial Officer stated (39 Agric. Dec. at 602):

In the present case, respondent's president and half-owner was convicted under 18 U.S.C. § 201(b) of bribing the supervisor of the meat inspectors at respondent's plant on four separate occasions. The Court explained that 18 U.S.C. § 201(b) requires that the bribe be given "corruptly" to "influence a public official to depart from conduct deemed essential to the public interest." The Court stated that "[i]n light of these standards, the Court is satisfied that the facts established at trial bespeak beyond a reasonable doubt a violation of § 201(b)." [Footnote omitted.]

If a felony conviction by a person responsibly connected with the recipient of meat inspection service is ever to form the basis for a determination that the recipient is unfit to receive meat inspection service, the felony conviction in this case requires that determination. That is, unless the statutory language is meaningless and is never to be applied, it must be applied in this case. There can be no other type of felony conviction which would more clearly establish that the recipient is unfit to receive inspection

service than the conviction involved in the present proceeding. Since I believe that Congress meant what it said and intended for the discretionary authority to be applied in the case of some types of felonies, I have no alternative but to determine that the respondent is unfit to receive inspection service because of Mr. Fenster's felony conviction.

The Judicial Officer explained that mitigating circumstances would be relevant and would be considered in some cases, such as *Norwich* (hijacked beef), discussed in subsection 2, *supra*, but not in the case of bribery convictions which strike at the "heart of the meat inspection program." He stated (39 Agric. Dec. at 602–04):

> In addition, in view of the nature of the felony conviction involved in this proceeding, it is not appropriate to consider other facts and circumstances as to Mr. Fenster's reputation in the community or as to present conditions at respondent's plant. Since Congress clearly indicated that some recipient of inspection service will be found unfit to receive inspection *because* a responsibly connected person was convicted of a particular felony, if that language is ever to be applied and given meaning it must be applied in this case. In this case the felony conviction by itself requires a determination that respondent is unfit to receive inspection service.
>
> This is not inconsistent with the holding in *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396 (1979) (attached as an appendix to this decision), . . . [*aff'd*, No. H79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982)], in which it was said:
>
> > Although only the felony conviction affords a jurisdictional basis for withdrawing inspection services from respondent, once the jurisdictional basis is met consideration can be given to any other relevant circumstances, favorable and unfavorable. Accordingly, it is appropriate to consider the evidence offered by respondent that aside from the two convictions, Alan Roessler's reputation in the community is good, and he has conducted himself and his business affairs in a responsible and exemplary manner. On the other hand, it is appropriate to consider that Alan Roessler was willing to commit a second crime to obtain inspection services for his plant.

In the *Norwich Beef* case, the felony which afforded the jurisdictional basis for withdrawing inspection service involved the receipt of a truckload of stolen beef. Since that felony is not directly involved with meat inspection, all of the facts and circumstances had to be considered to determine whether the recipient of meat inspection was unfit to receive inspection because of that type of felony conviction.

But in the present case, the felony conviction relates to the heart of the meat inspection program. Respondent's president and half-owner was convicted of "corruptly" giving money to the supervisor of the meat inspectors at respondent's plant under a statute which "is to discourage one from seeking an advantage of attempting to influence a public official to depart from conduct deemed essential to the public interest" (Finding 4, *supra*). In view of the type of felony involved in the present case, there is no need to consider any other circumstances in order to determine whether the conviction of this felony renders respondent unfit to receive inspection services.

It would similarly be inappropriate to consider whether it is likely that Mr. Fenster will again attempt to bribe a meat inspector. The statute indicates that at least in the case of some felonies, meat inspection is to be withdrawn *because* a responsibly connected person was convicted on one occasion of the felony. As stated above, if that statutory language is ever to be applied, it must be applied here.

In effect, respondent wants a second chance before the remedial provisions of the Act are applied. But even where the public health is not involved, *i.e.*, where licenses are suspended or revoked for violations of other regulatory statutes, the second chance doctrine does not apply where a violation was wilfully committed. 5 U.S.C. § 558(c).

Where a serious and wilful violation of a regulatory statute administered by this Department is found to have been committed, it is the consistent policy of this Department to impose a remedial sanction without regard to the respondent's present compliance with the Act and without making any determination that it is likely that respondent will

again violate the Act in the future.[5] No second chance is given. There is even less reason for giving respondent a second chance where the public health is at stake as in this case.

If a second chance were to be given to violators of the Department's regulatory programs even where the first violation was willful and serious, the remedial statutes would be rendered ineffective. It is a rare case where the violator has not ceased violating by the time the final order is issued. It is a rare case where the violator cannot produce some witnesses who regard his reputation as good irrespective of the violation. It is a rare case where the violator would not appear to be truly sorry for his misconduct and indicate that the violation will never again be committed. Accordingly, unless we were to adopt a second chance policy as to all of the Department's regulatory programs (which is not contemplated), there is no basis whatever for adopting it in this proceeding where the public health is at stake.

(b) District Court's First Utica Decision.

On appeal to the United States District Court, Judge Taylor upheld the Department's *per se* approach, finding "no abuse of discretion in the ensuing determinations that plaintiffs' evidence in impeachment or mitigation of the convictions was irrelevant or immaterial;" and agreeing with the Judicial Officer that "the evidence which plaintiffs presented on Fenster's present reputation and *Utica's* present plant conditions, is equally irrelevant to the application of the conviction-suspension provision of section 671" (511 F. Supp. at 665). The following excerpt sets forth Judge Tay-

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[5] *E.g., In re Sterling Colo. Beef Co.*, 39 Agric. Dec. [184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980)]; *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1387-88 (1979), [*aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981)]; *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 800 (1978) (remand order), [*final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1417 (1984)]; *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1530 (1977); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1218-21 (1977), *aff'd*, Nos. 77-2722 and 77-2979 (9th Cir. Apr. 7, 1980) (2-1 decision); *In re Catanzaro*, 35 Agric. Dec. 26, 35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Shatkin*, 34 Agric. Dec. 296, 313 (1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 135, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 62, 81, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

lor's views upholding the Department's *per se* approach (511 F. Supp. at 661–65):

> In Arguments I and II of their brief, plaintiffs argue that the Secretary is authorized to withdraw inspection services under 21 U.S.C. § 671 only when the evidence "establishes," and a finding is made, that such withdrawal is necessary to effectuate the purposes of the Chapter; and further that the specific requisite finding would be that unwholesome meat would otherwise be sold by plaintiffs in this case. This argument devolves from plaintiffs strained reading of the opening language of § 671 that: "The Secretary may (*for such period, or indefinitely, as he deems necessary to effectuate the purposes of the Act*) refuse to provide, or withdraw, inspection services. . . ." This argument also constituted one facet of plaintiffs claim against the adequacy of the administrative complaint. It must fail because it is a twisted and improper construction of plain statutory language; because Congress clearly enacted § 671 on the basis of a *congressional* finding that participation of persons convicted of certain crimes in the program created an unwanted risk of the introduction of unwholesome meats into commerce, in violation of the above-quoted congressional purpose; and because the Judicial Officer did in fact make the finding required by section § 671 that "In view of the serious nature of the felony conviction in this case, which strikes at the heart of the integrity of the federal meat inspection program, an *indefinite withdrawal* of inspection service is appropriate to protect the public health, unless Mr. Fenster is disassociated from respondent." [p. 22, Judicial Officer's Decision.] That finding is supported by substantial evidence on the whole record, in accordance with the above-discussed law, and need not be based upon "established" facts as plaintiffs argue here. It is also a reasoned and non-arbitrary exercise of the Secretary's discretion on duration of a suspension. It articulates a rational connection between the facts found and the choice made, in accordance with *Bowman, supra.*
>
> . . . As this court discussed, *supra*, concerning the adequacy of the complaint herein, Congress has specifically removed from this conviction-suspension section any necessity to find those facts relevant to those other sections pertaining to the wholesomeness of a participant's meat product. The Secretary need not re-establish the need for the

law itself in every case heard, with findings that a person suspendable under § 671 also currently sells unwholesome meats and is therefore suspendable under other sections. Such an interpretation would render § 671 a nullity. In enacting § 671 Congress has declared that, in order to effectuate the purposes declared in the above-quoted preamble, there are two types of criminal convictions which render a program participant unfit to continue in the industry; any felony, or two lesser crimes undermining the national interest in wholesome, unadulterated foods. Implicit is the congressional finding that the likelihood of such persons introducing unwholesome meats into commerce in the future is unacceptably strong, *regardless* of the quality of their meats at the time of the adjudication.

So the purpose of the hearing accorded the participant under § 671 is (1) to determine the actuality of a conviction and the status of the person convicted as a participant in the program or responsibly connected therewith; (2) to ascertain the elements of the crimes, if not felonies, and whether they are such as the statute describes as rendering a participant unfit; (3) to establish the duration of suspension necessary to effectuate the purposes of the act. On the issue of duration the elements of the felony committed are also relevant to a determination of what is necessary to effectuate the act. None of the issues to be heard or decided under § 671 make relevant plaintiffs' arguments, or evidence, that the hogs now being sold are wholesome. Congress has stated that this section shall have no effect on any other provisions for withdrawal of services based upon unwholesomeness.

The convictions on which this proceeding was initiated were four felony counts, each of which constituted an attempt to subvert the purposes of the act and facilitate the sale of at least arguably unwholesome food. Therefore, plaintiffs were plainly suspendable by *both* of the standards set out in § 671. The order of indefinite suspension, accordingly, cannot be said to be arbitrary, capricious, or an abuse of discretion. Indeed, the order has been carefully tailored to minimize its economic impact on Utica, either by the sale of Fenster's stock (over the duration of a year) or his withdrawal from active participation (after 90 days).

* * * * * * *

The Administrative Decisions also rely upon the testimony of Dr. Robert Gonter, the Director of the Evaluation and Enforcement Branch of the Compliance Division of the Food Safety and Quality Services of the Department of Agriculture. . . . His expert opinion was that inasmuch as the meat inspection service must rely considerably upon the integrity of plant management in effectuating the meat inspection program, he sought suspension in this case and it has become departmental policy to seek suspension in all cases of convictions involving bribery of federal meat inspection personnel. . . .

. . . Much of plaintiffs' evidence at the Administrative level constituted an attempt to mitigate or impeach the significance of Fenster's bribery convictions, or was related to the alleged current wholesomeness of plaintiffs' plant and the meats processed therein. To that extent it was irrelevant and immaterial, under § 671. . . .

. . . Plaintiffs' arguments that Fenster's bribes were futile in effectuating the sale of unwholesome meats are similarly self-defeating, and irrelevant as well. The evidence of probable economic loss to this community if Utica were to close is also, although unfortunate, irrelevant. That argument also reflects plaintiffs' continued adherence to the mentality which led to an offer of cash to a United States Veterinarian, in the first place. It is a refusal to acknowledge the declaration of our federal government, through Congress, that our interest in wholesome meats as a nation is superior to our economic interests, as individuals. All of plaintiffs' evidence taken together, including his character evidence, if considered relevant, is insufficient to render *insubstantial* the evidence on which the Secretary has based his rational decision that a suspension of Utica of indefinite duration is proper under § 671 if Fenster retains any responsible connection with the firm.

* * * * * * *

. . . It appears that, at the inception of these administrative proceedings, the ALJ advised the parties that, in accordance with an earlier Judicial Officer's Opinion, *In Re Norwich Beef Company*, 38 Ag.Dec. 380 (1970), he would hear plaintiffs' evidence of the circumstances surrounding

Fenster's felony convictions and his present reputation in the community. Accordingly, plaintiffs presented such evidence, which has been discussed *supra*. In his subsequent decision however, the ALJ noted plaintiffs' mitigation and character evidence and concluded that surrounding circumstances were not relevant, where the very nature of the felony conviction itself were so directly antithetical to the integrity of the program and the purposes of the act. [Appendix P. 127]. The Judicial Officer wrote, on this point:

> In view of the type of felony involved in the present case, there is no need to consider any other circumstances in order to determine whether the conviction of this felony renders respondent unfit to receive inspection services.
>
> It would similarly be inappropriate to consider whether it is likely that Mr. Fenster will again attempt to bribe a meat inspector. [Appendix p. 152].

The Judicial Officer thereafter likened plaintiffs' evidence and arguments to a request for a "second chance," and noted that:

> It is a rare case where the violator cannot produce some witnesses who regard his reputation as good irrespective of the violation. It is a rare case where the violator would not appear to be truly sorry for his misconduct and indicate that the violation will never again be committed. (Appendix p. 154).

This court first notes that plaintiffs were not prejudiced by the ALJ's permitting them to introduce evidence and argue theories which were later determined to be irrelevant or incompetent. Full and fair opportunity to present their case was provided, and there is no claim of the exclusion of any evidence which plaintiffs felt was pertinent to their presentation on the record below. This court further finds no abuse of discretion in the ensuing determinations that plaintiffs' evidence in impeachment or mitigation of the convictions was irrelevant or immaterial; and indeed this court has made that same finding, in evaluating the substantiality of the evidence which supports the administrative conclusion, *supra*. Similarly, the evidence which

plaintiffs presented on Fenster's present reputation and Utica's present plant conditions, is equally irrelevant to the application of the conviction-suspension provision of § 671: and if it were considered relevant it would not render insubstantial that evidence which supports the decision made. That is the essence of the above-quoted rumination of the Judicial Officer on the weight to be accorded the testimony of character witnesses in such cases.

(c) Circuit Court's First Utica Decision.

Utica Packing Company and David Fenster appealed the adverse decision of the district court upholding the Department's *per se* approach to the United States Court of Appeals for the Sixth Circuit. The circuit court held that "the Judicial Officer erred in refusing to consider mitigating circumstances," and remanded the proceeding to the district court, for remand to the Judicial Officer. *Utica Packing Co.* v. *Bergland*, 705 F.2d 460 (6th Cir. 1982) (unpublished). After discussing the decisions by the Judicial Officer and the district court, the circuit court gave the following reasons for remanding the case (slip op. at 5):

> On appeal, Fenster's principal argument is that the Judicial Officer erred in refusing to consider mitigating circumstances. We agree. Mitigating circumstances are not immaterial or irrelevant, and may be considered. Whether a particular conviction is itself sufficient to warrant withdrawal of inspection services depends upon the facts underlying the conviction. The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. *See Wyszynski Provision Co., Inc.* v. *Sec. of Agriculture*, 538 F. Supp. 361, 364 (E.D. Pa. 1982).
>
> Upon consideration of the briefs, the arguments of counsel, and the record, this Court is of the opinion that this action must be remanded to the district court with directions to afford the Judicial Officer an opportunity to consider the mitigating circumstances advanced by Fenster. This Court expresses no opinion on either the mitigating circumstances or the merits of the action.

In construing the circuit court's decision, we must, of course, consider the court's statements in the light of the factual situation and circumstances under consideration in *Utica*. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be

taken in connection with the case in which these expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821). See, also, *Osaka Shosen Kaisha Line* v. *United States*, 300 U.S. 98, 102–04 (1937); *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626–27 (1935).

Specifically, in construing the circuit court's decision, we must keep in mind the fact that the decision relates to convictions of David Fenster for four felonies under 18 U.S.C. § 201(b) for corruptly giving money to the supervisor of the meat inspectors assigned to Utica's plant, and that the felonies involved prove that the payments were made to influence inspection at the plant. The circuit court quoted the opinion of the district court in Fenster's criminal case that "the evidence of a quid-pro-quo arrangement sufficient to establish a violation of § 201(b) is, in the opinion of this Court, overwhelming" (slip op. at 3). Moreover, the circuit court's views were expressed with respect to the review of a district court decision which upheld the Judicial Officer's refusal to consider mitigating circumstances where the felony convictions strike at the heart of the meat inspection program. In the light of that factual setting, there are three aspects of the circuit court's opinion to be interpreted.

First, did the circuit court *require* the Judicial Officer to consider the mitigating circumstances? The circuit court said that mitigating circumstances "may" be considered, and remanded the case to afford the Judicial Officer "an opportunity" to consider the mitigating circumstances (slip op. at 5). However, the court recognized that "Fenster's principal argument is that the Judicial Officer erred in *refusing* to consider mitigating circumstances," and the court said: "We agree" (slip op. at 5, emphasis added). Hence, here as in *Wyszynski* (see note 8, *supra*), the use of the words "may" and "opportunity" must be regarded as euphemistic, i.e., the court's opinion must be interpreted as *requiring* the Judicial Officer to consider the mitigating circumstances.

The second point (which really requires no interpretation, but is mentioned here only because of a misunderstanding of the Judicial Officer's Remand Decision by the Department's attorneys and the "Replacement Judicial Officer") is whether the circuit court directed the Judicial Officer to decide the case on remand one way or the other. The concluding sentence in the circuit court's opinion states: "This Court expresses no opinion on either the mitigating circumstances or the merits of the action" (slip op. at 5). No plainer statement could be made! The circuit court was not directing the Judicial Officer to decide the case for or against Utica and Fenster, but left the initial determination of that matter entirely to the Judicial Officer.

However, although the circuit court expressed "no opinion on either the mitigating circumstances or the merits of the action," one would have to be particularly obtuse not to discern that the circuit court was indicating that in the *Utica* case, it would be *extremely* likely that Fenster's felony convictions alone would support a determination of unfitness *regardless* of the mitigating facts present. That is, the circuit court said (slip op. at 5):

> Whether a particular conviction is itself sufficient to warrant withdrawal of inspection services depends upon the facts underlying the conviction. The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. *See Wyszynski Provision Co., Inc.* v. *Sec. of Agriculture*, 538 F. Supp. 361, 364 (E.D. Pa. 1982).

The circuit courts knew that the felonies involved in *Utica* did strike at the heart of the policies of the Federal Meat Inspection Act. In fact, there could be no felony that strikes closer to the heart of the policies of the Federal Meat Inspection Act than the felony of corruptly bribing the supervisory meat inspector assigned to a packing plant for the express purpose of influencing the inspection activities at the plant! Hence the circuit court's opinion strongly suggests (notwithstanding its concluding disclaimer) that in *Utica*, it is extremely likely that Fenster's felony convictions "alone will support a determination of unfitness regardless of the mitigating facts present." Accordingly, when I received the remand order in *Utica*, I was confident that if, after considering the mitigating circumstances, I again held that Utica was unfit to receive inspection, I would be affirmed on appeal.

The third point to be interpreted evoked perhaps the strongest intra-USDA disagreement in the 37 years that I have been involved with the Department's regulatory programs. The issue is whether, under the circuit court's opinion, as fairly construed in relation to the factual setting of the case, the court precluded the use of a *per se* approach by the Judicial Officer when he considered the mitigating circumstances on remand, and required the Judicial Officer to consider the mitigating circumstances from the viewpoint that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

If, despite the circuit court's disagreement with the district court (which had affirmed the Judicial Officer's refusal to consider miti-

gating circumstances where the convictions strike at the heart of the meat inspection program), the Judicial Officer were still free on remand to adhere to his original view that where a person has been convicted of corruptly bribing the meat inspector, *no* mitigating circumstances could *ever* outweigh the bribery convictions, the Judicial Officer's decision on remand could have been very short, *viz.*:

Hypothetical Judicial Officer Decision on Remand

> This case is here on remand from the United States Court of Appeals for the Sixth Circuit to consider respondent's mitigating circumstances. I have carefully considered all of the mitigating circumstances, but, as I indicated in my original decision in this case, there are *no possible* mitigating circumstances that can ever overcome the presumption of unfitness resulting from convictions of corruptly bribing the supervisory meat inspector assigned to the plant. Accordingly, I find (again) that respondent is unfit to receive inspection service (unless David Fenster disassociates himself from respondent) notwithstanding the mitigating circumstances presented here.

However, I believe that such an approach would have been censurable conduct. It is the duty of an administrative agency to comply with the court's views on remand, irrespective of how erroneous the agency believes those views to be. As stated in 2 Am. Jur. 2d *Administrative Law* § 767 (1962) (footnotes omitted):

> § 767. *Compliance with court decision.*
>
> The administrative agency has an enforceable duty to comply with the order or judgment rendered on judicial review of its action unless it is void. The lower tribunal's exercise of jurisdiction after remand by the reviewing court is necessarily conditioned by the terms of the judgment on appeal, and the administrative agency is bound to act on and respect and follow the court's determination of questions of law within a reasonable time. However, this does not mean the agency may not indicate disagreement with the court's decision.

In *FPC* v. *Pacific Power & Light Co.*, 307 U.S. 156, 160 (1939), the Court stated:

> [T]here is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so.

Similarly, in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940), the Court stated:

> On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. *Federal Power Comm'n* v. *Pacific Co.*, 307 U.S. 156. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Cf. *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364.

Less the second sentence quoted immediately above be misunderstood, it is worth reviewing the factual situation to which the statement was addressed. In *Pottsville*, the Federal Communications Commission had denied Pottsville a permit to construct a broadcasting station on two grounds, one being that Pottsville was financially disqualified. On appeal, the circuit court held that the Commission's conclusion regarding Pottsville's lack of financial qualification was based on an erroneous understanding of Pennsylvania law, and remanded the case to the Commission "for reconsideration in accordance with the views expressed" (309 U.S. at 139).

By the time the proceeding got back to the Commission, the Commission had pending two rival applications for the same facilities, and determined that all three should be set down for argument "on a comparative basis" (see 309 U.S. at 140). The court of appeals then ordered the Commission to set aside its order directing a comparative hearing and to reconsider the application of Pottsville alone on the basis of the record as originally made and in accordance with the prior views of the court (see 309 U.S. at 140).

That latter action of the court of appeals was set aside on the ground that, although the court of appeals had authority to correct errors of law, and the Commission was bound to act upon such correction, the Commission could still carry out its statutory mandate by considering Pottsville's claim in comparison with the claims of the two rival companies. Nothing in *Pottsville* suggests that the Commission was free to ignore the court of appeals' correction of its error of law, i.e., the Commission was required in the comparative proceeding to follow the court of appeals' view as to Pottsville's financial qualification under Pennsylvania law.

The case of *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1938), which was referred to by the Court in *Pottsville* in the quotation above, was one in which the Labor Board voluntarily requested to withdraw its petition filed in the court of appeals to enforce an admin-

istrative order (because of a recent holding in *Morgan* v. *United States*, 304 U.S. 1 (1938), that deciding officials must themselves consider the evidence before them and not merely rely on a decision prepared by subordinates). The court said in *Ford Motor Co.* (305 U.S. at 373–74):

> It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. . . . The "remand" does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law.

Accordingly, it is clear that when the court of appeals in *Utica* remanded the proceeding to the Judicial Officer, he was required to follow the court's view of the applicable law, no matter how erroneous he believed it to be.

If the Judicial Officer were free under the circuit court's remand order to consider the mitigating circumstances on the basis of his original view that *no* mitigating circumstances could *ever*, in any case, outweigh felony convictions of corruptly bribing the meat inspector, the outcome of the review of the mitigating circumstances would have been a foregone conclusion. No meaningful purpose would have been served by having the Judicial Officer review the mitigating circumstances if he were free to follow his original view. It was that very view that led the Judicial Officer to adopt the *per se* approach in the first place (which regards all mitigating evidence as irrelevant and immaterial in bribery cases), and that led the district court to affirm the *per se* approach in bribery cases on review.

However, when the circuit court disagreed with the Judicial Officer's original approach, and agreed with "Fenster's principal argument . . . that the Judicial Officer erred in refusing to consider mitigating circumstances," since "[m]itigating circumstances are not immaterial or irrelevant" (slip op. at 5), the circuit court must have meant for the review of the mitigating circumstances to be a meaningful review by the Judicial Officer. Specifically, the circuit court's opinion must be construed as holding (by implication) that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to over-

come the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

As in *Wyszynski*, the circuit court in *Utica* gave no reasons why mitigating circumstances are relevant and material, and must be considered. But the circuit court could not have reversed the holding of the district court, which held that the Judicial Officer's use of the *per se* approach in the corrupt bribery case was reasonable, unless the circuit court believed that the Judical Officer's use of the *per se* approach was arbitrary and capricious. And the circuit court could not have believed that the Judicial Officer's use of the *per se* approach was arbitrary and capricious *in a corrupt bribery case* unless, in the opinion of the circuit court, some set of mitigating circumstances in some hypothetical case could be sufficiently strong so as to overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

In other words, the circuit court had no basis for reversing the views of the Judicial Officer and the district court as to the *per se* approach unless the circuit court disagreed with the Judicial Officer's view, affirmed by the district court, that felony convictions of corruptly bribing the meat inspector assigned to the plant so strike at the heart of the meat inspection program that mitigating circumstances are irrelevant and immaterial because no set of mitigating circumstances could ever overcome the presumption of unfitness resulting from such felony convictions. And if the circuit court disagreed with that view of the Judicial Officer, affirmed by the district court, the circuit court must have believed that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to overcome the presumption of unfitness resulting from such felony convictions.

Having said all that, however, intellectual honesty compels me to admit that, theoretically, there would have been another possible basis for overturning the view of the Judicial Officer and the district court. The circuit court could have overturned the Judicial Officer's *per se* approach on the ground that the court lacked sufficient experience to determine whether the *per se* approach is valid or not, i.e., the court could have stated:

Hypothetical Circuit Court Decision

> On appeal, Fenster's principal argument is that the Judicial Officer erred in refusing to consider mitigating circumstances. The Judicial Officer is of the view, affirmed by the district court, that in the case of convictions for cor-

ruptly bribing the meat inspector, the felonies so strike to the heart of the Federal Meat Inspection Program that mitigating circumstances are irrelevant and immaterial because it is impossible for any mitigating circumstances ever to outweigh convictions for corruptly bribing the meat inspector. The Judicial Officer and the district court may be right! But we do not have sufficient experience in this field to know for sure whether they are right or wrong. Therefore, we are not at this time prepared to approve of such a *per se* approach.[11] But neither are we prepared to say now that theoretically, at least, there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions for corruptly bribing the meat inspector.

After we have had more experience with bribery cases under the Federal Meat Inspection Act, we may be prepared to approve a *per se* approach. But until we have had sufficient experience in this area, we will require the Judicial Officer to consider mitigating circumstances, even though we recognize that under his view (which may or may not be correct), he will, *in every case*, regard the mitigating circumstances as insufficient to overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector.

In some future case, we may decide as to the correctness of the Judicial Officer's view that mitigating circumstances are irrelevant and immaterial because it is impossible for any mitigating circumstances ever to outweigh convictions for corruptly bribing the inspector. But we do not have sufficient experience to decide that matter now, and until we do, the Judicial Officer must continue to consider the mitigating circumstances, even though the outcome of his consideration is a foregone conclusion.

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[11] *Cf. United States* v. *McKesson & Robbins, Inc.*, 122 F. Supp. 333, 337 (1954), *rev'd*, 351 U.S. 305, 308–16 (1956), in which the district court stated:

> This court is unwilling, at this stage of case law development of legislatively sanctioned resale price fixing, to hold illegal *per se* fair trade agreements because the producer is also a wholesaler in the absence of showing some injury, inchoate or consummate, to competition.

The Supreme Court, however, held the fair trade agreements to be illegal *per se*. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 308–16 (1956).

If the circuit court had meant that, the court certainly would have expressed those views, in its own language, of course. It is not a fair interpretation of the views expressed by the circuit court to read such doubt into the position of the circuit court. In fact, to contend that the circuit court reversed the Judicial Officer's *per se* approach because the circuit court was not sure whether the Judicial Officer's views were correct or not would, in effect, be accusing the circuit court of judicial illiteracy, i.e., it would be accusing the circuit court of a complete inability to express the view that it was uncertain as to the correctness of the Judicial Officer's view.

However, there is nothing in the circuit court's decision to indicate uncertainty as to the Judicial Officer's view relating to the *per se* approach. The circuit court's decision expresses quite clearly the court's opinion that the Judicial Officer's view, in this respect, is erroneous. Hence it is clear that the only basis the circuit court had for overturning the decision of the Judicial Officer, which was affirmed by the district court, was that the circuit court believed that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

In other words, according to the circuit court, there are two classes of persons who have been convicted of corruptly bribing the meat inspector, (1) those bribers who are fit to receive meat inspection (because of mitigating circumstances), and (2) those bribers who are *not* fit to receive meat inspection. It was the duty of the Judicial Officer on remand to determine which class Utica and Fenster fit into.

To restate the matter under discussion in a different manner so as to focus the issue more sharply, the Judicial Officer's *per se* approach (reversed by the circuit court in *Utica*) is based on the following proposition:

USDA Proposition Supporting Per Se Approach

> Where a person responsibly connected with a packing plant has been convicted under 18 U.S.C. § 201(b) of corruptly bribing the meat inspector assigned to the plant, there is *not* a set of mitigating circumstances that can overcome the presumption that the packing plant is (and will be for the indefinite future) unfit to receive meat inspection so long as the convicted individual is associated with the meat plant.

The USDA proposition is categorical and universal! It is either true in every factual situation, including the situation presenting the most mitigating circumstances that can *possibly* be presented in *any* case, or else it is false. "[A]ll declarative sentences [including propositions] are true or false. . . ." M. Beardsley, *Practical Logic* 4 (1950). False propositions are "propositions which assert either the non-existence of what does exist, or the existence of what does not exist." M. Cohen, *A Preface to Logic* 180 (1944). Since the USDA proposition is so definite and categorical, if there are any mitigating circumstances that can ever outweigh the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant, the proposition is false.

On the other hand, unless there *is* a set of mitigating circumstances that can overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant, the USDA proposition is true! That fact is so obvious that it hardly needs to be stated. In other words, a reviewing court could not believe that the USDA proposition is false unless the reviewing court was of the view that, theoretically, at least, there *is* a set of mitigating circumstances that can overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

As stated in M. Beardsley, *Practical Logic* 282–83, 287 (1944):

> Any statement may be *affirmed* or *denied*. Take any statement—call it "S." To affirm "S" is simply to assert "S." To deny "S" is to affirm another statement, "Not-S," which has the following relationship to "S": (*a*) if "S" is true, then "Not-S" is false, and (*b*) if "S" is false, then "Not-S" is true. . . .
>
> * * * * * * *
>
> . . . Speaking of statements in general, then (including atomic and molecular statements), we shall say that to deny a statement is to assert the *contradictory* of the statement. . . .
>
> * * * * * * *
>
> . . . *[E]very* statement has one, and only one, contradictory.

There are three—and only three—*possible* views that a reviewing court could have with respect to the correctness of the USDA proposition, *viz.*:

1. Agree, i.e., believe that the proposition is true.
2. Disagree, i.e., believe that the proposition is false.
3. Not know whether the proposition is true or false.

As to the first of the three possible views, if a reviewing court agreed with the USDA proposition, it would have to affirm the Judicial Officer's *per se* approach (as was done in the district court's first decision in *Utica* (subsection 5(b), *supra*); and see the district court's first decision in *Toscony* (subsection 4, *supra*)). That is, if the reviewing court agreed with the Judicial Officer that there are *no possible* mitigating circumstances that can *ever* overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant, the reviewing court would have to hold that the *per se* approach is reasonable and lawful, and that mitigating circumstances are never relevant or material where there have been felony convictions of corruptly bribing the meat inspector assigned to the plant.

A reviewing court holding that the USDA proposition is true would not, of course, be setting forth that proposition as its own proposition. It would merely be holding that the administrative officials charged with protecting the public health under the Federal Meat Inspection Act could reasonably and rationally reach the conclusion set forth in the proposition.

The reviewing court would not be approaching the issue from the viewpoint of a Professor of Logic, who would expect verification of the proposition with mathematical certainty,[12] but, rather, from the viewpoint of a judge reviewing an administrative determination, which should be upheld if it has a reasonable and rational basis, is not arbitrary and capricious, and is within statutory limits.

As to the second and third of the three possible views, if the reviewing court either disagreed with the USDA proposition or did not know whether it is true or false, the court would, of course, have to reverse the Judicial Officer's use of the *per se* approach and require the Judicial Officer to consider the mitigating evidence. (These are the *only two possible grounds* for refusing to affirm the

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[12] The formal principles of Logic are not directly applicable to the USDA proposition since it is an *opinion* not subject to verification with mathematical certainty. But the principles of Logic set forth above are useful tools here since they lead to the same result reached by applying common sense.

per se approach as to felony convictions of corruptly bribing the meat inspector assigned to the plant!)

As explained above, there is nothing in the circuit court's decision indicating that it did not know whether the proposition is true or false, and there is no basis for reading into the circuit court's decision any such doubt. Accordingly, the only rational interpretation of the circuit court's first decision, which is in accord with the plain language of the decision, is that the circuit court disagreed with the proposition, i.e., the circuit court believed the proposition to be false.

Since the circuit court's opinion must be construed as disagreeing with the USDA proposition, i.e., expressing the view that the proposition is false, the circuit court is, by necessary implication, asserting the *contradictory* of the proposition (see Beardsley, *supra*, at 282–83, 287). The *contradictory* of the USDA proposition is identical to the USDA proposition, except that the word "not" is removed, *viz.*:

Proposition Necessarily Implied By Circuit Court

> Where a person responsibly connected with a packing plant has been convicted under 18 U.S.C. § 201(b) of corruptly bribing the meat inspector assigned to the plant, there is a set of mitigating circumstances that can overcome the presumption that the packing plant is (and will be for the indefinite future) unfit to receive meat inspection so long as the convicted individual is associated with the meat plant.

There is no way of avoiding this implication! That is, the reviewing court could not believe that the USDA proposition is false unless the reviewing court was of the view that there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from the bribery conviction.

In other words, leaving aside uncertainty as to whether the USDA proposition is true or false (as we must since the court's opinion cannot fairly be interpreted as expressing doubt or uncertainty), either (i) there is not a set of mitigating circumstances that can overcome the presumption of unfitness, or (ii) there is a set of mitigating circumstances that can overcome the presumption of unfitness. The circuit court's reversal of the Judicial Officer's *per se* approach necessarily implies that the circuit court believes that there is a set ofmitigating circumstances that can overcome the presumption of unfitness.

It was the duty of the Judicial Officer on remand to accept the circuit court's (implied) proposition. Specifically, in exercising his

discretion on remand, the Judicial Officer was not permitted to believe (as he previously had) that where there have been felony convictions of corruptly bribing the meat inspector, *no* set of mitigating circumstances can *ever* overcome the presumption of unfitness resulting from the bribery convictions. He was required to take the circuit court's (necessarily implied) view that enough mitigating circumstances can overcome that presumption of unfitness.

In short, the Judicial Officer was required to determine whether Utica and Fenster fit into the class of bribers who are, because of mitigating circumstances, still fit to receive meat inspection notwithstanding the bribery convictions, or whether they fit into the class of bribers who do not have enough mitigating circumstances and, therefore, are unfit to receive inspection.

Analytically, we would have to recognize that even if the circuit court did not disagree with the USDA proposition, or did not know whether it was true or false, the court still could have reversed for two other reasons.

First, theoretically, at least, the court might not have given the matter enough thought to fully understand the issues or to recognize the necessary implication of its decision.

Second, since the circuit court's decision was not to be published, theoretically, at least, the court might have taken a "pragmatic" approach, i.e., without determining a reasonable basis for reversing the *per se* approach, the court might have thought that it could placate Utica and Fenster (and avoid possible Supreme Court review) while having the same result reached after a remand. That is, the circuit court would expect the Judicial Officer to hold Utica unfit on remand, since the circuit court stated that the "more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present," and the circuit court would affirm the Judicial Officer's remand determination if Utica bothered to appeal again (which would not present an issue of any interest to the Supreme Court).

However, it would be highly inappropriate to attribute to the circuit court either a lack of thought and analysis or a conscious decision to take such a "pragmatic" approach.

Accordingly, since the only legitimate grounds for remand were that the court believed the USDA proposition to be false, or did not know whether it is true or false, and the circuit court's opinion cannot be construed as indicating doubt, there is no alternative but to hold that the circuit court's decision necessarily expresses the view, by implication, that the USDA proposition is false. And a holding that the USDA proposition is false necessarily asserts its

contradictory, i.e., according to the circuit court, there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions of corruptly bribing the the meat inspector assigned to the plant.

(d) Judicial Officer's Utica Decision on Remand.

On remand, "with great reluctance and misgiving" (slip op. at 29), the Judicial Officer dismissed the complaint, on the basis of his interpretation (see subsection 5(c), immediately above) of the circuit court's remand decision. *In re Utica Packing Co.,* 43 Agric. Dec. ___ (Nov. 18, 1982).[13] It is important to note that the decision on remand has two aspects, *viz.,* (1) the Judicial Officer's *interpretation* of the circuit court's decision (see subsection 5(c), immediately above), and (2) the *application* of that interpretation to the particular facts involved in *Utica.* In dismissing the complaint, the Judicial Officer stated (slip op. at 10–29):

> In addition to considering the effect of Fenster's bribery attempt at respondent's plant, we must consider the cancerous nature of bribery. Unless stopped, bribery can spread until it is the routine course of business in a large area. See *In re National Meat Packers, Inc.,* 38 Agric. Dec. 169, 172–73 (1978), in which it is explained:
>
> > In southern California between 1974 and 1976, 17 meatpacking houses and 35 employees of meatpackers were indicted and convicted of either bribery or illegally giving gratuity to meat graders. The involved plants constituted "a major part of the slaughtering companies or those using Federal grading service" in southern California (Tr. 19).
> >
> > Sixteen Federal meat graders were indicted and convicted of receiving money.
>
> Since meat inspectors cannot observe every activity at a plant by every employee which affects the wholesomeness of the product, the inspection service must be able to depend on the reliability and integrity of the plant's management to be assured that the health and welfare of con-

[13] Although all decisions by the Judicial Officer are printed in Agriculture Decisions for the month in which they are issued, the decision was (erroneously, I believe) made not to publish the Judicial Officer's Decision and Order on Remand in this case. (Presumably, the Department planned to print the decision in the March 1984 volume of Agriculture Decisions, which will contain the ruling on reconsideration. The Department is about 3 years behind in printing Agriculture Decisions.)

sumers will be protected. *See In re Norwich Beef Co.*, 38 Agric. Dec. 380, 394-96 (1979), *aff'd*, No. H 79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982).

Also, meat inspectors are relatively low paid Federal employees. Packers have, at times, paid weekly (tax free) bribes to meat inspectors or graders equal to or more than their Federal take-home pay (*see In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 171-72 (1978)). Accordingly, if we are to be assured of having wholesome meat and meat food products from a particular plant, we must know without question that the plant's management will not attempt to bribe any inspector at the plant.

It is the view of the Administrator of the Department's meat inspection program and the Judicial Officer that every person convicted under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector, with the necessary proof of criminal knowledge and purpose, is unfit to receive Federal meat inspection, irrespective of any mitigating circumstances. That conduct alone so strikes at the heart of the meat inspection program as to prove conclusively, without regard to any mitigating circumstances, that the convicted felon is unfit to receive Federal meat inspection.

Accordingly, in the present case, the Judicial Officer held that respondent was unfit to receive Federal meat inspection because of David Fenster's bribery convictions, irrespective of any mitigating circumstances. The Judicial Officer's decision made it clear that mitigating circumstances are to be considered in the case of felonies not striking at the heart of the meat inspection program. Specifically, the Judicial Officer held (*In re Utica Packing Co.*, 39 Agric. Dec. 590, 603 (1980)):

* * * * * * *

In a thoughtful and well-reasoned decision, the District Court affirmed the Judicial Officer's original decision in this proceeding. *Utica Packing Co.* v. *Bergland*, 511 F. Supp. 655 (E.D. Mich. 1981).

I believe that the original administrative decision in this case is correct, notwithstanding the reversal by the Court of Appeals. The decision by the Court of Appeals in this

case will assure the distribution of unwholesome or adulterated meat in some instances. That is, under the Sixth Circuit's opinion, if there are enough mitigating circumstances, a felon convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector must, nonetheless, be determined to be fit to continue to receive Federal meat inspection. Since the judicial system has not had outstanding success in predicting which criminals will repeat their criminal conduct, we are not likely to have any better batting average in predicting which felons convicted of bribing a meat inspector will not repeat the unlawful conduct, or otherwise attempt to subvert the meat inspecton program.

It is true that the Court of Appeals' decision indicates that in the case of a bribery conviction, it is "likely" it will support a determination of unfitness regardless of the mitigating facts present. Specifically, the Court states (slip op. at 5):

> The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present.

Although that suggests that the great majority of persons convicted of bribery under 18 U.S.C. § 201(b) will be found unfit to receive Federal meat inspection regardless of the mitigating facts present, it also suggests that some mitigating facts would outweigh a bribery conviction. Otherwise, the Court would not have remanded the present case to consider the mitigating circumstances, notwithstanding Fenster's convictions for bribing the supervisory meat inspector.

In other words, the Court's statement quoted above was made in this case where the Judicial Officer had held that Fenster's conduct so strikes to the heart of the policies of the Federal Meat Inspection Act that no possible mitigating circumstances could outweigh the felony convictions in determining respondent's fitness to receive Federal inspection. The Court of Appeals did not agree.

The Court's decision must, of course, be followed here—but not in cases in which an appeal does not lie to the Sixth Circuit.

For the reasons set forth above, the decision of the Court of Appeals in this case will not be followed in any case in which an appeal does not lie to the Sixth Circuit. In all cases in which an appeal does not lie to the Sixth Circuit, anyone who is convicted under 18 U.S.C. § 201(b) of the felony of bribing a Federal meat inspector will automatically be found unfit to receive Federal inspection, and Federal inspection will be withdrawn indefinitely from the plant (unless it is appropriate, as in the present case, to continue inspection if the convicted felon is completely disassociated from the plant).

However, since other reviewing courts might agree with the Sixth Circuit's decision in the present case, the Administrative Law Judges should in every case receive evidence as to mitigating circumstances and indicate their opinion as to such circumstances.

Respondent relies on a number of so-called mitigating circumstances. David Fenster testified that prior to offering the bribes, he felt that the inspectors were enforcing the rules unfairly, arbitrarily and in a discriminatory manner at respondent's plant. He was receiving offers to buy his plant, and he believed that the Federal inspectors might be part of a conspiracy to induce him to sell; that they might be stopping his production line unnecessarily so as to earn overtime pay; and that some of the inspectors were harassing him because of a personal dislike for him.

There is much evidence in the record to demonstrate the reasonableness of Mr. Fenster's beliefs as to the inspectors. His production line was stopped by the inspectors for an average of two or more hours a day during the period preceding the bribes. This not only caused respondent to have to pay over 100 employees for their lost time, but, also, frequently prevented the plant from completing the killing of the hogs that arrived by truck each day.

On many days during the summer of 1976 (preceding the bribes in November and December 1976), more than 15 or 20 hogs died on the trucks because the line had been stopped by the inspectors (Tr. 277-280). Some Federal inspectors felt that inspection at respondent's plant was more strict than at its competitors' plants, and David Fenster's son observed that at a competitor's plant the line

was not stopped for conditions which he felt were far worse than at respondent's plant.[2]

[2] Weighty evidence proves that much corrective action by the Inspectors at Utica was justified. A Compliance Review Staff gave respondent's plant the lowest possible rating in September 1976. If conditions were worse at competitor's plants, inspection there might have been too lax. Also, the record suggests that other plants have a "kick-out" rail which allows animals to be set aside without stopping the line. The addition of a "kick-out" rail should be explored by respondent.

Respondent contends that the ring leader of the inspectors harassing the plant was John Stadler, a close friend of Dr. Reed, who received the bribes in this case. John Stadler "hated the black people" at respondent's plant (Tr. 1026); he "had no use for blacks" (Tr. 1053). He also "hated Yugoslavians" (Tr. 1053), who comprise a large portion of respondent's work force. He referred to David Fenster's partner as "a stupid Yugoslavian" (Tr. 1025–26).

David Fenster is a Jew, and inspector Stadler made such obscene and derogatory comments about Jews that decency precludes me from quoting his comments or even giving the record citation (counsel for both parties are aware of the transcript reference). In particular, Inspector Stadler had a "personal dislike or hatred toward David Fenster" (Tr. 1050–51).

Inspector Stadler, Dr. Reed (who received the bribes) and another inspector "would go to a bar after work and think of ways to set up Mr. Fenster, or cause problems to him the following day at the plant," to "make it rough on the plant" (Tr. 1055).

These circumstances lend support to the view that David Fenster at least had a reasonable basis for believing that he was being harassed by some of the inspectors and subjected to discriminatory treatment.

Respondent complained frequently to Dr. Reed's supervisors, but conditions did not change at the plant, and Fenster felt that he was being given the "run around" by Dr. Reed's supervisors.

Notwithstanding these circumstances, they are no excuse for bribery. An individual who feels that he is being mistreated by Federal inspectors (or who actually is suffering mistreatment from inspectors) cannot take the matter into his own hands by offering bribes. He must

pursue the administrative avenues which are available. If his initial efforts are unsuccessful, he must continue bringing his problem to the attention of higher officials until he reaches the top. If all that fails, bribery is still inexcusable.

If an individual having difficulty because of Federal inspectors (real or imaginary) could solve his problems by bribing the inspectors, it would lead to the public interest being subverted, not only at that individual's plant, but at other plants, where the practice would soon spread.

Accordingly, I would give no weight to this circumstance in determining respondent's fitness to receive Federal meat inspection, in the absence of the Sixth Circuit's opinion in this case.

Respondent also contends that Fenster's conduct was aberrant behavior resulting from particularly stressful conditions and exacerbation of old psychic injuries while a victim of the Nazi Holocaust. David Fenster witnessed the killing of his father by the Nazis, and, together with his mother, sister, and brother, he escaped from a train en route to a gas chamber. He never saw his family again. He was recaptured and taken to a concentration camp before being liberated in 1945.

David Fenster undoubtedly was under great stress and emotional strain at the time of the bribery in 1976. In 1975 he lost the sight of his right eye, after several operations. For months after the operation, he had headaches and nerve problems, requiring him to take sleeping pills, tranquilizers, and other drugs. Then his left eye started to go bad in 1976. He consulted numerous doctors, receiving conflicting advice as to the desirability of surgery, which subjected him to great emotional stress. He had additional problems because his partner drank heavily. His problems with meat inspectors, referred to above, further contributed to his stress.

* * * * * * *

Although David Fenster deserves much sympathy for the many problems referred to above, they do not excuse bribery of a Federal meat inspector, and do not cause me to change my views with respect to respondent's unfitness

to receive meat inspection so long as David Fenster is associated with respondent.

* * * * * * *

Accordingly, these mitigating circumstances would have no weight with me in determining respondent's fitness to receive Federal meat inspection, in the absence of the Sixth Circuit's opinion in this case.

Respondent also relies on the prior good record of respondent and David Fenster, and his present good reputation, despite the conviction. Here again, I give more weight to the facts involved in the felony convictions than to opinions as to respondent and Fenster. I have reviewed too many files where highly respected persons testified as to a person's excellent character and reputation, despite unchallenged evidence in the file proving that he engaged in serious, fraudulent conduct, to attach any significant weight to such testimony.

Accordingly, I would give no weight to these circumstances in determining respondent's fitness to receive Federal meat inspection, in the absence of the Sixth Circuit's opinion in this case.

Respondent also relies on the fact that it is not now having any problems with the meat inspection program. In fact, on October 15, 1979, the U.S. Veterinarian who serves as Area Supervisor filed a report advising the Director of Meat and Poultry Inspection that the respondent plant had, since December of 1978, established "a clean meat program" and "now is producing very clean hogs and plant management can be proud of their product."

Although this is the most substantial of the mitigating circumstances relied on by respondent, it would not begin to tip the scales in respondent's favor, in the absence of the Sixth Circuit's opinion in this case. The argument that respondent is not now violating the Act is made in almost every disciplinary case that comes before the Judicial Officer, and is almost always true. Only a foolhardy respondent would continue to violate a regulatory statute, after a complaint is filed, pending the outcome of the litigation. Exemplary conduct during the course of litigation is not as

revealing or weighty as conduct occurring before the spotlight of litigation is turned on a respondent.

* * * * * * *

Accordingly, in the absence of the Sixth Circuit's opinion in this case, I would give no weight to respondent's conduct after the complaint was filed in this case.

Respondent also relies on the length of time since Fenster's illegal conduct. It is indeed unfortunate that so much time has elapsed. The bribery occurred at the end of 1976. The indictment was returned and filed on November 15, 1977. The criminal proceeding was concluded August 22, 1978. The criminal conviction formed the basis for the present administrative proceeding, which was initiated on October 18, 1978. The Administrative Law Judge decided the case February 11, 1980, and the Judicial Officer decided the case June 25, 1980. The remand order was received in September 1982. Although this six year period since the violation is most unfortunate from the standpoint of the public interest in assuring a wholesome meat supply, it does not afford the basis for finding that respondent is fit to receive meat inspection with David Fenster still associated with respondent.

Accordingly, I would give no weight to this circumstance, in the absence of the Sixth Circuit Court's opinion in this case.

Respondent contends that withdrawal of meat inspection would adversely affect its employees and the community. But under the terms of the order in this case, there is no need for inspection service to be withdrawn if David Fenster becomes disassociated with respondent. Although Mr. Fenster feels that he is indispensable to the successful operation of the plant, it seems likely that someone could be found to fill his role. In any event, however, it has consistently been held by the Judicial Officer that the public interest must prevail, and that an appropriate order must be issued, irrespective of any local damage to respondent, his employees or the community. [Footnote omitted.]

Accordingly, I would give no weight to this circumstance, in the absence of the Sixth Circuit's opinion in this case.

Two other circumstances that I regard as totally irrelevant, but which should be mentioned if we are to look at all the facts underlying the conviction, should be mentioned.

First, although any conviction under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector strikes so closely to the heart of the Federal meat inspection program that it proves conclusively to me that the convicted felon is unfit to receive meat inspection, nonetheless, there are, of course, degrees of bribery. In this case, the bribery was not as flagrant as it could have been. That is, although Mr. Fenster did not want the line stopped as often, there is some basis for his belief that the line was being stopped unnecessarily. Also, during the bribery conversations, Mr. Fenster made it clear to Dr. Reed that he wanted a clean plant, and that he wanted Dr. Reed's help in achieving that objective. As to tuberculosis hogs, although Mr. Fenster suggested several times during the bribery conversations that borderline hogs should be passed, he also stated on many occasions during the same bribery conversations that he had no right to tell Dr. Reed what to do as to tuberculosis hogs, and that Dr. Reed should use his own judgment as to them.

Second, the testimony in this proceeding indicates that the bribes would not have been given if Dr. Reed had not misunderstood a comment by David Fenster, and later hinted strongly to Fenster that he wanted money from Fenster. Fenster testified that in September 1976 when Dr. Reed was in Fenster's office, Fenster asked him "What do you want?" (Tr. 760). By this, Fenster meant, "What am I doing wrong? What do you want from me? What do you want me to do?" (Tr. 760).

Dr. Reed took Fenster's statement as suggesting a bribe, went to the FBI, got wired-up with a tape recorder, and then went back to Fenster's office on November 24, 1976. Dr. Reed initiated the discussion by saying, "Well, you told me, you asked me what I want?" (Tr. 772). Dr. Reed then said, "Well you know"—"You know what" (Tr. 772). Fenster naturally took this as an invitation for a bribe, and immediately said, "What do you want, money? Well, I'll

give you a hundred," "What do you want, you want $200?" (Tr. 772).

* * * * * * *

Respondent concedes that Dr. Reed's conduct was not sufficient entrapment to constitute a defense to a criminal proceeding, but, nonetheless, if the facts are as sworn by David Fenster at the administrative proceeding in this case, this would be a mitigating circumstance to be considered under the Sixth Circuit's remand order (although I would give such circumstance no weight in the absence of the Sixth Circuit's order).

Considering all of the mitigating circumstances in this case, I strongly believe that respondent is unfit to receive Federal inspection so long as David Fenster is associated with the plant. However, my belief is based on the strongly held view that *any* person who is convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector is unfit to receive Federal inspection regardless of *any* mitigating circumstances.

The Administrative Law Judge who saw and heard the witnesses testify in this case stated (Initial Decision 8–9) that the evidence establishes that:

> 1. Mr. Fenster's reputation in his community, despite his conviction by the United States District Court, is excellent;
>
> 2. His bribing of the Veterinarian-Inspector was apparently aberrant behavior for him resulting from: a) serious health problems, b) exacerbation of old psychic injuries while a victim of the Nazi Holocaust, and c) misapprehensions concerning the motivation of various inspectors who had undertaken stricter enforcement of Federal Meat Inspection Act requirements; and,
>
> 3. The problems which led to his aberrant behavior have largely disappeared leading the U. S. Veterinarian who serves as Area Supervisor to file an official report, on October 15, 1979, advising the Director of Meat and Poultry Inspection that the respondent plant had, since December of 1978, established "a clean meat program" and

> "now is producing very clean hogs and plant management can be proud of their product."
>
> Based on those facts, the Administrative Law Judge made "the consequent finding that recurrence is unlikely because of the general excellence of Mr. Fenster's character and reputation and the elimination of the conditions and motivations which led to the commission of the felony" (Initial Decision 9).

Notwithstanding all of the foregoing views, the Judicial Officer dismissed the complaint in *Utica* because of his view that *if* there are two classes of criminals who have been convicted of bribing meat inspectors, i.e., (i) those who are fit to receive inspection (because of mitigating circumstances), and (ii) those who are not fit to receive inspection, Utica and Fenster belong in the first group. His view that for the purposes of the *Utica* case he must assume that there are two such classes was based on his *interpretation* of the circuit court's remand order, discussed in subsection 5(c), above. His view that Utica and Fenster belong in the first class was based on his personal *application* of that interpretation. Specifically, the Judicial Officer stated (slip op. at 28–29):

> If mitigating circumstances must be considered, I cannot reasonably imagine any stronger mitigating circumstances than appear here. If any felon convicted under 18 U.S.C. § 201(b) of bribing a meat inspector is fit to receive Federal meat inspection, then David Fenster is fit to receive Federal meat inspection (or, more accurately, respondent is fit to receive Federal meat inspection even with David Fenster associated with the plant).
>
> Furthermore, David Fenster has already been precluded from working at respondent's plant for 9 or 10 months, since a stay order was not issued following the District Court's decision in this case. This is not a significant factor to me since I believe that *no* period of time away from a meat plant could make a person convicted under 18 U.S.C. § 201(b) of bribing a meat inspector fit to receive Federal inspection (just as no passage of time could make a Federal inspector who accepted a bribe fit to be reemployed as a Federal inspector). But this is a circumstance that is as relevant as the other circumstances referred to above.
>
> For the reasons set forth above, I am with great reluctance and misgiving dismissing the complaint in this case.

> I would not want to eat meat from any plant managed by a person who has been convicted under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector. I deeply regret that I feel compelled by the Sixth Circuit's remand order to cause other persons to have to do so.

(e) "Replacement" Judicial Officer's Utica Decision on Reconsideration.

Following the decision of the Judicial Officer on remand, the Department filed a Petition for Reconsideration, and at the same time the Secretary revoked the Judicial Officer's authority to perform any further regulatory function in the case and appointed a replacement to consider the Petition for Reconsideration. As stated in *Utica Packing Co.* v. *Block*, 781 F.2d 71, 74 (1986):

> As the brief of the Secretary in this court states, the USDA "violently disagreed" with the latest decision of the Judicial Officer and had "little hope of reconsideration." Instead of petitioning for reconsideration immediately, these officials obtained the Secretary's agreement to revoke Campbell's authority to perform any further "regulatory function" in the Utica case and to "vest such authority in Deputy Assistant Secretary John J. Franke, Jr." Appellee's Brief at 8-9. Mr. Franke is not a lawyer and had never performed adjudicatory, regulatory or legal work. Richard Davis, an attorney in the Office of General Counsel of USDA, was assigned to assist Franke. Davis had no previous contact with the Utica case, but his immediate supervisor participated in the removal of Campbell and appointment of Franke, and also supervised the division responsible for the prosecution of Utica.

The Department has had only two Judicial Officers since the position was created in 1942 (the first Judicial Officer served from 1942 to 1972, and the present Judicial Officer was appointed in January 1971). There had never previously been an order removing the Judicial Officer from a case (except where the Judicial Officer disqualified himself in a case or two because of contact with the case before being appointed Judicial Officer).

The "replacement" Judicial Officer held that the Judicial Officer misinterpreted the circuit court's remand order, and concluded that respondent is unfit to receive inspection while David Fenster is associated with it. He held that the circuit court "did not hold, even by implication, that there must be some set of mitigating circumstances which will outweigh a conviction of any felony" (slip

op. at 2–3). The "replacement" Judicial Officer stated (slip op. at 2–4):

> In his discussion of the import of the Court of Appeals Order, the Judicial Officer stated "under the Sixth Circuit's opinion, if there are enough mitigating circumstances, a felon convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector must, nonetheless, be determined to be fit to continue to receive Federal meat inspection." He states further
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> > Although [the Court of Appeals Order] suggests that the great majority of persons convicted of bribery under 18 U.S.C. § 201(b) will be found unfit to receive Federal meat inspection regardless of the mitigating facts present, it also suggests that some mitigating facts would outweigh a bribery conviction. Otherwise, the Court would not have remanded the present case to consider the mitigating circumstances, notwithstanding Fenster's convictions for bribing the supervisory meat inspector.
>
> The Court of Appeals clearly held that mitigating circumstances are not immaterial or irrelevant and that the Judicial Officer erred in refusing to consider the mitigating evidence presented in this case. But it did not hold, even by implication, that there must be some set of mitigating circumstances which will outweigh a conviction of any felony. Indeed, the Court said "The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present." All of this without once adverting to the strength of the evidence of mitigating circumstances. Finally, the Court unequivocally stated "This court expresses no opinion on either the mitigating circumstances or the merits of the action." Yet, despite the clear holdings and disclaimer quoted above, the Judicial Officer concluded that the Court's order implied that "some mitigating facts would outweigh a bribery conviction." I disagree. Indeed, for the Court to say, or imply, what the Judicial Officer inferred would have constituted the Court substituting its judgment for that of this Department. It is well established that a court may not do that. *Citizens to Preserve*

Overton Park, Inc. v. *Volpe*, 401 U.S. 402, 416 (1971); *Coastal Tank Lines, Inc.* v. *ICC*, 690 F.2d 537, 543 (6th Cir. 1982). I am unwilling to infer that the court intended to so intrude upon the Department's discretionary authority.[14]

I therefore believe that the Judicial Officer should have decided the case as he clearly indicated he thought it should be decided in his Decision and Order on Remand at page 27: "Considering all of the mitigating circumstances in this case, I strongly believe that respondent is unfit to receive Federal inspection so long as David Fenster is associated with the plant." He had at that point done all that the Court of Appeals order required him to do: considered the mitigating circumstances, considered how closely David Fenster's criminal conduct strikes to the policies of the Federal Meat Inspection Act, weighed the two against each other, and concluded that Utica is unfit to receive federal meat inspection while David Fenster is associated with it.

I further think that the order of the Court of Appeals, as I understand it, is correct and that in all cases under section 401 of the Federal Meat Inspection Act (21 U.S.C. § 671), if mitigating evidence is proffered it must be received and must be considered by the adjudicating officials who decide the case.

After consideration of the entire record of this proceeding, I agree, except as indicated in the three preceding paragraphs, with the Judicial Officer's original decision

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[14] If the circuit court did not imply what the Judicial Officer inferred, why did it reverse the Judicial Officer's use of the *per se* approach, which was affirmed by the district court? (See subsection 5(c), *supra*.) Furthermore, the cases cited by the "replacement" Judicial Officer merely state that a court is not empowered to substitute its judgment for that of the agency. The circuit court did not violate that principle by setting forth the standard to be applied by the agency in exercising its judgment. The problem with the circuit court's decision is not that it substituted its judgment for that of the agency, but that it set forth (by necessary implication) an erroneous standard to be applied by the agency in exercising its discretion, i.e., the circuit court precluded the agency from considering the mitigating circumstances in the light of its *per se* view that *no* mitigating circumstances could *ever* overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector assigned to the plant, and required the agency to consider the mitigating circumstances from the viewpoint that, theoretically, at least, there is a set of mitigating circumstances that can overcome that presumption (see subsection 5(c), *supra*).

and with his decision on remand.[15] Specifically, I agree that the felony involved here strikes at the very heart of the Federal Meat Inspection Act program and I agree that, despite the mitigating circumstances presented by respondent, respondent is unfit to receive federal meat inspection so long as David Fenster is associated with the plant. I therefore agree generally with the order originally issued by the Judicial Officer on June 25, 1980. I think, however, considering all the circumstances of this case, that a longer period of time should be allowed for David Fenster to dissociate himself from Utica.

Although the appointment of a "replacement" Judicial Officer to consider the Petition for Reconsideration was held to violate Utica's right to a "fair trial before a fair tribunal" (*Utica Packing Co.* v. *Block*, 781 F.2d 71, 77-78 (1986)), thereby rendering the "replacement" Judicial Officer's decision on reconsideration nugatory, in order to avoid any possible doubt as to the matter, I am expressly overruling that portion of his decision which states that the order of the circuit court is correct, and that in all cases under the Federal Meat Inspection Act, mitigating evidence "must be considered by the adjudicating officials who decide the case" (slip op. at 4).

As stated in my Decision and Order on Remand (see subsection 5(d), *supra*), the circuit court's ruling will be followed only in cases in which an appeal lies to the Sixth Circuit (slip op. at 15). However, until the matter is definitively decided, after deciding the case on the basis of the *per se* rule set forth above, the ALJ's should, and the Judicial Officer will, by way of *dicta*, indicate what weight is attached to the mitigating circumstances, and whether the respondent would be regarded as unfit if the mitigating circumstances were regarded as relevant.

This policy of "nonacquiescence" with respect to a circuit court's decision deemed erroneous is followed by many, if not all, administrative agencies where they believe that an adverse court of ap-

[15] This sentence could be interpreted as agreeing with the Judicial Officer's view that *if* we are compelled by the circuit court's remand decision to consider the mitigating circumstances from the viewpoint that there is theoretically, at least, a set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector assigned to the plant, the mitigating circumstances in *Utica* are sufficient to overcome the presumption of unfitness. In any event, the "replacement" Judicial Officer did not in any manner express disagreement with the Judicial Officer's *application* of his interpretation of the circuit court's decision. The "replacement" Judicial Officer expressed disagreement only with the Judicial Officer's *interpretation* of the circuit court's decision.

peals decision adversely affects a nationwide program. Complainant fears that such a policy of not following the *Utica* decision outside of the Sixth Circuit will be onerous to the Department and result in confusion (Memorandum in Support of Petition for Reconsideration filed September 9, 1983, in *Utica* by complainant, at 10). However, complainant's fears are unfounded. This policy changes *nothing* that complainant or a future respondent will have to do. It determines only what the ALJ's and Judicial Officer will do.

As stated in the Judicial Officer's Decision and Order on Remand in *Utica* (slip op. at 15), until this issue is definitively resolved, mitigating evidence should be received and considered in all cases. The only difference in treatment will be that in cases in which an appeal does not lie to the Sixth Circuit, the ALJ's and the Judicial Officer will decide cases involving convictions for bribery and related offenses under the *per se* rule, and indicate their views as to mitigating circumstances by way of *dicta*. However, in cases where an appeal lies to the Sixth Circuit, the *per se* rule will not be used by the ALJ's and the Judicial Officer.

(f) District Court's Second Utica Decision.

On appeal to the United States District Court, Judge Taylor again upheld the Department, agreeing with the "replacement" Judicial Officer's views, and strongly disagreeing with Judicial Officer Campbell's views. Judge Taylor stated (*Utica Packing Co.* v. *Block*, No. 80-72742, slip op. at 7-17 (E.D. Mich. Mar. 12, 1985)):

> Following the judicial officer's [i.e., Campbell's] consideration of all the mitigating circumstances in this case, he concluded that the Act requires that any person who is convicted under 18 U.S.C. § 201(b) be considered unfit to receive federal inspection regardless of mitigating circumstances. Thus, Utica is unfit to receive such services as a matter of law, so long as David Fenster is involved with the plant. But contrary to this conclusion, Judicial Officer Campbell felt compelled by the Sixth Circuit to dismiss the complaint because, if mitigating circumstances are capable of outweighing the bribery conviction, he could imagine none weightier than Fenster had advanced.
>
> * * * * * * *
>
> This court finds that Judicial Officer Campbell's decision is unsupported by substantial evidence in the whole record and that the decision is contrary to overwhelming evidence *and* to his own findings and conclusions. If this case were

not being otherwise decided this court would be compelled to reverse the Campbell decision. 21 U.S.C. § 671 states that the Secretary may, after a hearing and determination that the recipient of inspection services is unfit to engage in business which involves inspection, withdraw inspection services if the recipient commits a felony or more than one nonfelonious violation of law. It is undisputed that David Fenster bribed the federal meat inspector. This bribery, had it been effective, would have caused unwholesome meat to enter the stream of commerce.

Judicial Officer Campbell considered all the mitigating circumstances as the Sixth Circuit had required. He concluded that given the serious circumstances of Fenster's felony conduct, he should not be permitted to remain in contact with Utica despite the mitigation presented. At that point, we must agree with Mr. Franke, Judicial Officer Campbell had done everything that the Court of Appeals had ordered him to do. But Judicial Officer Campbell nevertheless felt "compelled" by the court to dismiss the complaint. So even though he stated in his opinion seven times that the weight of each of the mitigating circumstances presented was insufficient he ruled that if mitigating circumstances *must* be considered, he could not imagine any stronger mitigating circumstances than Fenster had argued, so they must be sufficient in the eyes of the Sixth Circuit. Upon such finding, he dismissed the complaint against Utica. Indeed, this is a gross misinterpretation of the Court of Appeals' order and sufficient basis for Mr. Campbell's replacement [by Mr. Franke for the purposes of this case].

* * * * * * *

Defendants ask for judgment because Assistant Secretary Franke's final decision of March 19, 1984 is supported by substantial evidence on the whole record, and the law. This court so finds. The Sixth Circuit held that the underlying facts will determine whether a particular conviction may warrant withdrawal of inspection. The court also held that in situations, in which the felonious conduct strikes closely to the policies of the Act, a determination of unfitness may be premised upon the conduct alone. *Utica Packing Company*, slip op. at 5. Upon consideration, Mr. Franke decided that the bribery of an inspector in this case strikes

at the very heart of the program. Even after a balancing of the mitigating circumstances, Utica was unfit to be a recipient of federal meat inspection as long as Fenster was associated with the plant. *Accord, Wyszynski Provision Co., Inc.* v. *Secretary of Agriculture*, 538 F. Supp. 361 (E.D. Penn. 1982). Mr. Franke based his assessment upon the same facts which were before Judicial Officer Campbell. Mr. Franke states his agreement with Judicial Officer Campbell's original decision and with this decision on remand, except for the concluding abdication to the Court of Appeals. When Fenster was convicted in 1978, Judge Philip Pratt found overwhelming evidence that bribes had been offered to encourage more relaxed inspection of Utica's hogs. 449 F. Supp. at 438-39. This court made a similar determination that the evidence revealed an intent to "facilitate the sale of arguably unwholesome food." 511 F. Supp. at 662. As pork consumers must rely for their health upon the integrity of such plant management and upon the meat inspection services provided by law, this program must not be emasculated. There is far more than substantial evidence in this case to support the Assistant Secretary's decision. For these reasons, this court finds that Mr. Franke's order must be fully enforced and summary judgment will be entered for defendants affirming the Assistant Secretary's decision.

The district court's second *Utica* decision is significant in two respects. First, by disagreeing with the Judicial Officer's interpretation of the circuit court's *Utica* decision, it puts a judicial gloss on the circuit court's opinion.[16]

Second, it shows from a practical standpoint the wisdom and reasonableness of the *per se* approach in cases involving convictions for bribery and related offenses, thereby providing further support for the *per se* approach in the present case. That is, the only reason the Judicial Officer held on remand that Utica was fit to receive inspection was that it was impossible to "reasonably imagine any stronger mitigating circumstances than appear here [in *Utica*]" (slip op. at 28). Hence, from a practical standpoint, when the district court upheld the "replacement" Judicial Officer's decision on reconsideration that the mitigating circumstances in *Utica* were

[16] I am not sure what the "gloss" is except to assert that I was wrong in my *interpretation* of the circuit court's remand decision. If I was wrong in my *interpretation*, I do not have the slightest idea why the circuit court reversed my original *per se* approach (see subsection 5(c), *supra*).

not enough to overcome the presumption of unfitness resulting from the bribery convictions, its holding suggests (from a practical standpoint) that no other mitigating circumstances will ever be enough to overcome the presumption of unfitness resulting from bribery convictions.

(g) Circuit Court's Second Utica Decision.

On appeal, the circuit court reversed the district court's decision on the gound that the replacement of the Judicial Officer with Assistant Secretary Franke violated Utica's right to a "fair trial before a fair tribunal" (*Utica Packing Co.* v. *Block*, 781 F.2d 71, 77–78 (1986)). The court remanded the proceeding to the district court, with "directions to remand it to the Secretary for re-entry of Judicial Officer Campbell's order dismissing the complaint against Utica and Fenster" (781 F.2d at 79).

However, what is important here is that the circuit court cast doubt as to the validity of Judicial Officer Campbell's *interpretation* of its original remand order. The circuit court stated (781 F.2d at 78–79; emphasis added):

> Nothing in this opinion should be perceived as minimizing the seriousness of Fenster's criminal activities. Bribing an inspector does strike at the heart of the meat inspection program and cannot be tolerated. As we wrote in our earlier unpublished opinion in this case:
>
> > The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. *See Wyszynski Provision Co., Inc.* v. *Sec. of Agriculture*, 538 F. Supp. 361, 364 (E.D. Pa. 1982).
>
> Judicial Officer Campbell properly concerned himself with the nature of Fenster's criminal activities and the possible harm to the public which could flow from them. It is not certain that Campbell properly *construed* this court's remand order in considering mitigating circumstances. However, that is not the issue presently before us. Whether the Judicial Officer was correct or incorrect in his *application* of the law, the Secretary's efforts to change the result by the methods described in this opinion cannot be permitted to succeed.
>
> The judgment of the district court is reversed, and the case is remanded with directions to remand it to the Secre-

tary for re-entry of Judicial Officer Campbell's order dismissing the complaint against Utica and Fenster.

It should be noted that these are gratuitous comments, unnecessary to the court's decision.[17] This again adds a judicial gloss to the circuit court's first decision in this case. Since the circuit court's first *Utica* decision, as I interpret it, is egregiously erroneous, I am only too happy to accept the hint in the circuit court's *dicta* that perhaps I incorrectly interpreted the circuit court's first decision in *Utica*. If I did incorrectly interpret the circuit court's remand decision, the only other *possible* (valid) ground on which the circuit court could have reversed my *per se* approach was that the court was not certain whether or not the USDA proposition underlying that approach is correct (see subsection 5(c), *supra*).

Accordingly, in future cases in the Sixth Circuit, I will construe the circuit court's first *Utica* decision as requiring a consideration of the mitigating circumstances merely because the court was not sure whether the USDA proposition underlying the *per se* approach is correct or not. That leaves the Judicial Officer free to believe (when he is considering the mitigating circumstances) that there is no set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector assigned to the plant. Under that view, it is a foregone conclusion that in such bribery cases, Judicial Officer Campbell will *never* find the mitigating circumstances to be sufficient to overcome the presumption of unfitness, but a reviewing court will then have the opportunity to determine, case by case, whether it finally concurs in the *per se* approach or whether it finds, in a particular case, that there are enough mitigating circumstances, in its opinion, to overcome the presumption of unfitness. (I will, however, in *dicta*, express my views as to how I would have decided the case if my original interpretation of the circuit court's first *Utica* decision is correct (see subsection 5(c), *supra*)).

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[17] Since the court was indulging in *obiter dicta*, it would have been helpful if the court had been a little more positive as to whether it disagreed with the Judicial Officer's construction, i.e., interpretation, of the court's remand order, and a little more informative as to why the circuit court reversed the Judicial Officer's *per se* approach, which had been affirmed by the district court's first decision, if the circuit court did not mean to hold in its first decision that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

6. Stevens Foods, Inc.

In *In re Stevens Foods, Inc.*, 40 Agric. Dec. 1288 (1981), the Judicial Officer withdrew meat inspection service and meat grading and acceptance services indefinitely from Stevens Foods, Inc., and from any establishment with which Steven L. Aaron is responsibly connected.

The withdrawals were based on the fact that Stevens Foods and Steven L. Aaron were each convicted of 48 felony counts of conspiring to defraud the United States, making false statements to the government, and bribery of government personnel. The convictions included 35 counts of bribery involving the giving of gratuities to the meat inspector at the plant "for or because of any official act performed or to be performed by such public official" (18 U.S.C. § 201(f)).[18] The Judicial Officer refused to consider mitigating circumstances because conviction under Count 1 of the felony indictment for conspiracy to engage in deliberate conduct to defraud the Defense Department by intentionally preparing substandard meat for use on military contracts conclusively shows that the inspection service cannot depend on the reliability and integrity of Steven L. Aaron and Stevens Foods. However, the Judicial Officer indicated that in the case of bribery convictions under 18 U.S.C. § 201(f), the gratuity section, the Judicial Officer ordinarily would consider mitigating circumstances where the bribery occurred prior to publication of the Department's Policy Statement on June 26, 1979. Specifically, the Judicial Officer stated (40 Agric. Dec. at 1296–99, 1304):

> Under the statutory language involved in this proceeding (21 U.S.C. § 671), conviction of a single felony may be the basis for a determination, after hearing, that a recipient is unfit to engage in any business requiring inspection. "However, inspection services are not to be withdrawn automatically because of the conviction of a felony. The felony must be of such nature as to support a finding that the recipient is 'unfit to engage in any business requiring

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[18] § 201. *Bribery of public officials and witnesses*

. . . .

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

inspection' as a result of that felony (21 U.S.C. § 671)." *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 394 (1979), *aff'd*, No. H79-210 (D. Conn. Feb. 6, 1981) (court opinion attached).

In *Norwich Beef*, it is explained that federal inspectors cannot watch every operation at a meat plant and, therefore, the inspection service must be able to depend upon the reliability and integrity of the plant's management so as to be able to protect the public interest by assuring that meat and meat food products distributed from the plant are wholesome, not adulterated, and properly marked, labeled and packaged (38 Agric. Dec. at 394-96).[3] It is explained in *Norwich Beef* that whether a felony conviction is of such a nature as to support a finding that the respondent is "unfit to engage in any business requiring inspection" depends on whether it shows that the inspection service cannot depend on the reliability and integrity of the respondent so as to adequately protect the public interest (*id.*).

[3] Similar testimony was given in this case by Robert Gonter, Director, Evaluation and Enforcement Division, Compliance Programs, Food Safety and Quality Service, U.S.D.A. (Tr. 19-20, 39-41, 46), and similar views are set forth in the Department's policy statement as to withdrawing inspection, grading and acceptance services based on convictions for bribery and related offenses (44 Fed. Reg. 37322, 37323 (1979)).

Although respondents Steven L. Aaron and Stevens Foods, Inc., were convicted of 48 felonies involving violations in 1972, 1973, 1974, 1975 and 1976, I would determine on the basis of Count 1 alone that Steven L. Aaron [footnote omitted] and Stevens Foods, Inc., are unfit to engage in any business requiring inspection.

Count 1 of the felony indictment against Steven L. Aaron and Stevens Foods, Inc., under 18 U.S.C. § 371, is based on a conspiracy to engage in deliberate conduct to defraud the Defense Department by intentionally preparing substandard meat for use on military contracts (including meat previously rejected by military inspectors), processing the meat in an unauthorized area not subjected to government inspection, concealing the substandard meat under conforming meat, substituting different samples for meat selected by military inspectors for inspection, fraudulently changing the lot numbers and military contract data on shipping containers, lying to military inspectors

about the intended use of nonconforming meat, causing false Certificates of Inspection to be prepared, and giving gratuities to inspectors to result in ineffective inspection so that Stevens Foods, Inc., could continue to produce and deliver a product of less value than that for which the Department of Defense had contracted (Finding 5).

Conviction of Count 1 of the felony indictment shows beyond a doubt that the inspection service cannot depend on the reliability and integrity of Steven L. Aaron and Stevens Foods, Inc., and would be unable to protect the public interest if inspection service were to be provided to them.

* * * * * * *

The remaining 35 counts of the indictment are based on violations of 18 U.S.C. § 201 (entitled "Bribery of public officials and witnesses") occurring in 1972, 1973, 1974 and 1975. The specific subsection of 18 U.S.C. § 201 involved in this case is subsection (f), which is a lesser bribery offense than a violation of subsection (b), requiring proof that the bribe was "corruptly" given "to influence" or "induce" action. Where the more serious violation of 18 U.S.C. § 201(b) is involved, it has been held that conviction of bribery under that subsection compels a determination that the respondent is unfit to receive inspection service, and that it is not appropriate to consider any other facts and circumstances, such as respondent's reputation in the community or present compliance with the Act. *In re Utica Packing Co.*, 39 Agric. Dec. 590, 600–05 (1980), *aff'd*, No. 80–72742 (E.D. Mich. Apr. 14, 1981) (court opinion attached).

However, where the bribery conviction is based on the gratuity section, 18 U.S.C. § 201(f), as in this case, and the offenses occurred prior to publication of the Department's policy statement setting forth the policy of the Food Safety and Quality Service to seek the indefinite withdrawal of inspection, grading and acceptance services in every case of a conviction of "bribery and related offenses such as the giving of unlawful gratuities to public officials" (44 Fed. Reg. 37322, 37323 (1979)),[5] I would ordinarily consider all of the facts and circumstances in the case, including any circumstances of a mitigating nature, since the industry was not on notice as to how serious the Department re-

garded "gratuity" convictions. But as to bribery and related "gratuity" offenses occurring after the publication of the policy statement, I would not ordinarily consider any mitigating circumstances because I concur in the views set forth in the policy statement that "the giving or offering of bribes or gratuities to Federal inspection or grading personnel . . . pose a direct and tangible threat to the integrity of the inspection and grading systems," warranting the indefinite withdrawal of inspection, grading and acceptance services (*id.*).[6]

[5] Where appropriate, the Food Safety and Quality Service might agree to settlements "which include a provision which assures a complete divestiture, by all convicted individuals, of their entire ownership interest in and operational control or direction of the establishment in question, and the termination of all associations between the convicted individual or individuals and the establishment in question. . . . These settlements may also include a provision for actual withdrawal of services for a specified period of time" (44 Fed. Reg. 37322, 37323 (1979)).

[6] "The Department has recognized the seriousness of such offenses in dealing with its own personnel, who have been subjected to immediate suspension without pay upon being charged with such offenses, and have been dismissed based upon the conviction for such offenses." 44 Fed. Reg. 37322, 37323 (1979).

In this case, I have not considered any mitigating circumstances relating to the "gratuity" convictions because Count 1 of the indictment shows that the gratuities to the inspectors were part of an overall conspiracy to defraud the Department of Defense (Count 1, ¶¶ 33-35), *i.e.*, it "was a further part of said conspiracy that said gratuities would result in ineffective inspection by the Department of Defense and the Department of Agriculture so that STEVENS could continue to produce and deliver a product of less value than that for which the Department of Defense had contracted" (Count 1, ¶ 35). Accordingly, Count 1 forcefully proves that the gratuity violations in this case are of such a nature that the inspection service cannot depend on the reliability or integrity of Steven L. Aaron and Stevens Foods, Inc., in its effort to protect the public interest.

* * * * * * *

Even if I were to consider respondents' alleged mitigating circumstances, they would not change my views set forth above.

For example, some of Steven L. Aaron's friends and business acquaintances consider him as reputable, respon-

sible, honest, truthful, a good citizen, and a good family man. They would be willing to continue to loan him money and do business with him. But similar testimony is adduced in almost every case, no matter how serious or flagrant the violations (see the quotation from *Utica*, *supra*, 39 Agric. Dec. at 604). Accordingly, I would give no significant weight to such testimony.

Since 16 of Thomas Burke's 23 payments resulting in the convictions involved here occurred after publication of the Department's Policy Statement (see § II, *infra*), the *dicta* in *Stevens* supports the view that mitigating circumstances should not be considered in the present case

7. National Meat Packers, Inc. (Charles D. Olsen).

In *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169 (1978) (decision as to Charles D. Olsen), the Judicial Officer withdrew meat grading and acceptance services from Olsen and any plant with which he was responsibly connected for a period of 10 years. The withdrawal was based on the fact that Olsen was convicted under 18 U.S.C. § 201(f) of one count of giving a gratuity ($100) to a meat grader "for or because of any official act performed or to be performed by such public official" (18 U.S.C. § 201(f)). In issuing the 10-year suspension order, the Judicial Officer stated (38 Agric. Dec. at 172–73, 177–78, 180):

> 5. In southern California between 1974 and 1976, 17 meatpacking houses and 35 employees of meatpackers [4] were indicted and convicted of either bribery or illegally giving gratuity to meat graders. The involved plants constituted "a major part of the slaughtering companies or those using Federal grading service" in southern California (Tr. 19).
>
> [4] The 35 employees worked for the 17 indicted companies as well as 9 other packinghouses.
>
> Sixteen Federal meat graders were indicted and convicted of receiving money.
>
> * * * * * * *
>
> . . . [T]he evidence in this case, including the sentencing memorandum prepared by respondent's attorney, shows that the "giving and receiving of gratuities between packers and USDA graders is a practice of some twenty or more years standing in the southern California area," and that "payments to the Graders in the Los Angeles area

ran as high as $300.00 per week but were limited to $100.00 in San Diego insofar as Mr. Olsen was involved" (RX 3, p. 2). . . .

* * * * * * *

There is no basis for determining in this proceeding whether the longstanding practice of bribing meat graders in southern California originated, as the graders contend, at the solicitation of the packers in return for upgrading beef of a lower quality, or as the packers contend, as a result of extortion by the graders. But in either event, the damage to the program from bribery is so great that a most severe sanction is necessary to prevent recurrence of such violations in the industry.

* * * * * * *

Respondent argues that he is 56 years of age and that a "ten-year withdrawal of grading as advocated by the Department would effectively deprive Charles Olsen of his livelihood in the meat packing business for the remainder of his employable life" (Response in Opposition to Appeal, p. 5). But that result is not too harsh, considering the serious nature of respondent's violation. The meat graders who accepted the bribes were fired from their jobs and will never again be employed as meat graders. A 56-year old lawyer who engaged in bribery in connection with his law practice could expect to be deprived of his livelihood as an attorney for the remainder of his employable life. Hence the respondent's sanction is not inappropriate considering the serious nature of bribery of a Government meat grader.

The fact that respondent Olsen cooperated with the United States attorney in obtaining the conviction of Hugo Lueck, a USDA grader not referred to in the indictment, was a relevant factor in reducing his criminal sentence. But it is irrelevant in determining what type of sanction is required to enable the Secretary to achieve the purposes of the remedial statute involved here.

* * * * * * *

The 10-year withdrawal of meat grading as to respondent Olsen is, of course, substantially more severe than the

> 10-year isolation from meat graders applicable to the individuals who were involved in the consent proceedings. But, as explained above, the consent sanctions are not relevant in determining the sanction that should be imposed in a litigated case. The circumstances that induced the Department to offer more lenient sanctions to the meatpackers and individuals who promptly consented to remedial orders are not present in this case. For example, it was administratively desirable to obtain consent settlements, with affirmative action programs by the meatpackers, in as many cases as possible to immediately clean up the deplorable situation which affected a major part of the slaughtering companies using Federal grading service in southern California. Also, it was administratively desirable that graded meat should remain available to consumers in southern California. To achieve these ends, a balance had to be struck between the desirability of imposing severe sanctions to serve as effective deterrents to future violations and the desirability of inducing the violators to sign immediate consent settlements, with affirmative action programs.
>
> But where an individual did not agree to become a part of the immediate industry clean-up, there is no need to strike a balance between such conflicting considerations.

The decision in *National Meat Packers* also describes the consent orders issued in many cases prior to the Department's 1979 Policy Statement referred to in subsection 1, *supra*. Under the consent orders, persons convicted of bribing or giving illegal gratuities to meat graders had meat grading services withdrawn for 12 months and inspection service withdrawn indefinitely, but with such withdrawals held in abeyance provided that the plants took detailed precautionary steps for the next 10 years to insure future compliance with the Department's programs, and the convicted individuals were completely isolated from federal meat graders or inspectors for 10 years (38 Agric. Dec. at 173-76). The 1979 Policy Statement explains that such isolation provisions will no longer be included in consent settlements.[19]

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[19] Problems involved in enforcing the "isolation" provisions of the consent orders are discussed in *In re Apex Meat Co.*, 39 Agric. Dec. 560 (1980) (complaint dismissed because facts did not establish violation of isolation provisions), and *In re Great Western Packing Co.*, 39 Agric. Dec. 1358 (1980) (withdrawal and denial of inspection and grading services made effective because of violations of isolation provision), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981).

8. William H. Hutton.

In *In re Hutton*, 38 Agric. Dec. 332 (1979), *appeal dismissed*, No. 79-0634-N (S.D. Cal. May 12, 1980), *final order*, 39 Agric. Dec. 355 (1980), the Judicial Officer withdrew meat grading and acceptance services from Hutton and any plant with which he was responsibly connected for a period of 10 years.

The *Hutton* case is identical to *National Meat Packers* discussed immediately above in subsection 7, and involves convictions under three counts of giving gratuities to a meat grader "for or because of any official act performed or to be performed by such public official" (18 U.S.C. § 201(f)).

On appeal, an agreement was reached "for settlement purposes only, that the respondent would immediately withdraw his appeal, with prejudice, and the Judicial Officer would amend his Order" (*In re Hutton*, 39 Agric. Dec. 355 (1980)). The amended order suspended the 10-year withdrawal of meat grading and acceptance services, provided (39 Agric. Dec. at 355–56):

> . . . William H. Hutton does not, for the term of this Order, become an officer, director, partner, substantial investor or supervisor in any establishment requiring federal meat grading and acceptance services; and provided further, that respondent, William H. Hutton does not assume, for the term of this Order, any employment or do any acts that would entail direct or indirect review of federal meat grading and acceptance determinations and activities.

9. Indiana Slaughtering Company.

In *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822 (1976), *aff'd sub nom. Indiana Slaughtering Co.* v. *Bergland*, No. 76-3949 (E.D. Pa. Aug. 1, 1977), the Judicial Officer entered an order agreed to by the parties indefinitely withdrawing meat inspection service from respondent, but with the withdrawal of inspection suspended for so long as Leon Netzman is not associated with respondent or its successors in any manner and provides no direction or advice to respondent or its successors, and has no contact or dealings with federal meat inspection or grading personnel, and respondent does not within 5 years offer money or other things of value to any meat inspector, meat grader or other public official (35 Agric. Dec. at 1833).

The case was instituted after Leon Netzman was convicted under 18 U.S.C. § 201(b)(3) and (f) of "four felonies for giving a thing of value, otherwise than as provided by law for the proper discharge of official duty, to public officials, to wit, a meat inspector and a

compliance officer of the United States Department of Agriculture, for and because of official acts to be performed by said officials" (35 Agric. Dec. at 1832).

Since the order issued in the case was agreed to by the parties, it is not relevant in determining the sanction in litigated cases (*In re Worsley*, 33 Agric. Dec. 1547, 1569 (1974)), but the *dicta* in the case makes it clear that mitigating circumstances are not relevant where the felony convictions involve bribery of a meat inspector. The Judicical Officer stated (35 Agric. Dec. at 1830–31):

> Although it is not necessary to consider the merits of respondent's defense if the case had proceeded to a full hearing, the transcript of the interrupted hearing shows that respondent would have fared no better after a full hearing than under the consent agreement.
>
> * * * * * * *
>
> Although the extenuating circumstances referred to by respondent's counsel were relevant in the criminal proceedings, they are totally irrelevant in this administrative proceeding. This is not a proceeding to punish respondent. It is a proceeding designed to achieve the purpose of remedial legislation administered by this Department. It is the policy of this Department to impose severe sanctions for serious violations of the regulatory programs administered by the Department in order to serve as an effective deterrent not only to the respondent, but also to other potential violators [footnote omitted]. Personal circumstances, *e.g.*, relating to a violator's present health, need to work, or prior tragic experiences [7] are not relevant considerations in such an administrative proceeding, under the Department's settled sanction policy. Consideration of such circumstances would not be conducive to achieving the purposes of the remedial legislation, and, therefore, would not be in the public interest [footnote omitted].
>
> [7] Respondent alleges that Leon Netzman "lost his parents, brothers, sisters, and most of the rest of his family due to murder by the Nazis in World War II, and this, along with the aforementioned sentence of the court, is much more than enough suffering for one man."

10. Summary as to Per Se Policy Involving Convictions of Bribery and Related Offenses.

The industry has been on notice since June 26, 1979, that it is the view of the administrative officials charged with protecting the public health under the Federal Meat Inspection Act that the

giving or offering of bribes or gratuities to Federal inspection or grading personnel pose a "direct and tangible threat to the integrity of the inspection and grading systems," and that the Department will "institute an administrative proceeding seeking the indefinite withdrawal or denial of Federal inspection and/or grading and acceptance services from any recipient of or applicant for such services when the Department's action is based upon a criminal conviction or convictions for bribery or related offenses," including, specifically, convictions under "18 U.S.C. 209" (subsection 1, *supra*), which is the statutory provision involved here.

As shown above, where there have been convictions that strike at the heart of the meat inspection program, there is a reasonable basis for following the USDA policy irrespective of any mitigating circumstances. District judges in two cases have approved that *per se* policy (subsections 4 and 5(b), *supra*). The two courts that have disagreed with that policy have advanced no reasons in support of their view (subsections 3 and 5(c), *supra*), and one of those courts later cast serious doubt on the Judicial Officer's interpretation that the court expressed the view by implication that theoretically, at least, there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector assigned to a plant (subsection 5(g), *supra*).

In addition, the courts that have considered the mitigating circumstances in particular cases have sustained the Department's determinations that the mitigating circumstances were inadequate to overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program under circumstances which demonstrate that, from a practical viewpoint, no set of mitigating circumstances will ever be found sufficient to overcome the presumption of unfitness in such cases. Specifically, the mitigating circumstances that have been found not sufficient to overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program include:

1. An unblemished record before and after the criminal conviction.

2. No difficulties with the meat inspection program before or after the criminal conviction.

3. Testimonials from friends and business associates and others who regard the convicted individual as a responsible and honest member of the business community, notwithstanding the criminal conviction.

4. Exceptionally stressful personal circumstances relating to the convicted person.

5. Real or perceived improper conduct by the inspection staff causing great harm to the packer, with no satisfaction achieved from supervisory inspection officials.

6. A belief that the inspector was soliciting a bribe.

7. A desire to have the meat inspector insure that the product produced at the plant remains wholesome, notwithstanding the bribe.

8. The withdrawal of meat inspection would adversely affect numerous packing plant employees and the community.

9. Time lapse of many years since the criminal conduct.

10. A finding by the Administrative Law Judge that recurrence of the criminal conduct is unlikely.

11. Adequate punishment in the criminal proceeding.

12. The criminal conviction involved one isolated event.

13. Adverse publicity from the criminal conviction caused loss of business to the company.

The first 10 mitigating circumstances listed above were all present in *Utica* (see subsection 5(d), *supra*), in which the district court affirmed the "replacement" Judicial Officer's determination (subsection 5(e), *supra*) that they were insufficient to overcome the presumption of unfitness resulting from the bribery convictions (subsection 5(f), *supra*).

From a realistic viewpoint, the mitigating circumstances rejected as insufficient to overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program demonstrate quite clearly that, as a practical matter, there are no mitigating circumstances that can overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program. This affords additional basis for affirming the *per se* approach adopted by the Judicial Officer here.

For the reasons set forth above, where there have been convictions for bribery or related offenses that strike at the heart of the meat inspection program,[20] the Department's *per se* approach is not only reasonable, but it is the *only* policy that will properly protect the public health. Assuming, however, that a reviewing court should disagree with this position, or with the view expressed in

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[20] The "heart of the meat inspection program" is an area, not a pinpoint. The administrative determination that convictions under 18 U.S.C. § 209 fall within that area (and, therefore, are subject to the *per se* rule) is reasonable and rational, notwithstanding the fact that convictions under 18 U.S.C. § 201(b) strike closer to the center of the area than convictions under 18 U.S.C. § 209.

§ I(A) (that convictions for supplementing the salary of the meat inspector assigned to a packing plant in connection with his official meat inspection duties necessarily involve fraud in connection with transactions in food), the fact relating to the "fraud" issue and the "unfitness" issue are set forth in § II, immediately following.

II. Assuming (Erroneously) That Where There Have Been Convictions of Supplementing the Salary of the Meat Inspector Assigned to a Packing Plant in Connection with His Official Meat Inspection Duties, the Facts of Each Case Must Be Examined to Determine Whether the Convictions Are Based on "Fraud in Connection with Transactions in Food" and Render the Plant "Unfit" to Receive Meat Inspection, the Facts Here Show Such "Fraud" and "Unfitness."

The same facts that show that Mr. Burke's convictions are based on "fraud in connection with transactions in food" also show that respondent is "unfit" to receive meat inspection (unless Mr. Burke disassociates himself from respondent). Accordingly, the facts relating to both issues will be considered together.

At the outset, however, the "unfitness" issue will be determined under the assumption that even though we must consider the mitigating circumstances, we are free to adhere to our view that no set of mitigating circumstances can ever overcome the presumption of unfitness resulting from convictions of bribery or related offenses involving the meat inspector. Since that is my view, I have given careful consideration to all of respondent's mitigating circumstances, but find them inadequate to overcome the presumption of unfitness resulting from the criminal convictions. No useful purpose would be served by discussing the mitigating circumstances in detail since it is impossible for any set of mitigating circumstances ever to overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program, such as the convictions involved here.

Assuming further, however, that a reviewing court will not accept as valid a determination of unfitness based upon a consideration of the mitigating circumstances when the Judicial Officer has the preconceived view that no set of mitigating circumstances can ever overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program, the circumstances relating to "fraud in connection with transactions in food" and "unfitness" are considered in detail below, without any preconceived views.

In the criminal proceeding against Thomas Burke, he was charged with 23 counts of supplementing the salary of the meat in-

spector assigned to his plant. Count 1, which is identical to the others, except for the date and amount of the payment, is as follows (PX 12, Information at 1-2):

> The United States Attorney for the District of New Jersey charges that:
>
> * * * * * * *
>
> 3. At all times stated herein, Michael Gabriel, DVM, was employed by the Food Safety and Inspection Service as a Veterinary Medical Officer assigned to the Newark, New Jersey Circuit of the Meat and Poultry Inspection Program.
>
> 4. At all times stated herein, the defendant, THOMAS BURKE, was President and Chief Operating Officer of Great American Veal, Inc.
>
> 5. At all times stated herein, Great American Veal, Inc., a New Jersey corporation with its principal place of business in Newark, New Jersey, operated a slaughtering house engaged in the slaughter and boning of veal calves at 50 Avenue L, Newark, New Jersey.
>
> 6. At all times stated herein, the slaughtering business operated by Great American Veal, Inc. at 50 Avenue L, Newark, New Jersey, was subject to the regulations of the Federal Meat Inspection Act, Title 21, United States Code, Section 601, including the requirement that a certified inspector of the United States Department of Agriculture be present on the premises at all times during slaughter operations.
>
> 7. At all times stated herein, Michael Gabriel, DVM, was the certified inspector assigned to the Great American Veal, Inc. slaughtering operation at 50 Avenue L, Newark, New Jersey.
>
> 8. On or about April 10, 1979 at Newark in the District of New Jersey, and elsewhere, the defendant
>
> THOMAS BURKE
>
> did knowingly and willfully contribute to and supplement the salary of an employee of the United States Department of Agriculture from a source other than the Government of the United States; in that the defendant paid to

Michael Gabriel, DVM, $150.00 in cash in connection with his official duties as the certified inspector assigned to the Great American Veal, Inc. slaughtering operation at 50 Avenue L, Newark, New Jersey.

In violation of Title 18, United States Code, Sections 209(a) and 2.

The dates and amounts of payment involved in all the counts are as follows:

Dates and Payment Amounts Involved in Criminal Violations

Count	Date	Amount	Count	Date	Amount
1	Apr. 10, 1979	$ 150	13	Sept. 10, 1979	$ 250
2	Apr. 20, 1979	100	14	Sept. 21, 1979	250
3	May 4, 1979	150	15	Oct. 5, 1979	190
4	May 22, 1979	90	16	Oct. 19, 1979	250
5	June 1, 1979	165	17	Nov. 2, 1979	175
6	June 7, 1979	100	18	Nov. 19, 1979	175
7	June 18, 1979	325	19	Dec. 3, 1979	190
8	July 1, 1979	325	20	Dec. 14, 1979	225
9	July 16, 1979	385	21	Dec. 28, 1979	175
10	July 27, 1979	325	22	Jan. 11, 1980	220
11	Aug. 13, 1979	400	23	Jan. 25, 1980	250
12	Aug. 24, 1979	205		TOTAL	$5,070

The 23 payments to the meat inspector over a period of 9½ months total $5,070. Sixteen of the 23 payments were made after publication of the Department's Policy Statement (which was well publicized in the meat industry) advising that the Administrator of the Federal Meat Inspection Program will seek the indefinite withdrawal of inspection services in all cases of bribery or related offenses, including, specifically, violations of 18 U.S.C. § 209(a), the criminal section involved here.[21]

The jury found Mr. Burke guilty of all 23 counts. The court's charge instructed the jury that the payments must have been made as compensation "for the services having to do with Dr. Gabriel's

[21] Respondent contends that there would not have been 16 violations committed after publication of the Department's Policy Statement if the Department had ended its investigation sooner. The Department kept the investigation open for a considerable period of time in order to learn the "degree of corruption in the plant, and to find out if possible what other members of USDA were involved" (PX 1, p. 15). But, in any event, Mr. Burke's actions and convictions are to be judged by what actually occurred—not what would have occurred had the Department blown the whistle sooner.

responsibility" as a meat inspector, and that the payments must have been made knowingly and willfully "with bad purposes" to "disobey or disregard the law." The court instructed the jury as to the defendant's claim that the payments were not made voluntarily, but only because Mr. Burke feared that unless they were made, Dr. Gabriel would use his position as meat inspector in an unreasonable and punitive manner. The court further instructed the jury that the wisdom or correctness of the USDA regulations were not at issue. Specifically, the court charged the jury (PX 11, pp. 15–17, 19):

> The offense has four essential elements, each one of which must be proved beyond a reasonable doubt. . . .
>
> * * * * * * *
>
> Concerning the third element, the law requires that the payments have to have been made as compensation for Dr. Gabriel's services, as a meat inspector. Thus, the Government has the burden of proving, beyond a reasonable doubt that the payments made were for the services having to do with Dr. Gabriel's responsibility as an employee of the United States Government. Accordingly I instruct you that no violation is present, merely because a private person gives money to a government employee, unless a connection is shown to exist between the public employment and the private compensation.
>
> As to the fourth or final element that must be proved beyond a reasonable doubt, the word knowingly, as that term has been used from time to time in these instructions, means, that the act was done voluntarily and intentionally, not because of mistake or accident or other innocent purposes.
>
> The word willfully, as that term has been used from time to time in these instructions means, that the act was committed voluntarily and purposely with specific intent to [do] something the law forbids. That is to say, with bad purposes. There're to disobey or disregard the law.
>
> One of the defenses raised by the defendant Thomas Burke is, that he made certain payments only because he feared that unless those payments were made, Dr. Gabriel would use his position as meat inspector in an unreason-

able and punitive manner, thereby causing or threatening the defendant to suffer the loss of money and business.

The defendant therefore claims that he did not voluntarily contribute to or supplement the salary of Dr. Gabriel, an employee of the United States Government.

I have defined for you the meaning of the terms knowingly and willfully, which are the four elements of the offense charged.

If you find beyond a reasonable doubt that the defendant acted knowingly and willfully as those terms have been defined for you, then, the Government would have carried the burden of establishing the final element of the offense.

Conversely of course, if you do not so find, then you'll acquit.

* * * * * * *

. . . I charge you that USDA regulations are not an issue in this case. It's not your responsibility to consider, nor may you consider the wisdom or correctness of any regulations which you have heard about in this case.

During the sentencing proceeding, both Mr. Burke and his attorney advised the court that the United States Department of Agriculture would withdraw meat inspection from Mr. Burke's plant, so long as he was associated with the plant. Mr. Burke's attorney stated during the sentencing proceeding (PX 13, p. 7):

He faces, your Honor, not only what this Court can deliver in terms of sentence, he also faces, as the Court is aware, administrative action by the United States Department of Agriculture which in effect would mean that they would not inspect his premises so long as he is a partner of that organization That means that there is going to have to be a reversal of what he does in this business. It means that he is going to have to take alternative means of support, and it is a difficult thing in these circumstances with a family, after the effort that has been made over a number of years in providing a successful function to even the City of Newark in its employment of people.

To think that Mr. Burke will not be able to continue in that business; that is severe punishment, and it is severe

punishment, your Honor, also in terms of what this period is like.

Similarly, Mr. Burke stated in a written statement used in the sentencing proceeding (RX H, Burke's Statement at 5):

> As the Court is aware, I now face not only a sentence in which imprisonment is possible, but also face the almost certain potential of personally losing federal inspection.

After considering all the circumstances, the court fined Mr. Burke $11,500, placed him on 3 years' probation, and required him to engage in community service. The court stated (PX 13, pp. 13–16; emphasis added):

> The COURT: Thank you. All right, knowing of the serious interest that the government has taken in the sentence in this case, and being aware, even without that reminder, of the *serious nature of the offense charged here, and the manner in which this type of offense can undermine the functioning of any democratic government*, I've taken some pains in evaluating the materials that have been furnished to me by both sides.
>
> I am also aware of the tendency of the courts today to resort to custodial sentences in cases of this sort in order, I believe, primarily, to demonstrate to the public at large that *this is a kind of conduct that cannot be tolerated, and that if tolerated will bring about, and I sincerely believe this, a great detriment to the system of government under which we live.*
>
> Now, with those things in my mind, I have compared this particular defendant, and I have found two things. One, the incidents, repeated deliberate incidents, in which he involved himself, did not, however bad they were, involve the corruption, the actual corruption of the United States. *The inspector with whom Mr. Burke was dealing was in fact, not suborned, and therefore, the effect of Mr. Burke's conduct was not as devastating as perhaps it was intended to be.*[22]
>
> In the second place, I find that the areas for which change was sought illegally were not of the sort that

[22] This circumstance was regarded as significant in determining Mr. Burke's *punishment*, but it is not significant in determining whether respondent is *unfit* to receive inspection because of the criminal convictions.

would have resulted in the injection into commerce of unwholesome food products. Thus, this was not, in my view as I heard the case, the offense of a man who was uncaring about the public consequences of his act. These two factors have led me to conclude, in view of the prior life of the defendant, that a custodial sentence would not be appropriate. However, it is not my intention, in any way, to diminish the seriousness of the offense either in the mind of the defendant or in the mind of the public, and I have, therefore, attempted to include that consideration in my formation of a sentence. It is adjudged that the imposition of term sentence is suspended. The defendant is placed on probation for a period of three years. It is a special condition of probation that the defendant engage in a community service undertaking with the direction of and approved by the United States Probation Office.

In addition, it is adjudged that the defendant do pay a fine of $500 on each of the 23 counts totaling $11,500. . . .

The sordid details of Mr. Burke's fraudulent endeavor to corrupt Dr. Gabriel, the USDA meat inspector assigned to his plant, are revealed in the transcript of the criminal proceeding, received in evidence in the administrative proceeding. (The jury had access to tape recordings of Mr. Burke's payments and transcripts of the tape recordings, but, unfortunately, they are not part of the administrative record, except for a few excerpts from the transcripts read into the record of the criminal proceeding.) Although I must accept at face value the criminal convictions, and could not properly attempt to reweigh the evidence introduced at the criminal proceeding, the criminal testimony is relevant here, if mitigating circumstances are regarded as relevant.

The fact of Mr. Burke's payments to Dr. Gabriel are not disputed. But whether the payments were voluntarily made by Mr. Burke or were, contrariwise, extorted by Dr. Gabriel, was an issue resolved against respondent by the jury. Hence that issue is no longer open for questioning. As stated by Mr. Burke's attorney at the sentencing proceeding (PX 13, p. 5):

At no time during the trial have we indicated, nor has Mr. Burke testified to any kind of statement which denied what was done, and that was admitted, and it was admitted not only because of the tapes, but it was admitted because it was done. What the essence of the defense was, as the Court understands, is what provocation there was. The

jury didn't agree with it, and we don't quibble with that, there's no way that we can. . . .

Dr. Gabriel testified that the payments related to overtime and to induce him to permit lice-infested calves to be placed in respondent's cooler in plastic bags for skinning in the next day or two, or after a weekend. Mr. Burke agreed (except for the "provocation").

As to the proper overtime procedure, a packing plant is free to operate overtime, but the plant must pay USDA for the overtime, and USDA, in turn, pays overtime to the inspector (PX 1, p. 14; PX 2, pp. 241–44).

As to the proper procedure for lice-infested calf carcasses, the regulations require the removal of the skin at the time of the postmortem inspection if a calf's carcass is infested with any parasite, such as lice. No discretion, in this respect, is left with the inspector (or his supervisor). Specifically, the regulations provide (9 CFR § 310.10; emphasis added):

> § 310.10 *Carcasses with skin or hide on; cleaning before evisceration; removal of larvae of Hypodermae, external parasites and other pathological skin conditions.*
>
> When a carcass is to be dressed with the skin or hide left on, the skin or hide shall be thoroughly washed and cleaned before any incision is made for the purpose of removing any part thereof or evisceration, except that where calves are slaughtered by the kosher method, the heads shall be removed from the carcasses, before washing of the carcasses. *The skin shall be removed at the time of postmortem inspection from any calf carcass infested with* the larvae of the "oxwarble" fly (Hypoderma lineata and Hypoderma bovis), or *external parasites*, or affected with other pathological skin conditions.[23]

The purpose of the regulation in not permitting lice-infested carcasses to be placed in the cooler (even in plastic bags) is to prevent contamination not only of other carcasses in the cooler, but also of

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[23] The ALJ sustained an objection to the introduction of the regulation (Tr. 16–17), but the criminal judge said that official notice will be taken of all the regulations "in effect at the time in question and relative to the situation that we have before us" (PX 7, p. 200). Similarly, I take official notice of the regulations (pursuant to 7 CFR §§ 1.141(g)(6), .145(i)). In addition, there is abundant testimony in the criminal record stating that lice-infested calves must be skinned on the killing floor at the time of the postmortem inspection, and cannot be placed in the cooler in plastic bags, and killed the next day, or after a weekend, as desired by Mr. Burke (PX 1, pp. 101–02; PX 2, pp. 215–16, 239–41; PX 3, pp. 317–18; PX 6, pp. 39, 87; PX 8, p. 62; and see Tr. 190).

the meat of the lice-infested carcass itself (Tr. 188–91; PX 1, p. 102; PX 2, pp. 215–16). As explained by Mr. Gould, Deputy Director, Compliance Division, Food Safety and Inspection Service, USDA (Tr. 189–91; capitalization in original):

Q. WHEN THERE IS FEAR ABOUT PUTTING AN ANIMAL WITH A HIDE ON IT IN A COOLER IN WHICH THERE ARE ALREADY SKINNED ANIMALS THE FEAR THERE IS THAT THE LICE ON THE ANIMAL THAT HAS THE HIDE ON IT WILL IN SOME WAY BE COMMUNICATED TO THE ANIMALS WHICH HAVE NO HIDE ON IT AT ALL; CORRECT?

A. YES, TO INCLUDE THE ANIMAL ITSELF THAT HAS THE HIDE ON IT. THERE'S AN OPEN CAVITY THERE.

Q. IT'S TRUE THAT ONE OF THE REASONS FOR THE BAGGING OF THE ANIMAL IS TO PREVENT THAT KIND OF COMMUNICATION WITH THE ANIMALS THAT HAVE ALREADY BEEN SKINNED?

A. WITH OTHER CARCASSES, YES.

Q. IT IS ALSO TRUE, IS IT NOT, THAT ONE WAY OF SEPARATING THE BAGGED ANIMALS FROM THE ALREADY SKINNED ANIMALS IS TO PUT THEM EITHER IN ANOTHER COOLER OR IN A FAR SECTION OF THE COOLER AWAY FROM THOSE HIDES OF ANIMALS THAT HAVE ALREADY BEEN SKINNED?

A. IT'S ONE WAY, BUT IT'S NOT THE WAY THAT THE REGULATION ADDRESSES.

Q. BUT IT AFFECTS, DOES IT NOT, THE OBJECTIVE, IS THAT TRUE?

A. IT POSSIBLY AFFECTS THE OBJECTIVE OF CONTAMINATING—THE POSSIBILITY OF CONTAMINATING OTHER CARCASSES, BUT NONETHELESS THERE IS A LIKELIHOOD THAT THE LICE WILL FIND ITS WAY ON TO THE CUT SURFACES, EXPOSED SURFACES OF THE CARCASSES THAT THE HIDE IS ATTACHED TO. KEEP IN MIND, IF YOU WILL, WHEN THE ANIMAL IS SLAUGHTERED THE VITAL ORGANS ARE REMOVED FROM THE ANIMAL FOR INSPECTIONAL PURPOSES, AND WE DO HAVE EXPOSURE FROM THE INSIDE AS WELL AS CERTAIN PORTIONS OF THE BREAST HAVE BEEN SKINNED BACK TO A CERTAIN DEGREE. SO EXPOSED MEAT IS AVAILABLE ON THAT CARCASS.

Dr. Gabriel testified that respondent prefers to skin calves after they have been cooled in the plant's cooler for a day or two, or after a weekend, but that the regulations do not permit that as to lice-infested calves. He testified) PX 2, pp. 215–16):

Q. What are you looking for when you look at the hide of the animal?

A. We're looking to see if there is any pathological or conditions on the hides of the animals.

Q. What type of parasitic conditions would there be? What are you looking for?

A. Something like lice, grubs.

Q. Why is it important to determine if the animal hide [h]as lice or grubs on it?

A. Because some of the plants use what we call color [cooler] skin[n]ing procedure in their calves. This plant like the hide to be on their calves to be put in the cooler and to be skinned while it is called [cooled] in the next day or the day after. It is up to the plant. So whenever we find a skin condition which will not permit the animals to go to the cooler, this is derailed out in a separate rail to be skinned on the same day of slaughter.

Q. Why must an animal that's railed out be skinned on the same day of slaughter? What's the purpose of that?

A. This is the regulation, sir.

Q. Well, do you know the purpose for the regulation?

A. Yes, sir. Because if you let this animal go to the cooler, it will be a source of contaminating the other meat.

Q. Doctor, do you—at Great American Veal, do you know what type of skinning processes they have there?

A. Yes. They have the cold skinning procedure.

* * * * * * *

Q. What's the purpose of the cold skinning procedure?

A. This the management of any plant that choose the procedure of the skinning and at Great American Veal the management chooses the cold skinning procedure which they would skin also carcasses after it is chilled in their cooler for a day or two or whatever their needs are, the plant needs.

* * * * * * *

Q. Dr. Gabriel, did Mr. Burke ever tell you why he had that procedure?

A. Yes, sir. Because he felt that when he skinned this carcass, after it will keep the bloom of the carcass and make it look much better than if it will be skinned the same day.

Q. Bloomed. Does it have anything to do with the value of the carcass?

A. Yes, sir.

Q. What is bloomed, by the way?

A. This is the color mainly of the carcass. And they feel that when it is skinned the same day it will look in bad shape then if it will be skinned the next day.

Dr. Gabriel testified that Mr. Burke told him that the value of a calf decreases by about $25 when it is skinned on the day of slaughter (PX 2, p. 240). Mr. Burke testified that the farmer loses the money when a calf is hot-skinned (PX 10, pp. 120–21). But since respondent is in a "very competitive" market "in terms of attracting growers" to supply it with product (PX 10, p. 9), and, on the other end, respondent could lose a customer if respondent failed to supply the product required (PX 10, pp. 9–10), respondent has a

very real interest in keeping good growers satisfied with the prices received from respondent (PX 10, pp. 8–10).

Dr. Hall, who was Dr. Gabriel's supervisor, testified that the regulations require lice-infested calves to be skinned immediately on the killing floor to prevent the condition from being imparted to the meat sold to the public. He testified (PX 1, pp. 101–02):

> Q. What is the regulation concerning calves that are found with lice in their skin or with a skin condition?
>
> A. The regulations state that an animal with lice or any skin condition, that the hide must be removed on the killing floor.
>
> • • • • • • •
>
> Q. What's the reason for the federal regulation requiring that the skin on animals with skin conditions be removed immediately?
>
> A. Well, the fear is that this disease condition of the skin will be imparted to the meat which is sold to the general public.

However, Dr. Hall testified that, in particular circumstances, he had allowed lice-infested carcasses to be placed in a cooler, but "under no circumstances overnight" (PX 1, p. 151). He testified (PX 1, pp. 141, 151)):

> Q. Now, doctor, if an animal has lice is it possible to put that animal in a sheet or bag and place that animal in a cooler without impairing the safety of the rest of the plant?
>
> A. That can be done.
>
> Q. And is that within the discretion of the veterinarian?
>
> A. Yes. Yes. The purpose—well, all right. Yes. That would be true.
>
> Q. And it would not be improper if he followed such procedures?
>
> A. No. It would not.
>
> • • • • • • •
>
> Q. Under what circumstances could an inspector put lice infected calves in a shroud in a cooler?

A. Well, we have circumstances, the government says an animal, a calf with a skin condition, any skin condition, has to be killed [skinned] on the killing floor. However, if you have circumstances whereby you get a particular contaminated lot with lice or grubs or what not, and and you cannot handle them on the killing floor, there are too many, in order not to hold up the production of their plants, you might put them in the cooler.

It's my practice to find an isolated rail where there will be no contamination with those calves that are not infected and you can put them there and hold them until they can be skinned but, but under no circumstances overnight.

Acting on Dr. Hall's authorization, Dr. Prasad, a meat inspector who was assigned to respondent's plant *after* the relevant time period involved here, on occasions when the regular inspector was unavailable (PX 8, pp. 18, 21), permitted lice-infested calves to be placed in the cooler (PX 8, pp. 56–57). However, Dr. Prasad recognized that "the regulation says that you've got to have those calves skinned on the kill floor," and that when he was asked by the packing plant to let lice-infested calves be put in the cooler in a plastic bag, he had to get authorization from his supervisor, Dr. Hall (PX 8, p. 62). He testified (PX 8, p. 62; and see PX 8, pp. 56–57):

Q. Okay. You testified that when you were at the Paterson [packing] plant that there was a lice problem there, and you found lice-infected calves. Is that right?

A. Yes, ma'am.

Q. And you followed the regulations. And the regulation says that you've got to have those calves skinned on the kill floor. Is that right?

A. Right.

Q. Were you asked to put those calves in a bag, in a plastic bag by the plant?

A. The instruction has to—see, I cannot bifurcate the regulation. And still I don't bifurcate.

Any bifurcation and other ruling has to come from my supervisor if they want. Because Circuit sets its own standard. I have no right to go beyond that regulation. I have to follow that regulation.

Q. And did you follow it at the Paterson plant?

A. Yes, I did.

Q. In other words, you had the calves skinned immediately on the kill floor, right?

A. I ordered it to skin it, and then the objection came, and then the ruling came that you can use the plastic bag on it.

Q. And you ordered it because that's what the regulation said, right?

A. Right.

Q. And you have no right to disobey the regulation, do you?

A. Nobody has the right to disobey the regulation.

Turning to the evidence as to Mr. Burke's cash payments, Dr. Gabriel testified in the criminal proceeding that Mr. Burke offered to pay him cash for overtime on a number of occasions, which overtures Dr. Gabriel initially refused. Dr. Gabriel testified that he was paid about $10 an hour for overtime, and that Mr. Burke told him he was a "fool" to work for such a low amount. Specifically, Dr. Gabriel testified (PX 2, pp. 245–46):

Q. Doctor, you had testified that Mr. Burke had begun to complain about the lice problem.

A. Yes, sir.

Q. To you. And telling you that he was losing money and everything like that. How soon after he started complaining about the lice did he first offer you cash directly for your overtime?

A. At least about 8, 10 months.

Q. All right. So he had been complaining about the lice almost from the day you got to the plant?

A. Yes, sir.

Q. All right. Now, tell us what happened in December of 1978 when Mr. Burke offered you this cash.

A. At that day I was taking that M.D. form—MB–11, which having all the overtime hours during four weeks period to be signed by Mr. Tom Burke.

> And when I was giving it to him to sign it he asked me how much I'm getting for an hour of overtime. I said about $10. He said, oh, that low, I pay twice that much. I didn't make any comment. So he told me you're a fool to accept that, I can pay you the overtime in cash.
>
> I turned him down and took the form and left.

When Mr. Burke's offers to pay cash for overtime continued, in accordance with USDA policy, Dr. Gabriel contacted Mr. St. Pierre, an agent of USDA's Inspector General, and, with the concurrence of the Department of Justice, Dr. Gabriel was furnished with a hidden tape recorder. Dr. Gabriel then accepted Mr. Burke's cash payments, recorded the conversations, and turned the tapes, together with the cash payments, over to Mr. St. Pierre. (PX 2, pp. 244–59; PX 6, pp. 95–96)

Mr. Burke paid Dr. Gabriel $15 an hour for overtime (PX 2, pp. 271–73, 298–300; PX 3, pp. 314, 375; PX 4, p. 32), which is about 50% more than the amount (about $10 per hour) paid by USDA to Dr. Gabriel for overtime.[24]

In order to prevent USDA from becoming suspicious, Mr. Burke instructed Dr. Gabriel at the end of each 2-week period how much of his overtime should be recorded on his USDA time sheets (for which Dr. Gabriel was paid by USDA) and how much would be paid in cash by Mr. Burke (PX 2, pp. 293–99; PX 3, pp. 311–12; PX 10, pp. 83–87). Dr. Gabriel testified (PX 2, pp. 293–96, 298–99):

> Q. Well, what was Mr. Burke telling you when he said "You give them five and I'll give you five and one half"? [The quotation is from the transcript of the tape-recorded conversation.] What was that in reference to?
>
> A. I give them five means the federal government and he give me the amount of hours he is going to pay me cash.
>
> Q. And did he either at that time or subsequently give you cash for those hours?
>
> A. Yes, sure.
>
> Q. Why, if you know, did Mr. Burke tell you why to give them five, "them" being USDA?
>
> * * * * * * *

[24] Some witnesses erroneously testified that $15 per hour is about one-third more than $10 per hour.

A. The plant of Great American Veal known to be working overtime and he wants me to put some overtime for the government so no one will notice what was going on between him and myself.

* * * * * * *

Q. Dr. Gabriel how did you know how many hours Burke was going to pay for and how many hours you were supposed to give to USDA according to Burke?

A. At the end of every two weeks, when I send my time and attendance sheet for the federal government, I will go to Mr. Burke and tell him about how many hours I work overtime at his plant during these two weeks. And I will have the little piece of paper the first week and the second week, how many hours and the total of the first week and the total of the second week, and the total of the two weeks. And then he will write a number about how many hours I'll give them, how many hours he will pay.

I take this little piece and then put whatever hours he told me to give the government, I give it to the government, take the little piece and push it in the garbage and that's it.

At the end of the four weeks I'll give him another little paper. The same thing, like the first two weeks. And then he will decide how many hours to go to the government and how many hours he will pay in cash, and then I'm having the MB-11 with the whole four weeks. I'll ask him to sign it and he'll sign it; and that's it.

Q. Directing your attention to May 18, Dr. Gabriel, did you have a conversation with Mr. Burke on May 18, 1979 concerning this overtime, the cash he was paying you for overtime?

* * * * * * *

Q. All right. According to this conversation you gave them [USDA] five of the hours. Is that correct?

A. Yes, sir.

Q. That left him [Burke] six?

A. Yes, sir.

Q. To pay for?

A. Yes, sir.

Q. Did he pay you the cash for them?

A. Did they? No. But he paid later.

Q. How much did he pay you for?

A. 90 dollar.

Q. Now, during course of that conversation Mr. Burke said to you I would like to take care of all of it, but you can't because they know you're getting some [expletive deleted] overtime.

What was that all about?

A. He wants to pay me all the hours I work for overtime at his place but because I note that it will be very noticed, and his place is known to work overtime, we discussed it before and I'm still trying to put some hours so no one will notice what's going on.

In a further effort to prevent USDA from being suspicious, Mr. Burke instructed Dr. Gabriel to submit an uneven amount of overtime to USDA on his time sheets, e.g., 5¼ hours rather than 5 hours. Dr. Gabriel testified (PX 3, pp. 380–81):

Q. Now, even later in the conversation [recorded on the concealed tape recorder] there's an exchange in which Mr. Burke says, "don't make it even." You say "sometimes it comes even." And he says, "add a quarter." A little later he says, "never make it even, it always has to be a quarter, a half, three-quarters."

What is that in reference to?

A. In reference to the hours I will put on my time and attendance sheet to be paid by the government.

Q. He's telling you not to make those hours even?

A. Yes, sir.

Q. Did he ever tell you why he didn't want you to make the hours even?

A. Yes, sir.

Q. Why, what did he tell you?

A. Because they just may notice the hours are equal or—they might suspect that something is going on between him and me in the plant.

At first, no "favors" were requested for the cash payments, but later Mr. Burke began "pressuring" Dr. Gabriel. Dr. Gabriel testified (PX 3, pp. 314–16):

Q. Did you have a discussion with Mr. Burke about what, if anything, he wanted you to do for this overtime?

A. Yes, sir.

Q. What did he tell you, if anything, in that conversation?

A. When he offered to pay me the overtime I asked him what favors he wants me to do, and he said, "No favors at all."

* * * * * * *

Q. Doctor, did he ask you to do anything at all for him concerning any of the regulations?

A. When he offered me the overtime he didn't ask me to do anything for paying me the overtime in cash. But later on on many occasions he was in a sense pressuring me to do things.

The "pressure" was Mr. Burke's efforts to get Dr. Gabriel to let lice-infested calves go to the cooler (in plastic bags), to be skinned in a day or two, or after the weekend, which is contrary to the regulations. Dr. Gabriel at first refused, but later accepted $50 per week from Mr. Burke to allow this practice. Mr. Burke told Dr. Gabriel that $50 per week was the amount he paid other inspectors (including supervisors) to allow lice-infested calves to go to the cooler.[25] Dr. Gabriel testified (PX 3, pp. 317–18, 327–30; PX 6, pp. 86–87; PX 3, p. 321; see also PX 3, p. 375):

Q. Well, tell us what, if anything, Doctor—Doctor, tell us what, if anything, Mr. Burke asked you to with respect to the regulations.

A. He asked me to let the carcasses with the lice go to the cooler, and this is against the regulations.

---

[25] As shown below, Mr. Burke admits that he *told* Dr. Gabriel that he paid other inspectors and supervisors, but denies that he actually *paid* anyone other than Dr. Gabriel (see note 29, *infra*, and accompanying text).

Q. Did that happen on more than one occasion?

A. Yes, sir.

Q. How often did that happen?

A. Almost every time when we have lice calves to be skinned on the same day of the slaughter.

Q. Did you do it?

A. No, sir.

Q. Did he ask you to do anything else with respect to the regulations, the enforcement of the regulations?

Mr. SEGAL: Your Honor, can we have a date on these so-called events?

The COURT: If you know, could you date these events.

The WITNESS: I can't remember the exact date, but in many occasions in this tape recording, there is some conversations in regard to Mr. Burke asking me to let this calves go to the cooler to be skinned next day or sometimes to stay in the cooler over the weekend and to be skinned at the start of next week. And this is been recorded in this exhibit. [PX 3, pp. 317–18]

* * * * * * *

Q. Dr. Gabriel, did there come a time when Mr. Burke offered you cash that had nothing to do with your overtime or anything else.

A. Yes, sir.

Q. When approximately was that?

A. May 25, 1979.

Q. Did Mr. Burke tell you why he was offering you this cash?

A. Yes, sir.

Q. Why?

A. He wants to have the calves with lice go to the cooler and not to be skinned in the same day of slaughter as the regulations say.

Q. He offered you a specific quid pro quo for the money?

A. Yes, sir. [PX 3, pp. 327-28]

* * * * * * *

A. Not in—I wasn't speaking to him in the government office, in my office, but before he made the offer he walked outside and looked for an empty room in his establishment and called me. He whistled to me to come over to the other room. I went to the other room, and he offered to pay me the cash not to let this animals to be skinned in the same day of the slaughter.

Q. How much money?

A. $50 a week.

Q. Anything else? Did he tell you anything else during that conversation?

A. Yes, sir. When I asked him 50 a week,[26] he said, "Yes," and he told me that offer is from his own experience of paying other people the same amounts of money.

* * * * * * *

Q. In what context? What was the context in which he told you that, Doctor?

A. Just because when I asked him 50, he said 50, and this is from his experience of paying other inspectors. So I told him, "You paid other inspectors $50?"

He said, "Yes, higher-ups. Higher graders than you I paid this $50." [PX 3, pp. 329-30]

* * * * * * *

Q. Did he [Mr. Burke] ever get you to change your proceedings in railing out liced cattle?

A. Yes, sir.

Q. How did he try to do that? What method did he use to try to get you to change your procedures?

---

[26] Note that Dr. Gabriel did not ask *for* $50 a week, he merely aked, "50 a week?" after Mr. Burke offered him $50 a week, to be sure of the exact terms of the offer.

A. For many occasions, he let these liced calves stay on the kill floor to the end of the kill and maybe sometimes he come to me and told me he cannot do it or someone left the plant and tried to make any excuses to let these calves go to the cooler or stay to the next day.

Q. Did he do anything else to get you to change your procedures with these calves?

A. Yes, sir.

Q. What would that be?

A. He paid me money to change this procedure.

Q. You're familiar with U.S.D.A regulations, are you not, Doctor Gabriel?

A. Yes, sir.

Q. Are you aware of any regulation which says it's permissible to pay the inspector money to get them to change the regulations?

A. Permissible?

Q. Yes, sir.

A. No, it is not permissible. [PX 6, pp. 86–87]

* * * * * * *

Q. Doctor, by the way, after Mr. Burke started paying you the cash, did the lice situation change?

A. Yes, sir.

Q. How did it change?

A. There was too many carcasses with lice coming to the plant.

Q. You mean there were more after he started paying you the cash?

A. Yes, sir. [PX 3, p. 321]

Dr. Gabriel testified that Mr. Burke's payments to him for overtime and for letting lice-infested calves go to the cooler lasted until he (Dr. Gabriel) was (routinely) reassigned to a different packing plant. He testified (PX 3, p. 332; and see PX 4, pp. 38–39):

Q. Doctor, you testified that after you had this conversation you met with St. Pierre and that as far as you were concerned you felt that the investigation was ended at that point. Did in fact the investigation end at that point?

A. No, sir.

Q. It continued?

A. Yes, sir.

Q. At whose direction?

A. Mr. Tom St. Pierre's direction.

Q. Did Mr. Burke pay you the $50 a week?

A. Yes.

Q. Did he do it more than one time?

A. Yes.

Q. How long did he continue to pay you the $50 a week?

A. From May until I left the plant, which was sometime in November, January 1980, I believe.

Q. Every two weeks he gave you a hundred dollars?

A. Every two weeks if I worked at his place, because sometimes I was scaled to go to some other plants for a period of a week or two——

Q. Every time that Mr. Burke gave you a hundred dollars did he—by the way, did he continue to pay cash, the overtime in cash?

A. Yes.

Q. Every time he gave you cash either for the hundred dollars or for the overtime, what did you do with it?

A. I go out of the plant and Mr. Tom St. Pierre will be waiting outside and he will draw his car after my mine. We will stop at one place. I will get out of the my car, go to his car, give him the recorder, initial the money, and he will initial the money and initial the tape.

Q. So each time you [were] paid cash you gave that cash to Tom St. Pierre. Is that correct?

A. The same day, sir, yes, sir.

Q. Each time you made a recording you gave the recording to Tom St. Pierre. Is that correct?

A. Yes.

Mr. Burke testified at the criminal proceeding that Dr. Gabriel extorted the cash payments from him, and that they were not made voluntarily (PX 10, pp. 43–88, 116–17). However, the jury did not believe Mr. Burke's version of the facts and, therefore, for the purposes of this proceeding, I accept Dr. Gabriel's testimony as true and correct. Although the jury's verdict is conclusive as to this matter, the transcript of the criminal proceeding includes a number of additional references to the tape-recorded conversations, which are of interest here, e.g. (PX 10, pp. 74–76, 79–80, 82–88, 106–07, 110, 114–15):

Q. Mr. Burke, I believe you testified that you were beside yourself at having to pay this money for these liced calves on a Memorial Day weekend and that you were truly upset about the fact that this money was being extorted from you, sir?

A. That's correct.

Q. Nevertheless, it is true that what you actually said on that occasion to Doctor Gabriel, "You and I are two big boys. We know there are certain things we can do together." [The quotation is from the transcript of the tape-recorded conversation.] That's not Doctor Gabriel speaking, Mr. Burke, that's you speaking, is it not?

A. Could I see it?

Mr. SEGAL: Can we have an identification?

The COURT: What's the exhibit number?

Mr. MILNER: 12a, your Honor.

* * * * * * *

Q. You're talking with Doctor Gabriel about these liced calves that he wants you to skin and Doctor Gabriel says to you, "This is, you know, regulations and he's doing what he's supposed to do," speaking about the inspector; is that correct?

A. Where are you on here?

Q. This is page three. Doctor Gabriel says, "This is, you know, regulations and he's doing what he's supposed to do." [PX 10, pp. 74–76]

* * * * * * *

Q. Right here. Beginning right there. (Indicating.) Did you find it?

A. "This is, you know, regulations."

Q. That's Doctor Gabriel speaking?

A. Yes.

Q. And you say, "Right, right," and he says, "Really?" [27] And you say, "Understand," and Doctor Gabriel says, "If you feel that the regulation is breaking you, you fight the regulations." And you say, "You can't." He says, "You fight the people who put these regulations. Okay?" You said, "Listen to me," and he said, "I'll listen to me," and he said, "Okay," and you say, "You and I are two big boys," right? That's what you said, right?

A. That's what I said.

Q. And he says, "Oh okay," and you say, "We know there are certain things we can do together," just like that, and he says, "Okay." And then you say, "Mr. Burke, you know, so make a deal with me." [28] He didn't say make a deal with me. You said it, Mr. Burke.

A. No.

* * * * * * *

Q. Is that an accurate transcription of what occurred, Mr. Burke?

A. I think it's part of a total conversation that went on.

Q. That's Doctor Gabriel extorting money from you, is it, Mr. Burke? That's what that is?

---

[27] The question mark after "Really," added by the reporter, would appear to be erroneous. An exclamation point would seem more appropriate.

[28] This again appears to be a reporter's error as to punctuation and capitalization. As shown by the following two sentences, this sentence should read: "And then you say, Mr. Burke, 'You know, so make a deal with me.' "

A. The total conversation, in my reading, it clearly reflects that. [PX 10, pp. 79–80]

* * * * * * *

Q. Mr. Burke, you've indicated that, in fact, it was Doctor Gabriel who was asking you for this money and not the other way around; is that correct?

A. That's correct.

Q. And that you were pressuring him—or he was pressuring you with the overtime. Isn't it a fact that you were pressuring him to let him to do what you wanted him to do with the lice calves?

A. I didn't want him to do anything differently than anybody else had done.

Q. Isn't it true that you have described this situation exactly opposite than the way it actually happened at the time the incident occurred?

A. No.

Q. Why then is it that on April 6 when you're speaking to Doctor Gabriel you say to him, "I don't want to talk to you about nothing like that in that office at all." You ask him, "Where's the microphone?"

Isn't it true that you, in fact, knew that what you were doing was wrong and that you didn't want to be in a position of possibly being recorded in this conversation?

Mr. SEGAL: Objection. We've got multiple questions.

Mr. MILNER: Yes, I'll withdraw the question.

The COURT: Yes.

BY MR. MILNER:

Q. Isn't it true that throughout listening to these tapes, Mr. Burke, that, in fact, it's Doctor Gabriel who comes to you and it's you telling him how many hours he's going to be paid for. It's not him——

A. Doctor Gabriel was making up the slips. It was him saying, "Here's how much you have for the week. How much should I give them?"

Q. On April 20 you tell him, "You give them five and I'll give them five and one-half." You're telling him.

A. From the sheet that he has written, laying down in front of me on his table.

Q. On May 18 he's asking you how much to give them, being the U.S.D.A., and you say, "Whose is this, yours?" And he says, "This is mine, yes." Referring to his overtime and you say, "Right, always give them half." It's you telling him how much to give them.

A. He's showing me the sheet there about the hours on it for each week.

Q. How do you explain this, Mr. Burke? On May 18 on page two you say, "I would like to take care of all of it but I can't because they know you're getting some overtime." How do you explain that, Mr. Burke?

A. Because we had a situation where I was forced into it and any conversations after that could go either way, whether he's catching me on the run—he wants to see me in his office. He's calling me in there. I'm trying to get out of there and get a plane to go home on Friday afternoons and he's showing me paperwork and any conversations like that would be normal. The pattern was established. He pushed me into it and it was going to continue like that.

Q. You say, "I would like to take care of all of it."

A. If he'd leave me alone and stop strangling me with unfair and unnecessary things, I would have done anything to get rid of this man.

Q. Then you say, "So give them half." You're talking to Doctor Gabriel, a man who you say is pressuring you. He's extorting this money from you. He's after you and he's got you around the throat and you say to him, "Give them half." He doesn't say that to you. He doesn't give me half. You're telling him how much to pay them and how much you're going to pay. You're telling him?

A. That's after he's got me in there going over this thing.

Q. This is the man that's got you by the throat?

A. That's right.

Q. You're telling him?

A. The very same man.

Q. On July 27, this very same man who's got you is talking to you and he says to you, "I just want, you know, you tell me how much you want to pay for the Government time." You say, "How many you got?" And then you tell him, "So give them—I take 15. Give them the rest, whatever it is."

You're the one who is telling him how much you're going to pay, Mr. Burke.

A. I think it was a well-established pattern in the beginning.

* * * * * * *

Q. Mr. Burke, you testified that, in effect, you weren't saving any money on this deal, yet on April 6, Doctor Gabriel says to you, "Okay. Now, you know, I will understand this is a favor from you." You say, "This is not a favor," and he says, "Uh-huh," and you say, "It's for you and it's for me. They charge me twice what you should get."

Mr. SEGAL: Your Honor, is this a question or are we just having declarations?

The COURT: The question will come. I think perhaps we're waiting for the siren.

Q. Mr. Burke, who else did you pay at U.S.D.A. besides Doctor Gabriel?

A. No one at all.

* * * * * * *

Q. You told Doctor Gabriel you did, didn't you?

A. I told Doctor Gabriel that to stop him from getting a complete situation going.

Q. You told Doctor Gabriel you paid other people at U.S.D.A, didn't you, Mr. Burke?

A. Yes. Doctor Gabriel is approaching me for money and I definitely told him that to stop him from extorting more money from me.

Q. In fact, you told Doctor Gabriel it was somebody above him at U.S.D.A. didn't you?

A. I believe I did.

Q. Was it Doctor Glasser?

A. No.

Q. Doctor Hall?

A. It was nobody whatsoever. I have never paid a cent to any Government emplolyee except Doctor Gabriel.

Q. In fact, you told Doctor Gabriel you were going to pay him the same thing you were paying these other folks; is that correct?

A. That's right. To keep him in line and to keep him from asking me for crazy figures. [PX 10, pp. 82-88] [29]

* * * * * * *

Q. On April 9, you were talking to Doctor Gabriel about a calf which he said was moribund and which you said wasn't and you told him, "But the regulations are wrong. They're really wrong," didn't you, sir?

A. The part that he was reading was wrong.

Q. You didn't say the part that you're reading is wrong. You said the regulations are wrong.

A. You are looking possibly four or five hours in total of conversations and you're leaving out the other hundred or 200 hours.

* * * * * * *

Q. Didn't you say on April 9 to Doctor Gabriel, "But the regulations are wrong. They're really wrong and if they're wrong—" Didn't you say that, Mr. Burke?

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[29] See note 25, *supra*, and accompanying text, for Dr. Gabriel's testimony in this respect.

A. If that is exactly what I said there in quotation marks and that's the only part of the conversation you want to look at . . .

Q. Mr. Burke, just answer the question?

A. Yes, I'm sure that I said it.

Q. And if this is wrong, you don't want to follow them, do you? [PX 10, pp. 106–07]

* * * * * * *

Q. Maybe you would eat that but Doctor Gabriel wouldn't have, would he? Doesn't he go on to say, "Maybe you would eat it, but don't you think, really, Tom, those people that buy the meat from you, if they know you're selling this calf,you think they will come back and take meat from you? No."

A. Conversations like this with Doctor Gabriel in such a repulsive situation of having to be in his office and handing him money can certainly not be looked at as the way that I think at all. [PX 10, p. 110]

* * * * * * *

Q. And the problem was caused by him railing out all of these calves; is that correct, sir?

A. The problem was caused by him insisting to skin these calves on the kill floor. Did I say kill? Skin the calves on the kill floor.

Q. Yet on May 4, you have this conversation with Doctor Gabriel, don't you, Mr. Burke? "Right now the first thing is really—" this is you speaking. "Right now the first thing really, you know, is to—if I had known about it right away, we could come to a better understanding because it, you know, the problem with the lice. Can I put bags on them or not?"

Doctor Gabriel says, "Tom." You say, "I'm not trying to compromise you but, you know, could you bullshit them [USDA] that we killed late? There was no time or something like that, you know, because that's my biggest headache here. That's the damn lice."

Doctor Gabriel says, "You told me you were going to take care of this problem, especially with the farmers."

You said, "I did. I tried. I screamed. I carried on and everything. It improved greatly."

Doctor Gabriel says, "It improved greatly until you started paying me the overtime."

Isn't that what you said on May 4, 1979?

A. Well, I assume you're reading it and maybe I should look at it.

Q. Isn't that what you said?

A. That's what this says here, yes, that's correct.

Q. That's what you said, isn't it?

A. It's a copy of what I said. [PX 10, 114–15]

The one tape-recorded conversation that is helpful to Mr. Burke's contention that Dr. Gabriel solicited the money for permitting the lice-infested calves to go to the cooler to be skinned later is as follows (PX 10, pp. 116–17):

Q. Mr. Burke, on May 25, do you recall this exchange between yourself and Doctor Gabriel?

Tom Burke: "Could we put a plastic bag and skin them on the kill floor Tuesday morning early?"

Gabriel: "That's what you want me to do?

Burke: "It would help me. It would really help.

Gabriel: "And you pay me overtime, my overtime and that's it."

Burke: "I don't follow you.

Gabriel: "What do you mean you don't follow?"

Burke: "What do you mean? I know. What do you mean?"

Gabriel: "You just want me to do you these favors and you pay me overtime which I work every minute of it and you know that and that's it."

Do you remember that conversation with Doctor Gabriel?

A. Yes, I do.

Q. Did you consider that conversation a solicitation to you?

A. Yes.[30]

However, the jury considered all of the tape-recorded conversations and all of the testimony, and found that Mr. Burke voluntarily made the cash payments to Dr. Gabriel. That determination is binding here. As shown above, even Mr. Burke's attorney concedes that the "jury didn't agree" with Mr. Burke's version as to the "provocation" for the payments, and Mr. Burke's attorney said we "don't quibble with that, there's no way that we can" (PX 13, p. 5).[31]

One additional isolated incident is worth mentioning here. On one occasion, Mr. Burke asked Dr. Gabriel to let him personally have a calf Dr. Gabriel had tagged USDA condemned, so that he could eat it himself. Dr. Gabriel testified (PX 3, pp. 319–20):

Q. All right. Doctor, did Mr. Burke ever ask you to do anything against the regulations with respect to the moribund [dying] calves?

Mr. SEGAL: Objection as to doing things against the regulations. I would object to that.

Mr. MILNER: I'll rephrase the question.

Q. Did you ever have any conversation with Mr. Burke about the moribund calves after he started paying his cash for the overtime?

A. Yes, sir.

Q. Tell us what those conversations were, Doctor.

A. One of the conversations about moribund was that I tagged a carcass as USD condemned. And Mr. Burke told me that he can eat this carcass meat if I let him have it.

---

[30] See also Mr. Burke's testimony accompanying note 33, *infra*, with respect to this incident, in which Mr. Burke admits that he paid "money to Doctor Gabriel with regard to the lice and bagging."

[31] Even if an inspector or grader used language that led the convicted individual to believe that a bribe was being solicited, that would be significant only in the criminal proceeding (by way of defense on the ground of entrapment, or in mitigation of the *punishment*), but it would not be significant in determining whether the packing plant is *unfit* to receive inspection (see *Utica*, § I(B)(5)(d), *supra*, and *National Meat Packers*, § I(B)(7), *supra*).

I said, "No, I can't let you do that. Once I tag it USDA condemned, it must be condemned and disposed as a condemned carcass."

Next day, if I remember, when I met Mr. Burke, I brought the subject again because that carcass which I tagged as USD condemned died in the antemortem area almost about two hours after I tagged it.

So I told him, "Your remember that carcass which you discussed with me yesterday?"

So he told me, "Yes."

I told him it died about two hours after I tag it.

"Would you still eat that meat?"

I think he said, "yes;" something like that.

This isolated incident is not tied in with any of the payments, but it is the type of "favor" that a packing plant operator might request of a meat inspector who is on his personal payroll.

The facts set forth above show clearly that Mr. Burke's convictions are based upon "fraud in connection with transactions in food." He put the meat inspector assigned to his plant, Dr. Gabriel, on his personal payroll, paying Dr. Gabr iel about 50% more for overtime than he was paid by USDA. That was a fraudulent interference with the relationship between Dr. Gabriel and his employer, USDA—an interference that would normally lead to a conflict of interest. The fact that Dr. Gabriel was an honest meat inspector and was not suborned does not detract in any manner from the fraudulent nature of Mr. Burke's convictions.[32]

Mr. Burke's further payments made to Dr. Gabriel to induce him to violate the regulations with respect to lice-infested calves are additional circumstances showing "fraud in connection with transac-

[32] During the administrative hearing, complainant's expert witness and attorney at times seemed to express the view that the only fraud involved relates to the payments for the lice-infested calves (e.g., Tr. 15, 46-48, 133-34). At other times, they seemed to recognize (correctly) that any payment to a meat inspector in connection with his official duties involves fraud (e.g., Tr. 17-22, 115-16, 119-20, 180). As stated by complainant's witness, Mr. Gould, "you don't have control of your program when inspectors are in business for themselves" (Tr. 180). In any event, however, the complaint is broad enough to include more than just the lice matter (in fact, the complaint does not specifically refer to the lice matter), and we are not bound here by any (erroneous) legal views expressed by the Department's attorney or witness. It is clear that respondent had a fair opportunity to present all of its defenses, by way of evidence and argument, to the matters relied on in this decision.

tions in food." It is immaterial that Mr. Burke was charged under the compensation section, 18 U.S.C. § 209(a), rather than the bribery section, 18 U.S.C. § 201(b), or the gratuity section, 18 U.S.C. § 201(f). Mr. Burke was charged with making payments to Dr. Gabriel "in connection with his official duties as the certified inspector assigned to the Great American Veal, Inc. slaughtering operation" (PX 12, Information, Counts 1-23). The *undisputed* evidence at the criminal proceeding shows that a portion of these payments, *viz.*, $50 per week, was made for the purpose of inducing Dr. Gabriel to permit lice-infested calves to be placed in the cooler for skinning on the next day, or later. The only conflict in the testimony was whether these payments were requested by Dr. Gabriel or whether they were volunteered by Mr. Burke. Mr. Burke's admissions that the payments were made to permit the bagging and cooling of the lice-infested calves are as follows (PX 10, pp. 43, 46-50, 53, 74; emphasis added):

Q. Were you ever asked for money by Doctor Gabriel?

A. Yes, I was. [PX 10, p. 43]

* * * * * * *

Q. Mr. Burke, in your experience, was your request for bagging calves with lice on them something that you had not experienced before?

A. Yes, it was.

Q. Well, had you had calves bagged?

A. Yes, on several occasions I had calves bagged, yes, and I had seen them in other areas of the country, all over, calves in bags.

Q. Well, did you deem this a favor from Doctor Gabriel that you were requesting.

A. Not a favor at all. It was a normal thing that was a local rule, where a calf was put in the cooler with a plastic bag on it if it had a lice problem.

Q. In your plant today, are you permitted to bag calves and put them in the cooler?

A. Yes, I am.

Q. Who is your inspector?

A. Doctor Hall is the supervisor. My present inspector today is Doctor Prasad. Until a few weeks ago or a few months ago it was Doctor Choy, over twenty different inspectors that I had in that plant.

* * * * * * *

Q. Now, doctor, did there come a time when a request was made of you for any monies in connection with the bagging of calves?

A. Yes, there did. We had—I was sent for and told that we had a few dozen calves on the kill floor with lice and I was asked to—Doctor Gabriel had sent for me and he told me, "Tom, we have a lot of calves on the kill floor with lice and what do you want me to do about it?" And I said, "Just put plastic bags on them like everyone else has done."

Q. When was the occasion when you had this conversation with him?

A. This was Memorial Day weekend.

Q. Had you had a similar discussion with him at an earlier time before Memorial Day?

A. Yes, a few weeks earlier or a month earlier there was another discussion about lice.

Q. What happened on that occasion?

A. I asked him to bag the calves and put them in the cooler and he said, no, he couldn't do that and I said, "Fine. Go ahead and skin them."

Q. On this occasion, on the eve of Memorial Day, could you tell us what your conversation with him was?

A. I said, "Doctor, we're going to have problems with these calves over the long weekend and I think they should be bagged and put away." And he tried to tell me that that would be a big favor to me, that in addition to the money he was getting, he wanted more money.

Q. Did you make any reply to whether or not it was a favor or whether you wanted a favor?

A. I said, "Doctor, I don't want any favors in this plant whatsoever. I want a clean piece of meat to leave here and

what is to be done is the standard procedure to be followed." I never asked Doctor Gabriel for a favor.

Q. *Now, when this Memorial Day situation occurred, did you pay money to Doctor Gabriel with regard to the lice and bagging after that?*

A. *Yes, I did.*[33]

Q. *Did you have—did you pay him on more than one occasion?*

A. *Yes, I did.*

Q. *Did you have any multiple situations after that in which calves were bagged and hung because of the lice situation? Would that become a practice after that?*

A. *Yes, it did.*

Q. Well, did you do it often? Was it done often?

A. No, it was very rarely, and whether that was when Doctor Gabriel was there or not, I don't remember.

Q. Well, during the time that Doctor Gabriel was there, did you have a greater or a lesser incidence of lice?

A. A much lesser incidence.

Q. And was there a necessity for bagging these lice afterwards?

A. I believe that we skinned some and bagged some.

Q. *Well, then what was it that you got in return for the payment of this money?*

A. *I got absolutely nothing in return and I didn't want anything in return.* [PX 10, pp. 46–50]

* * * * * * *

Q. *And in connection with the lice situation, did he bring up the subject of money to you specifically then?*

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[33] See the testimony accompanying note 30, *supra*, with respect to this incident, in which Dr. Gabriel's exact words are quoted from the transcript of the tape-recorded conversation.

A. *Yes, he did.* [PX 10, p. 53]

* * * * * * *

Q. *Mr. Burke, I believe you testified that you were beside yourself at having to pay this money for these liced calves on a Memorial Day weekend and that you were truly upset about the fact that this money was being extorted from you, sir?*

A. *That's correct.* [PX 10, p. 74]

Mr. Burke cannot here disavow his admission in the criminal proceeding that he paid money to Dr. Gabriel for permitting the lice-infested calves to be bagged and placed in the cooler, for skinning at a later date. And, as stated above, we are bound here by the jury's determination that the money was paid voluntarily, rather than extorted by Dr. Gabriel.

Mr. Burke's statement quoted above that he got "absolutely nothing in return for the payment of this money" with respect to the lice-infested calves (PX 10, p. 50) is not inconsistent with his admissions quoted above (text accompanying note 33, *supra*) that he paid Dr. Gabriel to let the lice-infested calves be placed in the cooler to be skinned at a later date (PX 10, pp. 43, 47–49, 74; see also Dr. Gabriel's testimony quoted earlier (text following note 25, *supra*) that Mr. Burke told him that he paid other inspectors $50 per week for the lice-infested calves (PX 3, pp. 329–30), and Mr. Burke's admissions quoted earlier (text preceding note 29, *supra*) that he told Dr. Gabriel he paid other inspectors and supervisors $50 per week (PX 10, pp. 82–88)). That is, according to Mr. Burke, there was nothing wrong with placing lice-infested calves in the cooler, since it was a practice permitted by Dr. Hall in the area (but not overnight (PX 1, p. 151)). Hence Mr. Burke could testify truthfully (from his viewpoint) that he received no favor for his money with respect to the lice-infested calves notwithstanding his admission that he paid Dr. Gabriel to induce Dr. Gabriel to follow the same practice permitted by Dr. Hall, but which would not, except for the payments, have been permitted by Dr. Gabriel.

For the foregoing reasons, Mr. Burke's convictions are clearly based upon "fraud in connection with transactions in food."

The criminal record also shows clearly that respondent is "unfit" to receive inspection service so long as Mr. Burke is associated with the plant. Mr. Burke has been convicted of criminal violations which strike at the heart of the meat inspection program. The sordid facts set forth above as to Mr. Burke's endeavors to corrupt the meat inspector by paying him 50% more than his usual over-

time pay, and later by paying him for permitting lice-infested calves to go to the cooler to be skinned later, show clearly that respondent is unfit to receive inspection so long as Mr. Burke is associated with the plant.

Respondent relies on a number of mitigating circumstances, none of which overcome the presumption of unfitness resulting from Mr. Burke's 23 misdemeanor convictions.

Assuming that Mr. Burke honestly believed that bagging the lice-infested calves could have been permitted by Dr. Gabriel under the USDA regulation, that is not a persuasive mitigating circumstance here. Instead of going through supervisory channels to (attempt to) get Dr. Gabriel to change his policy as to lice-infested calves,[34] Mr. Burke took the fraudulent course of paying Dr. Gabriel money to change his policy. USDA cannot place the required degree of trust in such a person (see § I(B), *supra*).

For the same reason, even if there were (i) a lack of clarity in the regulation (which is not the case),[35] and (ii) uncertainty as to how lice-infested calves should be handled, that would not be a persuasive mitigating circumstance. If there were a lack of clarity in the regulation, Mr. Burke would have to go through supervisory channels to obtain a policy determination rather than take the fraudulent course of paying the inspector to change his policy. USDA cannot place the required degree of trust in such a person (see § I(B), *supra*).

Respondent relies on the fact that USDA concedes that no unwholesome meat ever left respondent's plant (PX 1, p. 86; and see Tr. 189) (at least not to USDA's knowledge (Tr. 148, 192–195)). That is respondent's strongest mitigating circumstance, but it is not enough to overcome the presumption of unfitness arising from Mr. Burke's 23 criminal convictions.

The statutory provision involved here expressly refers to convictions based upon "[i] the acquiring, handling, or distributing of *unwholesome,* mislabeled, or deceptively packaged food *or* [ii] upon *fraud in connection with transactions in food*" (21 U.S.C. § 671, em-

[34] Dr. Hall, who was Dr. Gabriel's supervisor, testified that he would never permit lice-infested calves to be held overnight (PX 1, p. 151), which is what Mr. Burke paid Dr. Gabriel to do.

[35] As shown above, the regulation is clear and categorical, and leaves no discretion in the inspector or his supervisor to change the procedure prescribed in the regulation. Nonetheless, a Bulletin issued April 7, 1983, by Dr. McNay, Regional Director of the Meat Inspection Program, indicates that there is a "lack of uniformity in the region," and states, *inter alia*, that "All veal carcasses must be warm skinned if they show skin disease, lice, ticks, and grubs (hypoderma)." Hence it appears that not all inspectors were following the clear terms of the regulation.

phasis added). Hence Congress expressly recognized that some convictions leading to a finding of unfitness would not involve unwholesome meat. See also the district court's first *Utica* decision, subsection I(B)(5)(b), *supra* (511 F. Supp. at 661–65).

In addition, although I accept, for the purposes of this Decision, the Department's admission (or, perhaps, self-serving assertion, i.e., to avoid possible criticism for continuing the investigation for 9½ months) that no unwholesome meat ever left respondent's plant, the *undisputed* evidence is that "THERE IS A LIKELIHOOD THAT THE LICE [IN PLASTIC BAGS IN THE COOLER] WILL FIND ITS WAY ON TO THE CUT SURFACES, EXPOSED SURFACES OF THE CARCASSES THAT THE HIDE IS ATTACHED TO," since the "VITAL ORGANS ARE REMOVED FROM THE ANIMAL FOR INSPECTIONAL PURPOSES, AND WE DO HAVE EXPOSURE FROM THE INSIDE AS WELL AS CERTAIN PORTIONS OF THE BREAST HAVE BEEN SKINNED BACK TO A CERTAIN DEGREE" (Tr. 191; capitalization in original).[36] Perhaps the lice that found their way onto the exposed meat surfaces died in the cooler (although Mr. Gould was not sure what temperature kills lice (Tr. 193–94)). Perhaps if the lice died, they fell into the plastic bag. Perhaps if some lice adhered to the meat, Dr. Gabriel found them all. Perhaps the lice that found their way onto the exposed meat surfaces laid eggs on the meat. If they did, perhaps the eggs fell into the plastic bag. If not, perhaps Dr. Gabriel found them all. Perhaps the fact that lice crawled around on the meat does not make it "unwholesome."

Although lice infestation presents a major problem to calves,[37] nothing in the record suggests that lice crawling around on meat presents a health hazard to consumers. But as for me and my house, we prefer to eat meat that has not had lice crawling around on it!

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[36] This evidence was not presented in the criminal proceeding, and came out in the administrative proceeding only on respondent's *cross-examination* of Mr. Gould, the Department's only witness at the administrative hearing.

[37] Both biting and sucking types of lice infest cattle. Louse infestation tends to be more of a problem during colder months when cattle have longer coats and are confined in close proximity to one another. Lice are species specific for the most part and cattle lice tend not to affect other species of animals or humans.

The major signs are itching and loss of hair in affected calves and cattle. Hair loss is self-induced due to rubbing and licking by affected animals who are greatly irritated by the lice. In severe cases, blood-loss anemia may develop due to thousands of lice draining blood from a single animal. This most often occurs in younger animals that are exposed to large numbers of lice.

Yearbook of Agriculture, *Animal Health* 165–66 (1984).

Respondent also argues that Dr. McNay, Regional Director of Meat Inspection for the Northeast Region, offered to include respondent in the Department's Total Quality Control Program (under which the management of packing plants are involved in the inspection program at their plant and designated employees of the packing company are given certain responsibilities to insure a wholesome product) after Mr. Burke's criminal convictions (Tr. 169–73). However, the undisputed evidence shows that Dr. McNay merely solicited respondent's application to participate in the Quality Control Program, and he was not the person who had authority to determine whether respondent should be included in the program or not (Tr. 196–97).

Respondent contends that it had many difficulties with Dr. Gabriel, causing unnecessary production delays and losses to farmers (PX 7, pp. 223–24; PX 9, pp. 23–37; PX 10, pp. 6–38), including too many determinations by Dr. Gabriel that calves were moribund (dying), which must be condemned under USDA regulations (PX 1, pp. 94–95; PX 2, pp. 228–29; PX 5, p. 139; PX 6, p. 132; PX 7, pp. 213–14). Dr. Gabriel testified that Dr. Rellosa, staff assistant to the Regional Director, agreed with his handling of moribund calves at respondent's plant (PX 2, pp. 233–37), and Dr. Rellosa testified that Dr. Gabriel was doing what he had to do with the moribund calves—the problem was with the calves (PX 6, pp. 128–29; PX 7, pp. 151, 191). But, in any event, assuming that Dr. Gabriel was erroneously determining that too many calves were moribund, that is no excuse for making cash payments to Dr. Gabriel (for overtime). The only recourse to a meat plant that has real or perceived difficulties with the inspector assigned to the plant is to appeal to the inspector's supervisors, and their supervisors, up to and including the Secretary of Agriculture. (Appeals could also be made to Senators, Congressmen, trade associations, etc.). Real or perceived difficulties with the inspection staff is not a mitigating circumstance sufficient to overcome the presumption of unfitness resulting from criminal convictions that strike to the heart of the meat inspection program (see § I(B)(5), *supra*).

Respondent also relies on a number of letters submitted on his behalf during the sentencing proceeding, and received in evidence here (RX H). They include letters from Dr. Prasad and Dr. Hall, expressing the view that Mr. Burke is cooperative and, if given the chance, will conduct himself more cautiously and with prudence in the future, and within the confines of the law. A banker states that Mr. Burke has shown good character in his dealings with the bank. A supplier of shipping containers to respondent states that Mr. Burke is a model of probity and has never misrepresented himself

best copy available

or circumstances. A creditor, who is also a friend, states that Mr. Burke has good character notwithstanding his convictions. A consulting engineer who was involved in the design of respondent's plant states that he is a responsible member of the community. A fellow church member states that he is a good citizen. The pastor of Mr. Burke's church (which he had attended for approximately one year) states that he is a respected member of the congregation and "has the ability to be a responsible member of our congregation and add support in ministering to our community." Finally, three organizations express appreciation to Mr. Burke for supplying calf parts of value to their programs. However, here, as in *Toscony* and *Utica* (see § I(B)(4), and I(B)(5), *supra*), Mr. Burke's "job-related" [38] convictions outweigh the letters.

Even if I were to review the mitigating circumstances here under the strictures of the *Utica* remand order, as I originally interpreted *Utica* (see § I(B)(5)(d), *supra*), I would not regard the mitigating circumstances here as sufficient to overcome the presumption of unfitness resulting from Mr. Burke's 23 convictions, considering all of the facts and circumstances revealed in the record of his criminal proceeding, including Mr. Burke's admissions that he paid money to Dr. Gabriel in order to induce Dr. Gabriel to permit a practice that Dr. Gabriel regarded as contrary to the regulations (and which was, in fact, contrary to the regulations).

No useful purpose would be served by discussing the extent to which my views differ from those of the ALJ. There is no issue of credibility to be determined by the ALJ. In fact, the only witness who appeared before the ALJ was Mr. Gould, Deputy Director, Compliance Division, Food Safety and Inspection Service, USDA. The conflicts in the testimony occurred during the criminal proceeding. Insofar as the expressions by the ALJ and respondent are out of harmony with the views here set forth, those expressions are disapproved.

Complainant's proposed order does not contain the customary provisions permitting the convicted individual 90 days within which to disassociate himself from the packing plant and one year within which to sell his stock. Presumably, this was an oversight. If not, complainant should develop in future cases why a change of policy in this respect is appropriate.

In addition, complainant's proposed order would activate the withdrawal of inspection if respondent or "its packers, officers, directors, shareholders, employees, successors [or] assigns" committed

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[38] The quotation is from *Toscony Provision Co.* v. *Block*, No. 81-1729, slip op. at 15 (D.N.J. Mar. 11, 1985).

"any felony" within 5 years. That is far too broad, and unnecessary to protect the public health.

For the foregoing reasons, the following order should be issued.

ORDER

Inspection service under Title I of the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*) is indefinitely withdrawn from and denied to respondent, its officers, directors, successors, assigns, and affiliates, directly or through any corporate or other device; *Provided, however,* That such withdrawal and denial of inspection shall be suspended for so long as:

(a) Thomas J. Burke is not associated with respondent, its officers, directors, successors, assigns or affiliates, directly or through any corporate or other device, as a partner, officer, director, shareholder, employee, or consultant, and for so long as Thomas J. Burke provides no direction or advice to and exercises no control over respondent, its officers, directors, successors, assigns or affiliates, directly or through any corporate or other device; *Provided, further*, That Thomas J. Burke shall be permitted to be associated with the respondent firm for 90 days subsequent to the date this order becomes final and shall have one year subsequent to the date this order becomes final in which to dispose of his stock; and

(b) Respondent, its partners, officers, directors, shareholders, employees, successors and assigns do not, within 5 years following the effective date of this order, commit any violations of any section of the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*) or any other statute based upon the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food, or commit any violation of §§ 201 or 209 of Title 18 of the United States Code; and

(c) Within 5 years of the effective date of this order, respondent, or any of its officers, employees or agents does not unlawfully give, pay, or offer, directly or indirectly, any money or other thing of value to any meat inspector, meat grader, or other person acting on behalf of the United States Government in connection with any aspect of its operation; and

(d) Within 5 years of the effective date of this order, respondent (1) does not knowingly hire, in any capacity, any individual who has been convicted of violating the FMIA or 18 U.S.C. § 209, and (2) immediately dismisses from its employment any such individual, hired after the effective date of this decision, when that individual's conviction becomes known.

(e) The term "violate," as used herein, means a violation found upon conviction, or upon final decision in a formal adjudicatory

proceeding before the Secretary, or upon affirmation of such conviction or decision, if appealed.

And provided further, That if it is determined, after opportunity for a hearing under the Federal Meat Inspection Act, that any term of the above provision has not been or is not being complied with, the suspension will be terminated and the withdrawal and denial provisions of this order will become effective immediately.

This order shall become final and effective upon service on the respondent.

In re: LAKE COUNTRY PORK PACKERS, INC. FMIA Docket No. 96. Decided Septmeber 12, 1986.

Edward H. McGrail, Administrative Law Judge.
Harold Rueben, for complainant.
Pro se, for respondent.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. §§ 601 *et seq.*), and the applicable Rules of Practice (7 CFR § 1.130 *et seq.* and 9 CFR § 335.1 *et seq.*), to withdraw federal meat inspection service from Lake Country Pork Packers Co., Inc. This proceeding was commenced by a complaint filed on January 3, 1986, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of federal meat inspection services. The parties have agreed that this proceeding should be terminated by the entry of the Consent-Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Lake Country Pork Packers Co., Inc., herinafter referred to as respondent, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision is for settlement purposes in this proceeding only and does not otherwise constitute an

admission or denial by the respondent that it violated the regulations or statutes involved.

3. The respondent waives any action against the USDA under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is a corporation which operates an establishment located at Route 96-A, P.O. Box 131, Ovid, New York 14521, for the slaughter of swine and for the preparation, sale and distribution of meat and meat food products for use as human food in commerce.

2. Respondent is, and at all times material herein was, the recipient of inspection services under Title I of the FMIA at said establishment.

3. Anthony DeAngelis is now, and at all times material herein was, acting as an employee in a managerial capacity with the respondent.

4. Thomas DeAngelis was, and at all times material herein, acting as Vice-President, Secretary, Manager and Stockholder of respondent.

5. On or about August 17, 1965, Anthony DeAngelis was convicted and sentenced in the United States District Court for the District of New Jersey of the offense of conspiring to transport and causing to be transported in interstate commerce warehouse receipts knowing same to have been taken by fraud and to transport and cause to be transported in interstate commerce falsely made and forged warehouse receipts, in violation of 18 U.S.C. 371.

6. On or about August 17, 1965, Anthony DeAngelis was convicted and sentenced in the United States District Court for the District of New Jersey of the offense of unlawfully and with fraudulent intent transporting and causing to be transported falsely made and forged securities in interstate commerce, in violation of 18 U.S.C. 2314.

7. On or about July 21, 1980, Anthony DeAngelis was convicted and sentenced in the United States District Court for the Southern District of Indiana of the offense of unlawfully, wilfully and knowingly, conspiring to commit an offense against the United States, in that he conspired to unlawfully, wilfully, and knowingly conceal and cover up by trick, scheme and device, material facts in a matter within the jurisdiction of the United States Department of Agriculture, a Department of the United States, in that there was a failure to disclose in applications by Meadow Meats, Inc., for federal meat, poultry or import inspection that Anthony DeAngelis

was responsibly connected with Meadow Meats, Inc., and that he had been convicted of felonies, despite the fact that the identities and felony conviction records of all persons responsibly connected with an applicant for federal meat, poultry or import inspection were required to be disclosed to the Department of Agriculture in applications for federal meat, poultry or import inspection, all in violation of 18 U.S.C. 371.

8. On or about July 21, 1980, Anthony DeAngelis was convicted and sentenced in the United States District Court for the Southern District of Indiana of the offense of devising and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises and for the purpose of executing the aforesaid scheme and artifice did wilfully and knowingly cause to be delivered by mail according to the direction thereon, a letter addressed to Mr. Ted McAninch, M & R Livestock Co., in violation of 18 U.S.C. 1341; did wilfully and knowingly cause to be delivered by mail according to the direction thereon, a letter addressed to Mr. Al Farrow, Farrow Bros. Livestock Co., in violation of 18 U.S.C. 1341; did wilfully and knowingly cause to be delivered by mail according to the direction thereon, a letter addressed to Mr. Ted McAninch, in violation of 18 U.S.C. 1341; and while associated with an enterprise consisted of an association of meat processors, did knowingly, wilfully and unlawfully combine, conspire, confederate and agree to participate, directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) and 1963.

9. On or about March 1, 1985, Thomas DeAngelis was convicted and sentenced in the Supreme Court of the State of New York for the crime of Grand Larceny.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Decision will be issued.

ORDER

Inspection services under Title I of the FMIA are withdrawn indefinitely from respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate device.

Said withdrawal of inspection shall be suspended and held in abeyance and inspection services shall be provided to respondent for so long as, in addition to all other requirements of inspection,

the conditions set forth hereinbelow are met. The Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth hereinbelow. The summary withdrawal of inspection service shall be effective pending final determination of a violation in accordance with the applicable Rules of Practice. Such summary withdrawal shall have no relevance with respect to the final determination in the proceeding and will not preclude the respondent from requesting an expedited hearing.

1. Anthony DeAngelis and Thomas DeAngelis shall not associate with respondent, its successors, affiliates, or assigns, directly or through any corporate or other device, as a partner, officer, director, shareholder, consultant or employee; shall have no access to respondent's plant; shall not provide any direction or advice to or exercise any control over respondent, its successors, affiliates or assigns, directly or through any corporate or other device; and shall have no business dealings whatsoever with respondent, its successors, affiliates, or assigns.

2. Respondent shall not knowingly employ or add any individual who has been convicted, in any federal or state court of any felony, or more than one violation of any law, other than a felony, based upon the acquiring, handling, or distribution of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food; and

3. Respondent shall immediately terminate its connection with any such individual when that individual's conviction becomes known; and

4. Respondent shall not violate any sections of the FMIA, or any regulations issued thereunder; and

5. Respondent shall maintain full, complete, and accurate written records of all other business activities applicable to the FMIA, which are available for review by USDA personnel; and

6. Respondent shall afford duly authorized personnel of the USDA an opportunity to examine and to copy all such records, reports, and other documents required of the respondent in this Consent Decision.

The Order shall become effective upon issuance by an Administrative Law Judge.

In re: STATE NATIONAL PROVISIONS, INC. FMIA Docket No. 97. Decided October 9, 1986.

Victor W. Palmer, Administrative Law Judge.
Kevin Thiemann, for complainant.
Edward Ruckert, Washington, D.C., for respondent.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. § 601 *et seq.*), hereinafter referred to as the FMIA, and the Applicable Rules of Practice (9 CFR § 335.1 *et seq.*), to activate the suspended withdrawal of inspection from State National Provisions, Inc., hereinafter referred to as the respondent, as specified in the Stipulation and Consent Decision and Order in FMIA Docket No. 77 filed on July 13, 1984. This proceeding was commenced by a complaint filed by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture, who is responsible for the administration of the FMIA. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this Stipulation and the provisions of this Consent Decision only, respondent admits all of the jurisdictional allegations of the complaint, admits the Findings of Fact; and waives:

(a) Any further procedural steps;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this Decision.

2. This Stipulation and Consent Decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by respondent in connection with this proceeding.

FINDINGS OF FACT

1. State National Provisions, Inc., respondent, is a corporation which operates a meat processing establishment at 82–86 Westerloo Street, Albany, New York 12202.

2. State National Provisions, Inc., is, and at all times material herein was, a recipient of federal meat inspection services under Title I of the Act at 82-86 Westerloo Street, Albany, New York 12202.

3. On February 27, 1984, a complaint was filed, pursuant to section 401 of the Act (21 U.S.C. § 671), by the Administrator of the Food Safety and Inspection Service of the United States Department of Agriculture seeking withdrawal of inspection services under Title I of the Act from respondent based on one (1) felony conviction of respondent.

4. On July 13, 1984, Administrative Law Judge John G. Liebert issued a Stipulation and Consent Decision in FMIA Docket No. 77 withdrawing inspection for one (1) year from respondent and its owners, officers, directors, successors, affiliates, or assigns.

5. Two (2) consecutive weeks of actual suspension from respondent, from December 23, 1984 through January 5, 1985, was required in the above-referenced Stipulation and Consent Decision.

6. The withdrawal of inspection from respondent, as set forth in the above-referenced Stipulation and Consent Decision, was held in abeyance for the remaining fifty (50) weeks for so long as certain terms and conditions were followed.

7. One of the pertinent conditions specified in the above-referenced Stipulation and Consent Decision involved the preparation, sale, transportation, or attempted distribution of any adulterated or misbranded products.

8. On or about January 24, 1985, February 26, 1985, and February 28, 1985, the respondent prepared and sold corned beef rounds, within the designated State of New York, which were adulterated and misbranded because the corned beef rounds contained more than the allowable added substance.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Order and Consent Decision in disposition of this proceeding, such decision will be issued.

ORDER

1. Inspection services under Title I of the FMIA are withdrawn from and denied to the respondent, its owners, officers, directors, successors, affiliates, or assigns, directly or through any corporate or other device for a period of one (1) year beginning on October 1, 1986. Four (4) consecutive weeks of actual suspension will begin on December 5, 1986 and end on January 2, 1987. The remaining forty-eight (48) weeks of the one (1) year withdrawal period will be

held in abeyance and will not become effective for so long as, in addition to all other requirements of inspection, for one (1) year from the effective date of this Consent Decision, unless otherwise noted *infra:*

(a) Respondent does not knowingly hire or permit, to the extent allowed by New York law, the continued employment of any person who has been convicted of any violations of the FMIA or similar State and local food safety laws.

(b) Respondent designates a member of the management team to act as a quality control manager at its establishment. Said individual shall have specific authority to forbid shipment of products that have excess added substance as established by the Consent Decision and applicable USDA regulations. The name of the quality control manager will be provided to the FSIS Inspector in Charge at respondent's establishment.

(c) Respondent shall establish and implement the following monitoring program at its establishment for processing products containing added substances:

(1) After the product is accepted at respondent's establishment, said product will be placed into tanks before processing. A piece count will be made and the product weighed as an entire lot. For the purpose of this consent decision, a lot shall be defined as one (1) day's production. Moreover, at least twenty percent (20%) of the individual pieces in the tank will be individually weighed and recorded. The product will then be pumped with the permitted added substance. After pumping, the product will be placed back into tanks and weighed again both as an entire lot and as the individual pieces specified above.

(2) If the product is found to contain more than the allowable limit of added substance, said product will stand and drain until it is below the allowable limit. Once draining has been completed, said product will be weighed again to insure that it is within the allowable limit of added substance.

(3) If the product is found to be within the allowable limit of added substance, either as pumped or as drained, said product will be removed to a separate tank. The product will be given a lot number, which shall be recorded for identification at the time of packing along with the date of pumping in respondent's records. Moreover, respondent shall record the identifying lot number on the product's package.

(d) Respondent shall keep a record of the piece count, product weight prior to processing, pumped weight, drained weight (if applicable), date(s) of processing, and lot number for each lot processed. One (1) copy of said record will be attached to the processing

tank(s) for identification, one (1) copy will be provided to the FSIS Inspector in Charge at respondent's establishment, and one (1) copy will be retained in respondent's files until at least sixty (60) days beyond the end of this monitoring program.

(e) Respondent shall permit the FSIS Inspector in Charge at its establishment to take product samples of his own choosing for testing by the USDA. The number of samples provided in a given thirty (30) day period will be determined by the Meat and Poultry Inspection Office, located at 80 Wolf Road, Suite 503, Albany, New York 12205.

2. For the purposes of this Consent Decision and Order only, a "violation" involving added substances will be defined as one (1) or more product samples containing more than three percent (3%) added substance above the allowable added substance limits as set forth in the applicable USDA regulations and found in two (2) separate lots in any given thirty (30) day period. Moreover, for the purposes of this Consent Decision and Order, a violation must occur during the one (1) year period specified *supra* and be discovered by the USDA either during the one (1) year period or in the sixty (60) days immediately following the end of said one (1) year period.

3. The violation of this Consent Decision and Order, as defined in paragraph 2 *supra*, will result in the immediate withdrawal of inspection services under Title I of the FMIA. The Secretary of Agriculture shall have the right to summarily withdraw inspection service upon finding of a violation by appropriate national headquarters staff. The appropriate national headquarters staff will consider the procedures that have been implemented by respondent, the overall history of compliance, and such other factors as may be deemed relevant prior to making any final determination to summarily withdraw inspection services. Any summary withdrawal of inspection service shall be subject to respondent's right to request an expedited hearing on the alleged violation. Moreover, nothing in this Consent Decision shall preclude the referral of any such violations to the Department of Justice for possible criminal or civil proceedings.

4. If any provision of this Order is declared to be invalid, such declaration shall not affect the validity of any other provision herein.

5. This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: CHERRY MEAT PACKERS, INC. FMIA Docket No. 103. Decided October 20, 1986.

John A. Campbell, Administrative Law Judge.
Andrea Bateman, for complainant.
Michael Dockterman, Chicago, Illinois, for respondent.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. § 601 *et seq.*), hereinafter referred to as the FMIA, and the Applicable Rules of Practice (9 CFR § 335.1 *et seq.*), to withdraw federal meat inspection services from Cherry Meat Packers, Inc., hereinafter referred to as the respondent. This proceeding was commenced by a complaint filed by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture, who is responsible for the administration of the FMIA. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision as set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision, respondent admits all the jurisdictional allegations of the complaint, admits the Findings of Fact, and waives:

(a) Any further procedural steps;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by respondent in connection with this proceeding.

FINDINGS OF FACT

1. Cherry Meat Packers, Inc., is a business, incorporated in the State of Illinois, which operates a meat processing establishment at 4750 So. California Avenue, Chicago, Illinois 60632.

2. Cherry Meat Packers, Inc., is, and at all times material herein was, a recipient of federal meat inspection services under Title I of

the Act at 4750 So. California Avenue, Chicago, Illinois 60632 (Establishment No. 24).

3. On or about July 17, 1986, Cherry Meat Packers, Inc., was convicted, in the United States District Court for the Northern District of Illinois, of one misdemeanor for selling misbranded food products and one misdemeanor for offering for transportation misbranded food products, in violation of the FMIA (21 U.S.C. §§ 610(c)(1) and 676(a)).

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Order and Consent Decision in disposition of this proceeding, such decision will be issued.

ORDER

1. Inspection services under Title I of the FMIA are withdrawn from and denied to the respondent, its owners, officers, directors, successors, affiliates, or assigns, directly or through any corporate or other device for a period of one (1) year beginning on the effective date of this Order. This Order will be held in abeyance for that period and will not become effective:

(a) For so long as, within one (1) year of the effective date of this Consent Decision, respondent, or any of its officers, employees, or agents do not violate (as that term is defined in paragraph 2 *infra*) any section of the FMIA (21 U.S.C. § 601 *et seq.*) involving the preparation, sale, transportation, or attempted distribution of any adulterated or misbranded products; and

(b) For so long as respondent, within one (1) year of the effective date of this Consent Decision:

(1) Does not knowingly hire, in any capacity, any individual who has been convicted of any felony; and

(2) To the extent permitted by Illinois law, dismisses from its employment any such individual, hired after the effective date of this Consent Decision, when that individual's conviction becomes known.

2. The violation of any provision in paragraph 1 of this Order will result in the immediate withdrawal of inspection services under Title I of the FMIA. The term "violation" means a final decision in a formal adjudicatory proceeding before the Secretary of Agriculture or a conviction in federal or state court.

3. If any provision of this Order is declared to be invalid, such declaration shall not affect the validity of any other provision herein.

4. This Order shall become effective on the day upon which service of this Order is made upon the respondent.

DISCIPLINARY DECISIONS

In re: CALVIN HUTCHINS. P&S Docket No. 6615. Decided September 3, 1986.

Dorothea A. Baker, Administrative Law Judge.
Allan R. Kahan, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Calvin Hutchins, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 78, Laurel Hill, Florida 32567.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account. This registration has been inactive since August 20, 1971.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Calvin Hutchins, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Act, shall cease and desist from engaging in

business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Hundred Fifty Dollars ($350.00), payable by the effective date of this order.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: ROYAL J. ALEXANDER. P&S Docket No. 6628. Decided May 16, 1986.

William Weber, Administrative Law Judge.
Ben Bruner, for complainant.
Pro se, for respondent.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Royal J. Alexander is an individual doing business as LaFontaine Livestock Sale. His business mailing address is 203 S. Walnut, Box 222, LaFontaine, Indiana 46940.

(b) Respondent at all times material herein was:

(1) Engaged in the business of conducting and operating the LaFontaine Livestock Sale stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis. This registration states that LaFontaine Livestock Sale is a partnership consisting of Royal J. Alexander and Alpha B. Alexander; however, at all times material herein, Alpha B. Alexander was not a partner in such organization.

2. Respondent during the period of December 31, 1984 through January 31, 1985, failed to maintain and properly use his Custodial Account for Shipper's Proceeds (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due the owners or consignors of livestock in that:

(a) As of December 31, 1984, respondent had outstanding checks drawn on his custodial account in the amount of $17,095.12, and had an overdraft in his custodial account in the amount of $1,432.29, resulting in a deficiency of $18,527.41 in funds available to pay shippers their proceeds.

(b) As of January 31, 1985, respondent had outstanding checks drawn on his custodial account in the amount of $11,400.80 and had an overdraft in his custodial account in the amount of $7,444.95, resulting in a deficiency of $18,845.75 in funds available to pay shippers their proceeds.

(c) Such deficiencies were due to the failure of respondent to deposit in his custodial account, within the time prescribed by the regulations, an amount equal to the proceeds receivable from the sale of consigned livestock.

3. (a) Respondent, in connection with his operations as a market agency selling on commission and on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, sold consigned livestock and in purported payment to the consignors, issued checks which were returned unpaid by the bank upon which they

were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) Respondent, on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, and in the transactions set forth in paragraph III(b) of the complaint, sold consigned livestock and failed to remit, when due, the proceeds received from the sale of such livestock to the consignors of such livestock.

(c) As of September 23, 1985, there remained unpaid a total of $18,369.69.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 313(a)), and section 201.42 of the regulations (9 CFR § 201.42).

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Royal J. Alexander, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Act, shall cease and desist from:

1. Failing to deposit in his Custodial Account for Shippers' Proceeds within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the requirements of Section 201.42 of the regulations;

3. Issuing checks to any person in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

4. Failing to remit, when due, the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors; and

5. Failing to remit the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors.

Respondent is suspended as a registrant under the Act for a period of two years and thereafter until such time as he demonstrates that the deficiency in his Custodial Account for Shippers'

Proceeds has been eliminated. When respondent demonstrates that the deficiency in his custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the two year period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR # 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order Upon Admission of Facts by Reason of Default became final on September 3, 1986.—Ed.]

In re: PALETTA BROTHERS MEAT PRODUCTS, LTD., and LARRY PALETTA, P&S Docket No. 6654. Decided September 3, 1986.

William J. Weber, Administrative Law Judge.
Allan R. Kahan, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents, both corporate and individual, violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Paletta Brothers Meat Products, Ltd., hereinafter referred to as the respondent, is a corporation with its principal place of business located at Coldwater, Michigan. Respondent's business mailing address is 70 Homer Drive, Coldwater, Michigan 49036.

2. Respondent is, and at all times material herein was:

(a) A packer, within the meaning of and subject to the provisions of the Act; and

(b) Engaged in the business of buying livestock in commerce for purposes of slaughter.

3. Respondent's average annual purchases of livestock exceed $500,000.00.

4. Larry Paletta, hereinafter referred to as respondent Larry Paletta, is an individual whose mailing address is 26 Ravencliffe Avenue, Hamilton, Ontario L8P3M4.

5. Respondent Larry Paletta is, and at all times material herein was:

(a) President and sole stockholder of respondent Paletta Brothers Meat Products, Ltd.;

(b) Responsible for the management, direction and control of respondent Paletta Brothers Meat Products, Ltd.; and

(c) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Paletta Brothers Meat Products, Ltd., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations as a packer, and respondent Larry Paletta, through any corporate or other device, shall cease and desist from engaging in the business of a packer, in commerce, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Paletta Brothers Meat Products, Ltd. and Larry Paletta are hereby jointly and severally assessed a civil penalty in the amount of Five Thousand Dollars ($5,000.00); PROVIDED HOWEVER, that Four Thousand Five Hundred Dollars ($4,500) shall be suspended provided that respondents shall not violate the cease and desist provisions of this order.

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondents.

Copies hereof shall be served upon the parties.

In re: CHESTER LIVESTOCK MARKET, INC. P&S Docket No. 6704. Decided September 3, 1986.

John Campbell, Administrative Law Judge.
Eric Paul, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent, Chester Livestock Market, Inc., is a corporation with its principal place of business in Chester, South Carolina. Respondent's business mailing address is P. O. Box 111, Chester, South Carolina 29706.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Chester Livestock Market, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Chester Livestock Market, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Seven Hundred and Fifty Dollars ($1,750.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: LOURDES G. MARQUEZ and GERARDO R. MARQUEZ. P&S Docket No. 6546. Decided July 22, 1986.

William Weber, Administrative Law Judge.
Thomas Heinz, for complainant.
Pro se, for respondent.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT, AS TO RESPONDENT LOURDES G. MARQUEZ

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would

constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Lourdes G. Marquez and Gerado R. Marquez, a/k/a Lalo Marquez, hereinafter "respondents", are individuals with a mailing address at 7102 North 43rd Avenue, # 417, Glendale, Arizona 85301.

(b) Respondents, at all times material herein, were:

(1) Doing business as Boone Packing Co.,

(2) Engaged in the business of buying livestock in commerce for purposes of slaughter and manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(3) Packers within the meaning of and subject to the Act.

2. (a) Respondents, in the transactions set forth in paragraphs II and III of the Complaint and Notice of Hearing, purchased livestock for purposes of slaughter and failed to pay, when due, the full purchase price of such livestock.

(b) As of December 31, 1984, there remained unpaid by respondents $59,495.41 for such livestock purchases.

3. Respondents, in connection with their operations as packers, on or about August 8, 1984, issued a check in the amount of $28,292.80 to Demsey-Jamison, Inc., Peoria, Illinois, in purported payment for livestock which was returned unpaid by the bank upon which it was drawn because respondents did not have sufficient funds available in the account upon which such check was drawn to pay such check when presented.

4. Respondents, in connection with their operations as packers, have failed to create, keep and maintain accounts, records and memoranda which fully and correctly disclose their transactions subject to the Act, in that respondents have failed to create, keep and maintain a general ledger, an accounts receivable ledger, a cash receipts and cash disbursements journal, a sales journal and copies of all purchase and sale invoices.

CONCLUSIONS

By reason of the facts found in Findings of Fact 2 and 3 herein, respondents have violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Finding of Fact 4 herein, respondents have violated section 401 of the Act (7 U.S.C. § 221).

ORDER

Respondents Lourdes G. Marquez and Gerado R. Marquez, directly or through any corporate or other device, in connection with any business or operation as a packer, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to pay the full purchase price of livestock; and

3. Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented.

Respondents shall create, keep and maintain accounts, records and memoranda which fully and correctly disclose their business transactions subject to the Act, including but not limited to: (1) a general ledger; (2) an accounts receivable ledger; (3) a cash receipts and cash disbursements journal; (4) a sales journal; and (5) copies of all sale and purchase invoices.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on September 9, 1986.—Ed.]

In re: LOURDES G. MARQUEZ and GERARDO R. MARQUEZ. P&S Docket No. 6546. Decided July 22, 1986.

William J. Weber, Administrative Law Judge.
Thomas Heinz, for complainant.
Pro se, for respondent.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT, AS TO RESPONDENT GERARDO R. MARQUEZ

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stock-

yards Administration, United States Department of Agriculture, charging that the respondents violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Lourdes G. Marquez and Gerado R. Marquez, a/k/a Lalo Marquez, hereinafter "respondents", are individuals with a mailing address at 7102 North 43rd Avenue, # 417, Glendale, Arizona 85301.

(b) Respondents, at all times material herein, were:

(1) Doing business as Boone Packing Co.,

(2) Engaged in the business of buying livestock in commerce for purposes of slaughter and manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(3) Packers within the meaning of and subject to the Act.

2. (a) Respondents, in the transactions set forth in paragraphs II and III of the Complaint and Notice of Hearing, purchased livestock for purposes of slaughter and failed to pay, when due, the full purchase price of such livestock.

(b) As of December 31, 1984, there remained unpaid by respondents $59,495.41 for such livestock purchases.

3. Respondents, in connection with their operations as packers, on or about August 8, 1984, issued a check in the amount of $28,292.80 to Demsey-Jamison, Inc., Peoria, Illinois, in purported payment for livestock which was returned unpaid by the bank upon which it was drawn because respondents did not have sufficient funds available in the account upon which such check was drawn to pay such check when presented.

4. Respondents, in connection with their operations as packers, have failed to create, keep and maintain accounts, records and memoranda which fully and correctly disclose their transactions

subject to the Act, in that respondents have failed to create, keep and maintain a general ledger, an accounts receivable ledger, a cash receipts and cash disbursements journal, a sales journal and copies of all purchase and sale invoices.

CONCLUSIONS

By reason of the facts found in Findings of Fact 2 and 3 herein, respondents have violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Finding of Fact 4 herein, respondents have violated section 401 of the Act (7 U.S.C. § 221).

ORDER

Respondents Lourdes G. Marquez and Gerado R. Marquez, directly or through any corporate or other device, in connection with any business or operation as a packer, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to pay the full purchase price of livestock; and

3. Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented.

Respondents shall create, keep and maintain accounts, records and memoranda which fully and correctly disclose their business transactions subject to the Act, including but not limited to: (1) a general ledger; (2) an accounts receivable ledger; (3) a cash receipts and cash disbursements journal; (4) a sales journal; and (5) copies of all sale and purchase invoices.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on September 9, 1986.—Ed.]

In re: BOBBY M. HACKER. P&S Docket No. 6658. Decided September 18, 1986.

William J. Weber, Administrative Law Judge.
Jory Hochberg, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Bobby M. Hacker, doing business as Hacker Cattle Co., hereinafter referred to as the respondent, is an individual whose business mailing address is 1010 Ridgewood Drive, Valdosta, Georgia 31601.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Hacker, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding

is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: DOUG WELCH d/b/a W.W. GARRY, MICHAEL BENSON, MARLOWE K. BENSON, WAGNER-HUDSON LIVESTOCK MARKETING AGENCY, INC., ROGER D. KOCH CORPORATION d/b/a SWITZER WAGNER & CO., AND SWITZER-BAR 10, and ROGER D. KOCH. P&S Docket No. 6537. Decided September 25, 1986.

Fraudulent business practices in purchase/sale of livestock—Suspension—Civil Penalties—consent.

In *In re Welch*, P&S Docket No. 6537 (decision as to Michael Benson), decided by the Judicial Officer on September 25, 1986 (38 pages), the Judicial Officer affirmed Judge Weber's order barring respondent Benson from engaging in business subject to the Act for 1 year and assessing a $10,000 civil penalty. The Judicial Officer amended the order, however, to require payment of the civil penalty in equal payments each month over a 3-year period, rather than at the end of 2 years. The Judicial Officer affirmed the cease and desist order requiring Benson to cease and desist from engaging in practices that would operate as a fraud or deceit upon any person in connection with the purchase or sale of that person's livestock; cooperating in any arrangement with a livestock selling agency in (i) purchasing consigned livestock at less than fair market value, (ii) enabling the selling agency to operate as a fraud or deceit upon consignors to the selling agency, or (iii) sharing in the profits derived from the resale of livestock purchased from consignments to such selling agency; or cooperating with any market agency buying livestock on a commission basis or its employees or agents in engaging in any act or practice which operates as a fraud or deceit upon the market agency or its principals. Benson, a hog salesman for commission firms operating at a terminal stockyard, violated §§ 307 and 312(a) of the Act by splitting the profits made by a dealer (Welch) buying livestock from Benson's commission firm or selling livestock to Benson's commission firm and in transactions where Benson transferred purchase orders received by Benson's employer to Welch to fill. Proof by a preponderance of the evidence is all that is required. The ALJ's determination as to the veracity of the witnesses is controlling. Such profit-

sharing is particularly odious at a terminal stockyard where intentional. The sanction imposed here is not nearly as severe as numerous sanctions that have been issued in recent years under the P&S Act (numerous cases cited).

Decision by Donald Campbell, Judicial Officer.

Allan Kahan, for complainant.
Timothy Shuminsky, Sioux City, IA., for respondents.
William J. Weber, Administrative Law Judge.

DECISION AND ORDER AS TO MICHAEL BENSON

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on June 17, 1986, by Administrative Law Judge William J. Weber (ALJ) barring respondent Michael Benson from engaging in business subject to the Act for 1 year, assessing a $10,000 civil penalty payable within 2 years, and ordering respondent Michael Benson to cease and desist from engaging in practices that would operate as a fraud or deceit upon any person in connection with the purchase or sale of that person's livestock; cooperating in any arrangement with a livestock selling agency in (i) purchasing consigned livestock at less than fair market value, (ii) enabling the selling agency to operate as a fraud or deceit upon consignors to the selling agency, or (iii) sharing in the profits derived from the resale of livestock purchased from consignments to such selling agency; or cooperating with any market agency buying livestock on a commission basis or its employees or agents in engaging in any act or practice which operates as a fraud or deceit upon the market agency or its principals.

On July 17, 1986, complainant, seeking to have the civil penalty payable upon the effective date of the decision, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On the same date, respondent, seeking to set aside the Decision and Order, also appealed to the Judicial Offi-

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* *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and Aug. 1985 Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program (December 1962–January 1971)).

cer. On September 9, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the ALJ's findings and conclusions are adopted as the final decision in this case, with changes too minor to itemize (except that the last sentence of Finding B(1)(2), which follows the sentence containing note 4, was added by the Judicial Officer). Additional conclusions by the Judicial Officer follow the ALJ's conclusions. The order is amended to require payment of the civil penalty in equal payments each month over a 3-year period.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

The complainant charges Doug Welch and Michael Benson (and others who may bear legal responsibility) with conspiratorial, unfair, and deceptive trade practices to defraud consignors and others in a series of transactions in violation of the Packers and Stockyards Act 1921, 7 USC 181 (Act), and the related regulations, 9 CFR 201.1.

Respondents denied any violation of the law or regulations.

At the time of trial, respondent Doug Welch d/b/a W. W. Garry (Welch), agreed to the entry of a Consent Decision and Order providing for six (6) months suspension, and a ten thousand dollar ($10,000.00) civil penalty and a cease and desist order.

Earlier, Roger D. Koch, an individual, and Roger D. Koch Corporation d/b/a Switzer Wagner and Company, and Switzer-Bar 10 (Switzer Wagner, Switzer-Bar 10), agreed to the entry of a Consent Decision providing for a cease and desist order.

An agreement was reached between counsel concerning a cease and desist order with respect to respondent Marlowe K. Benson and Wagner-Hudson Livestock Marketing Agency, Inc. (Wagner-Hudson), but it has not yet been implemented. (TR p.8)

Trial of the issues was held on December 10, 11, and 12, 1985, with respect to the remaining respondent, Michael Benson. The last brief was filed April 17, 1986.

* * * * * * *

A. (1) On nine transactions [1] between July 15 and November 17, 1983, respondent Michael Benson in the course of his employment with respondent Wagner-Hudson, in private treaty transactions, sold consigned livestock to respondent Welch at substantially less than full market value of the livestock.

Purchase Date (1983)	No. Head	Resale Date (1983)	Resold to/at	Profit
July 15	4	July 15	Sioux City Livestock	$110.00
Aug. 8	33	Aug. 8	Iowa Stock Pig Co.	$306.05
Sept. 14 & 15	27	Sept. 15	Wagner-Hudson	$87.26
Oct. 3	9	Oct. 3	Hayes Order Buyers Inc.	$113.70
Oct. 6	7	Oct. 6	Hayes Order Buyers Inc.	$128.25
Oct. 12	10	Oct. 12	Iowa Pig Co.	$182.20
Nov. 17	17	Nov. 17	Hayes Order Buyers Inc.	$147.70
Nov. 17	5	Nov. 18	Wagner-Hudson	$128.65

* * * * * * *

(2) These sales at substantially less than full market value enabled respondent Welch to immediately resell [2] the livestock at substantial price increases ranging up to 40%.

(3) Welch shared approximately one-half of the profits with Benson.

* * * * * * *

B. (1) In seven transactions,[3] between February 20 and March 29, 1984, respondent Welch consigned hogs to Switzer Wagner. Respondent Michael Benson purchased those hogs to fill commission orders placed with his employer, Switzer Wagner.

Consignment and Sale Date (1984)	No. Head Consigned	No. Head Purchased for Bar 10	Bar 10 Customer/Principal
Feb. 20	84	2	C & B Livestock
Mar. 15	38	14	C & B Livestock
Mar. 19	46	27	C & B Livestock
March 20-23	76	19	C & B Livestock
Mar. 26	66	17	C & B Livestock
Mar. 29	100	21	M & K Livestock

[2] In one instance hogs were held over and sold the following day.

(2) Respondent Benson paid unusually high prices, ranging from $2.20 to $4.30 per hundredweight (cwt) above the mode price [4] for the total lot of hogs. The resulting profit to Welch was split with respondent Michael Benson.

(3) Respondent Michael Benson did not tell his employer, nor the principals for whom the hogs were purchased, of his share in the profit from these transactions.

(4) Respondent Welch paid the usual commission to Switzer Wagner for the normal market services to sell these hogs.

(5) Respondent Michael Benson did not perform any unusual or extra services warranting or justifying any direct payment(s) by Welch to Benson.

* * * * * * *

C. (1) Respondent Michael Benson in his employment for Switzer-Bar 10 received orders to purchase hogs on a commission basis. Respondent Benson transferred these orders to respondent Welch to fill.[5]

[5] Purchase Date (1984)	No. Head	Actual Purchase Price	Invoiced Purchase Price	Fraudulent Gain
Mar. 13	29	$1,697.85	$2,073.76	$360.40
Mar. 15	23	$1,673.87	$1,900.39	$211.60
Mar. 19	42	$2,765.90	$3,061.33	$272.30
Mar. 20	23	$1,620.70	$1,969.21	$334.22
Mar. 22	59	$4,301.90	$4,702.87	$365.74
Mar. 26	17	$1,373.60	$1,550.36	$165.71
Mar. 29	49	$3,872.75	$4,124.91	$221.82

(2) Respondent Welch purchased hogs to fill the orders and invoiced and collected from Switzer-Bar 10 at falsely increased prices.

(3) Respondent Welch charged Switzer-Bar 10 the usual buying commission for these purchases.

(4) Again, respondent Michael Benson shared with Welch about 50% of the profits from these transactions.

* * * * * * *

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[4] A mode price is the price paid the greatest number of times in the observed transactions.

D. (1) Between May 13, 1983 and April 16, 1984 Welch paid Benson $15,015.37 in 20 checks (ranging from $100 to $2,319.22), as Benson's share of the profits.

* * * * * * *

E. (1) Doug Welch is engaged in the business of buying and selling livestock in commerce for his own account, as well as, buying livestock in commerce on a commission basis under the name of W. W. Garry, 208 Livestock Exchange Building, Sioux City Stockyards, Sioux City, Iowa 51107.

(2) He is registered with the Department of Agriculture as a dealer to buy and sell livestock for his own account, as well as, a market agency to buy livestock on a commission basis.

* * * * * * *

F. (1) Respondent Michael Benson at relevant times here was the Secretary/Treasurer of Wagner-Hudson Livestock Marketing Agency, Inc., Sioux City Stockyards, Sioux City, Iowa, until early January 1984. He was a hog salesman for respondent Wagner-Hudson.

(2) Thereafter, respondent Michael Benson was head hog salesman for Roger D. Koch Corporation d/b/a Switzer-Wagner and Company and Switzer-Bar 10.

(3) Respondent Michael Benson at all times material herein was engaged in the business of a market agency furnishing stockyard services and of a dealer buying or selling livestock in commerce as the agent or employee of the vendor or purchaser. [Respondent Benson's Answer]

* * * * * * *

Respondent Benson had a fiduciary responsiblity to sell consigned hogs at the highest price available.

The evidence here indicates that Benson sold some hogs at unusually low prices and purchased other hogs at unusually high prices. This, by itself, is not necessarily illegal or unethical.

However, in these transactions, Benson dealt with Doug Welch. When Benson was buying from or selling to Welch the relationship should have been at arm's-length. The evidence here raises some questions whether they actually dealt at arm's-length.

Welch gave Benson some $15,000.00 during this time. A 50% split of the profits is established by admissions of both Welch and Benson to the investigator, and the records themselves.

Thus, the record shows that Benson sold consigned hogs at less than full value, purchased hogs at unusually high prices, and received substantial payments from the favored party.

The transactions themselves are well documented and not disputed. Basically, Benson tried to explain away the incriminating $15,000.00 as payments for "services" he rendered to Welch. This evidence lacks credibility and persuasiveness, is implausible and is somewhat contradictory. In fact, Welch admitted sharing profits with Benson and promised to stop, when interviewed by the investigator.

The clear preponderance of the evidence shows that Benson was paid by Welch for Benson's favored treatment.

This cheats consignors and purchasers of hogs, and erodes confidence in the people who operate the system and those who rely on the system. This erosion can become self-aggravating.

The division in profits established by the record is the keystone that locks both sides of the archway into a solid pattern of wrongdoing. It overrides any quibbling arguments about the degree of "highness" or "lowness" of the prices concerned.

The sharing of profits between supposedly competing interests (Benson and Welch, buyers and sellers, and vice versa) is the critical wrongdoing here.

When Benson bought at a high price and sold at a low price, in deals with Welch, it cheated his employers, those who consigned hogs to be sold by Benson, those who placed orders for Benson to fill on commission purchases, the industry and the public.

They trusted Benson to sell high and buy low, to the best of his ability, and market conditions. Benson appears to have failed this trust, to enhance Welch's profits and thereby his own secret share of these profits.

Benson engaged in willful, fraudulent, false and deceptive trade practices, careless disregard of duties under the Packers and Stockyards Act and regulations, in violation of sections 307 and 312(a) of the Act (7 USC 208, 213(a)).

Complainant seeks a $10,000.00 civil penalty and an order preventing Benson from operating under the Act for one year.

The violations are serious, and cannot be tolerated. Efforts must be made to deter them. An appropriate sanction is required.

Great weight must be given to the complainant's recommended sanction. In re *Braxton Worsley*, 33 Agric. Dec. 1547, 1567 (1974); In re *Sy B. Gaiber and Co.*, 31 Agric. Dec. 843, 845-51, (1972); In re *J.A. Speight*, 33 Agric. Dec. 280, 310-19 (1974); In re *Samuel Esposito* 38 Agric. Dec. 613, 665 (1979).

The record shows a calculated course of conduct striking at the heart of the industry—integrity in the purchase and sale of livestock by an agent/representative.

Binding precedents of the USDA Judicial Officer require the recommended sanction be imposed.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Michael Benson contends on appeal that the ALJ's findings of fact are not adequately supported by the record, and that the sanction is unduly severe. However, there is no merit to either contention.

No useful purpose would be served by setting forth in full the record supporting the ALJ's findings of fact. The proof here far surpasses the preponderance of the evidence, which is all that is required.[6] In addition, the record is relatively short and easy to understand. Furthermore, complainant's briefs, which should be included in the record on appeal, contain detailed citations to the evidence supporting the ALJ's findings of fact. Nonetheless, reference to some of the testimony and exhibits is set forth below to aid the reviewing court.

The checks issued to Michael Benson by Doug Welch were issued by Welch's company, *viz.*, W. W. Garry Co. (e.g., CX 1, p. 10). Doug Welch admitted that he split his profits on hogs with Michael Benson. Mr. Welch testified (Tr. 226):

> Q. You are obviously familiar with the allegations contained in the Complaint. During the period set forth in the Complaint, 1983 and 1984, did you split profits on hogs with Mike Benson?
>
> A. Yes.

Similarly, Michael Benson admitted to Philip O. Edwards, Supervisory Marketing Specialist in complainant's Omaha Regional Office, that the payments were for half the profits of Welch's W. W. Garry Company. Mr. Edwards testified (Tr. 80):

> Q. Did your—did your conversation [with Michael Benson] talk about anything else?

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[6] *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

A. Oh, yes. I asked Mike the basis for—of percentage or how he got the money or what was the basis on the money. And he said he presumed it was on half the profits.

Q. What money were you talking about?

A. The checks that were issued to Mike Benson by W. W. Garry.

At the hearing, Michael Benson testified that he told complainant's investigator, Philip O. Edwards, that Doug Welch's payments were for extra work done by Benson for Welch (Tr. 321–23). But the ALJ, who saw and heard the witnesses testify, believed Edward's version of Benson's admission to Edwards. That is, the ALJ stated (Initial Decision at 11):

> A 50% split of the profits is established by admissions of both Welch and Benson to the investigator, and the records themselves.

The ALJ's determination as to the veracity of the witnesses is controlling in the circumstances here. As stated in *Great Western Food Distributors* v. *Brannan*, 201 F.2d 476, 479–80 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953), on appeal from a decision by USDA's Judicial Officer:

> Often the "most telling part" of the evidence is not apparent from the printed page, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors". N.L.R.B. *v.* Universal Camera Corp., 2 Cir., 190 F.2d 429, 430. Thus, "we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth." Ohio Associated Tel. Co. *v.* N.L.R.B., 6 Cir., 192 F.2d 664, 668.
>
> . . . In short, anyone who has observed witnesses on the stand will know that those "who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of courts of review who do not enjoy the same advantages." Jennings *v.* Murphy, 7 Cir., 194 F.2d 35, 36.
>
> It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of deter-

> mining whether the finder of the fact was justified, i. e. acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings. To go further is to disregard the "most telling part" of the evidence. N.L.R.B. *v.* Universal Camera Corp., supra. With this in mind we approach the proof offered in this proceeding.

Similarly, in *Cella* v. *United States, 208 F.2d 783, 788 (7th Cir. 1953), cert. denied*, 347 U.S. 1016 (1954), a case under the Packers and Stockyards Act, the court stated:

> The hearing officer observed these witnesses upon the stand. He was the trier of the facts. The matter of their credibility was for him to decide. Great Western Food Distributors *V.* Brannan, 7 Cir., 201 F.2d 476, 479.

Finally, in *Fairbank* v. *Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970), also under the Packers and Stockyards Act, the court stated:

> When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. National Labor Relations Board *v.* Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); see also United States *v.* Oregon Medical Society, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

In addition, Michael Benson's testimony at the hearing was vacillating and contradictory as to the payments from Welch. He testified at times that he did not expect to be paid by Welch, but at other times he testified that he did expect to be paid by Welch. He testified that the payments by Welch were for his physical labor rather than as a share of Welch's profits, but at other times he seemed to recognize that the payments must have been larger, at times, because Welch made more money on the hogs. Specifically, Michael Benson testified (Tr. 316–17, 320, 327, 332–34, 338, 342–47):

> Q. Did you have an agreement as to how much he would pay you?
>
> A. No.
>
> Q. How often would he pay you?

A. There was no real time when he would pay me. He just would pay me. I never, you know, asked when are you going to pay me or anything. I just never—at first when we first did it?

Q. Yeah.

A. I didn't think I was going to get paid for it.

Q. Then he came up and gave you some money?

A. Yes.

Q. And what was your understanding that that money was for?

A. For the work I did. [Tr. 316–17].

* * * * * * *

Q. Did you expect to be paid for all this extra work [for Welch]?

A. Yes.

Q. And, of course, you got paid?

A. Yes. [Tr. 320].

* * * * * * *

Q. Did he [Welch] ever show you or tell you I marked these hogs up or I did this with these hogs or anything like that?

A. No.

Q. All you did was the physical labor for him?

A. That's right. Yes.

Q. And then he paid you for the physical labor?

A. Yes. [Tr. 327].

* * * * * * *

Q. Okay. Did Doug Welch ever come to you and say, here, I'm going to split these monies with you that I made off my transactions?

A. No.

Q. Did he just pay you a sum of money?

A. Yes.

Q. Did you ever ask him, say, how come you are paying me 1065 dollars this time—strike that. Let me get some exact figures. Did you ever ask him today you paid me 613 dollars and 13 cents, but last week—last month you paid me 397.39. Did you ever ask him why the difference?

A. No.

Q. Would it correspond that in the months that you received higher checks—like in August of '83 you received 1003 dollars and 71 cents versus in June receiving 613 dollars and 13 cents. Would there be a correlation or—you know what I mean by correlation?

A. Yeah.

Q. Would there be a correlation between the amount of work you did, the number of hogs that you had to work on versus the amount of money that you would get?

A. It would be the amount of hogs that I took care of or handled. Butchers you make more.

Q. The more hogs you took care of and handled, the more money that you would be receiving for the services rendered from Doug Welch and W. W. Garry?

A. Yes. [Tr. 332-34].

* * * * * * *

Q. . . . Did you ever know what profit he [Welch] made?

A. Never. [Tr. 338].

* * * * * * *

Q. So you did many of the same things for all your other customers——

A. Yes.

Q. —that you do for Mr. Welch?

A. Yes.

Q. How come you didn't get money from them?

A. From who?

Q. From the other customers that you were selling hogs.

A. I never asked them for anything. I just—I do not know why.

Q. The first time that Mr. Welch gave you a check, did you ask what's this for?

A. Yeah. I said what's this for.

Q. And what did he say?

A. For the work you are doing.

Q And did you say, gee, it seems to be a lot of money?

A. Who said that? You said that.

Q. No, I'm asking you, did you say, oh, gee, seems to be a lot of money?

A. No. Somebody gives me a check, I don't ask what it's for.

Q. Even when that check is larger than your salary?

A. I won't—no, I won't ask—if somebody gives me a check, I won't ask what it's for.

Q. Even when it's two and a half times your weekly wages?

Mr. SHUMINSKY: I am going to object. That is not true.

Q. The check was—there was one check received—dated August 30th of 1,003 dollars; one check dated November 25th of 1055 dollars; and one check dated December 19th which was not two and a half times, but close to five times your salary, 2,2——

A. Per month or per week?

Q. No, per week. You got——

A. He didn't give me a check every week, did he?

Q. No. But that is——

A. Per month—what would it be per month? Would it be about——

Q. A thousand dollars per month.

A. Yeah. Be about the same for the work I was doing for him and anybody else.

* * * * * * *

Q. And you never asked no matter what the size of the check as to how he determined the amount?

A. No. I would say—I would just say to him the hogs must have been all right or something. He said, yeah. Yeah. If he said—and then he would give me the check, say thanks a lot. I would say thank you. I was—I was surprised they were that big. I mean I will—I was surprised it would be that big.

Q. And you never——

A. And I never expected a check from him anyway.

* * * * * * *

Q. What did you tie the amount of money that he gave you to because it was varying amounts?

A. Well, I figured it was probably for the work that I was doing for him. His hogs must have been making money, you know, must have been making good money, so he was paying me for it. You know, that's what I—you know, so that's what I figured it was for.

Q. How—what did you assess or what did you believe was the reason that sometimes you would get like 668 dollars and that sometimes you would get 1055 dollars?

A. Well, the hogs must have made more money. One set of hogs must have made more money and then there was more of them.

Q. More of them?

A. More of the hogs, and so he paid me more.

Q. There were a larger number of hogs?

A. Yes.

Q. When there were more hogs, what would be your compensation? Would it be smaller or lower?

A. Smaller or what?

Q. Okay. What was the correlation between the number of hogs that you worked during a month period and the size of the check that you received?

A. The more hogs I dealt with and handled, the more money I got. [Tr. 342-47].

In addition to the admissions by Doug Welch and Michael Benson, and the contradictory nature of Benson's testimony at the hearing, the fact that 14 of the 20 checks given to Michael Benson by Doug Welch were in uneven amounts further supports the conclusion that the payments represented a split of the profits, and that Michael Benson knew that the payments represented a split of Doug Welch's profits. The dates and the amounts of the checks are as follows (CX 24, p. 1):

Dates and Amounts of Checks Given by Welch to Benson

Date of Check	Amount of Check
May 13, 1983	$250.00
May 26, 1983	397.39
June 20, 1983	613.13
July 1, 1983	432.13
July 19, 1983	520.07
Aug. 1, 1983	915.56
Aug. 30, 1983	1,003.71
Sept. 22, 1983	296.40
Oct. 7, 1983	100.00
Oct. 14, 1983	300.00
Oct. 25, 1983	668.50
Nov. 23, 1983	100.00
Nov. 25, 1983	1,055.88
Dec. 19, 1983	2,222.93
Dec. 30, 1983	305.74
Jan. 31, 1984	1,511.55
Mar. 5, 1984	903.16
Mar. 16, 1984	100.00
Mar. 28, 1984	2,319.22
Apr. 16, 1984	1,000.00
Total	15,015.37

After a first payment of $250 in an even amount, Michael Benson received seven checks from Welch ending in 39¢, 13¢, 13¢, 7¢, 56¢, 71¢, and 40¢. Michael Benson would have to be incredibly naive not to recognize that these checks had to be computed on a percentage of Welch's profits.

The documentary evidence shows that the checks were, in the main, for exactly one-half of Welch's profits. For example, the documentary evidence shows that during the period July 5–15, 1983, Doug Welch made profits totalling $1,040.15 on hogs involving Michael Benson (CX 1, p. 7). His check to Michael Benson on July 19, 1983, for $520.07 represented exactly one-half of the profits ($1,040.15 ÷2 = $520.075).

The documentary evidence shows that from August 2–29, 1983, Doug Welch made profits totalling $2,007.43 on hogs involving Michael Benson (CX 2, p. 6). Doug Welch's check dated August 30, 1983, to Michael Benson for $1,003.71 represents exactly one-half of those profits ($2,007.43 ÷2 = $1,003.715).

The documentary evidence shows that from September 7–21, 1983, Doug Welch made profits totalling $592.81 on hogs involving Michael Benson (CX 3, p. 7). Doug Welch's check to Michael Benson dated September 22, 1983, for $296.40 represents exactly one-half of those profits ($592.81 ÷2 = $296.405).

The payment in even amounts of $100 on October 7, 1983, and $300 on October 14, 1983, appear, at first glance, to be contrary to the norm. However, a closer analysis reveals that the $100 and $300 checks represent cash advances to Benson (either requested by Benson or volunteered by Welch before the exact profits were computed and divided in half). That is, the documentary evidence shows that during the period September 23–October 21, 1983, Doug Welch's profits on hogs involving Michael Benson totalled $2,137.02 (CX 4, p. 6). The checks for $100 and $300 dated October 7 and 14, 1983, combined with the check for $668.50 dated October 25, 1983, total $1,068.50, which is just 1¢ less than exactly half of Welch's profits for the period September 23–October 21, 1983 ($2,137.02 ÷2 = $1,068.51).

Large discrepancies in the 50% profit sharing appear in two of the checks. The documentary evidence shows that Doug Welch made profits totalling $1,906.32 on hogs involving Michael Benson from February 9–March 2, 1984 (CX 11, p. 24). One-half of the profits would have equalled $953.16. Instead of receiving that amount, Michael Benson received a check dated March 5, 1984, for $903.16. (This $50 discrepancy between $953.16 and $903.16 could have been a clerical error or a $50 reduction for some unexplained reason.)

The largest discrepancy relates to the period from March 9–26, 1984, in which Doug Welch made profits totalling $5,837.44 on hogs involving Michael Benson (CX 12, p. 20). During this period, Doug Welch gave Michael Benson a check for $100 on March 16, 1984, and a check for $2,319.22, on March 28, 1984, totalling $2,419.22.

One-half of the profits during this period amounts to $2,918.72 ($5,837.44 ÷ 2 = $2,918.72).

Even in the absence of any admissions by Welch and Benson, the documentary evidence would have led me to conclude that Doug Welch was giving Michael Benson approximately half of his profits on hogs, and I would have inferred from the documentary evidence that Michael Benson knew that he was receiving about half of Doug Welch's profits. But, in view of the admissions set forth above, there is no need to rely on the documentary evidence and inferences in this respect.

Griffen E. Bonham, Chief, Marketing Practices Branch, Livestock Marketing Division, Packers and Stockyards Administration, USDA, testified that respondent Michael Benson's conduct was unfair and deceptive, and that it is considered as a very serious violation of the Packers and Stockyards Act for a commission firm salesman to enter into the type of arrangement that Michael Benson had with Doug Welch (Tr. 355–89). Any type of arrangement involving the sharing of profits between an order buyer or dealer doing business at a terminal stockyard and a commission seller at the stockyard is an unfair, unjust and deceptive practice in violation of the Act (7 U.S.C. §§ 208, 213(a)). Such profit sharing is particularly odious at a terminal stockyard where livestock is sold by private treaty (as distinguished from auction), in view of the nature of private treaty selling. Private treaty selling at a terminal stockyard (such as the Sioux City stockyard involved here) is described in Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law 228–29 (1981), as follows (quoting from one of the author's prior decisions):

> In a private treaty sale, the prospective purchasers gather at the head of a commission firm's alley. Prior to the sale, the commission firm sorts each consignment into uniform lots, which are placed in separate pens. A good commission firm salesman knows what types of livestock are needed by particular buyers, and he has an opportunity to visit with the buyers before the sale begins. The salesman selects the buyer whom he believes to be the best buyer for a particular lot of livestock and takes that buyer into the pen (or pens) and negotiates in secret with him as to the price. No buyer knows exactly what the other potential buyers will bid. Thus, each buyer entering the pens must bid as high as he believes is necessary to purchase the livestock. At a private treaty sale, there is haggling over the price between the buyer and the seller. If they agree on a price,

> the sale is consummated. If not, the salesman takes another buyer into the pen and negotiates secretly with him as to the price. The salesman's offering price to the subsequent buyers may be higher or lower than the price involved in the negotiations with the previous buyers. Where a commission salesman has no good basis for selecting one buyer over another, on occasion he will flip a coin to determine the order in which the purchasers will have an opportunity to negotiate for livestock in a particular pen or alley.
>
> In a private treaty sale, if the livestock are sold to the first buyer who is taken into the pen, the other buyers do not have an opportunity to bid on the livestock. But all buyers had the opportunity to make known to the salesman their particular buying needs that day and, therefore, they all had an opportunity to try to influence the seller into selecting them as the first potential purchaser. (Footnote omitted.)

In the present case, the record supports the ALJ's finding that in a number of private treaty transactions, Michael Benson, in the course of his employment as a commission firm salesman, "sold consigned livestock to respondent Welch at substantially less than full market value of the livestock" (Initial Decision at 3). That violated one of the main objectives of the Act, which "is to safeguard farmers and ranchers against receiving less than the true market value of their livestock" (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 1 (1957), *reprinted in* [1958] U.S. Code Cong. & Ad. News 5212, 5213. *See Glover Livestock Comm'n Co.* v. *Hardin*, 454 F.2d 109, 113 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S.D.A.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971).

Even if there had been no proof that Benson sold consigned livestock to Welch at less than the full market value, or purchased livestock consigned by Welch at more than the full market value (to fill Benson's employer's purchase orders), the mere fact that there was a transfer of funds from Welch to Benson in connection with transactions at the stockyard placed Benson in a conflict-of-interest situation, which is a very serious violation of the Act. As stated in *Midwest Farmers, Inc.* v. *United States*, 64 F. Supp. 91, 95, 102 (D. Minn. 1945) (3-judge court):

> The producer consigns his livestock to a market agency to represent him as his agent and who is supposed to have no interest except the welfare of his principal. Accordingly

> the producer places his financial interests in the absolute control of his agent. Consequently, the success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value. To say that much depends on the integrity and ethics of those engaged in marketing livestock is speaking mildly. Experience long ago taught that stockyards require some sort of supervision and Congress has lodged it in the Department of Agriculture under the Act of 1921, as amended, obviously because a major portion of the great agricultural industry of the country is vitally concerned.
>
> * * * * * * *
>
> The methods of transacting business in the yards constantly are a temptation to collusion. Sales of livestock are made by negotiation and bargaining, and not at public auction. The purchaser is present; the shipper is not, but relies on his market agency. The agent is in closest contact with buyers for packers, with speculators and traders and perhaps has dealt with these same persons for many years; so, in accordance with human instincts, ways and means are found to profit at the expense of the absent member to the transaction. A marketing agency should maintain a position at all times which would assure absolute loyalty to its shippers. No interest should be allowed to interfere between the agent and his principal. When an agency receives a consignment of livestock, the sole objective should be to sell it at the highest price obtainable on an open, competitive market. When the agency acquires an interest, other than agent, it no longer can honestly and efficiently represent the principal.

A commission firm employee is in a fiduciary relationship to the firm's principals, and owes the highest degree of loyalty to the firm's principals.[7] Respondent Michael Benson engaged in a very serious violation by entering into an arrangement with Doug

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[7] *Midwest Farmers, Inc.* v. *United States*, 64 F. Supp. 91, 94–102 (D. Minn. 1945) (3-judge court); *In re Saylor*, 44 Agric. Dec. ____, slip op. at 185 (Sept. 20, 1985) (decision on remand); *In re Bosma*, 41 Agric. Dec. 1742, 1744, 1751–54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984); *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 211–12 (1980), *appeal dismissed*, No. 80–1293 (10th Cir. Aug. 11, 1980); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 829 (1979).

Welch that necessarily and inherently created a conflict-of-interest situation.

It would have been highly improper for Michael Benson to have received even small payments from Doug Welch, in view of their relationship. But here the payments from Welch to Benson exceeded $15,000 in a period of just over 11 months. That was almost as much as Benson's yearly salary (Tr. 268-70, 379-80)! If Benson's salary was not adequate payment for the work he did on behalf of all consignors, including those instances in which Doug Welch was the consignor, the remedy was to obtain more pay from his employer—not to secretly obtain $15,000 from Welch. (Michael Benson admits that he never told anyone (other than the Internal Revenue Service (Tr. 271)) about Welch's payments to him (Tr. 334-35)).

Although respondent should have known that it was highly improper for him to secretly accept over $15,000 from Doug Welch, even if we assume that he did not (which requires the assumption that he lacks any sense of business morality), his conduct was, nonetheless, willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)). As stated in *Goodman* v. *Benson,* 286 F.2d 896, 900 (7th Cir. 1961):

> We think it clear that if a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. Eastern Produce Co. *v.* Benson, 3 Cir., 278 F.2d 606, 609.

Similarly, in *Eastern Produce Co.* v. *Benson,* 278 F.2d 606, 609 (3d Cir. 1960), the court stated:

> Nor can we subscribe to the proposition that the test of willfulness in this context is to be evil purpose or criminal intent, for this is not a criminal statute.

In *Butz* v. *Glover Livestock Comm'n Co.,* 411 U.S. 182, 186-87 (1973), the Court stated with respect to the Packers and Stockyards Act:

> The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose

it to deter repeated violations of the Act, whether intentional or negligent.

Accord Finer Foods Sales Co. v. *Block*, 708 F.2d 774, 778 (1983); *American Fruit Purveyors, Inc.* v. *United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).[8]

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Saylor*, 44 Agric. Dec. 2238, slip op. at 498-520 (Sept. 20, 1985) (decision on remand),[9] which is set forth as an appendix to this decision.[10]

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[8] The definition of willful in *TWA* v. *Thurston*, 105 S. Ct. 613, 624-26 (1985), is based on the legislative history of the Age Discrimination Employment Act, which is quite different from the legislative history of the term willful under the Administrative Procedure Act. Accordingly, the Court's holding in *Thurston* as to the meaning of "wilful" is not appropriate for use in our Department's disciplinary proceedings.

[9] The Department's severe sanction policy did not originate with *Saylor*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974). Slight revisions (mostly editorial) were made in *Saylor*.

[10] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam, 524 F.2d 977 (5th Cir. 1975); In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric.

Continued

In view of respondent Michael Benson's serious violations of the Packers and Stockyards Act occurring over an extensive period of time, the sanction recommended by complainant is fully justified. Respondent argues "that the greatest punishment and penalties goes to the person who has the audacity to require P & S to hold a hearing" (Appeal Petition at 4). However, respondent has not been given an *increased* sanction because he went to a hearing—he merely was not afforded the opportunity to accept a *decreased* sanction that was given to the other parties, including Doug Welch, who consented to the issuance of a decision and order without a hearing. Doug Welch consented to a $10,000 civil penalty and a 6-month suspension order, which is the identical sanction that was offered to respondent Michael Benson on a consent basis (Tr. 382).

Many criminals who engage in plea bargaining are punished less than others who go to trial. Similarly, in appropriate circumstances, the Packers and Stockyards Administration offers a *reduced* sanction to a respondent who consents to a decision and order, without a hearing. There are sound administrative reasons for that practice. In the first place, a consent order is effective much sooner than in the case of a litigated order. This aids in deterring others from violating the Act.

Second, consent decisions conserve the Department's limited money and manpower.

Third, a consent decision eliminates the uncertainty that may develop at a hearing. It is not unusual for trade witnesses who give sworn statements during the investigation favorable to complainant's case to change their story on the witness stand. Moreover, it is not unheard of for respondents in administrative cases to offer perjured testimony in support of their defense. In a recent Packers and Stockyards Act case, *In re Saylor,* 41 Agric. Dec. 2187 (1982), *remanded,* 723 F.2d 581 (7th Cir. 1983), *final decision,* 44 Agric. Dec. 2238 (Sept. 20, 1985), Saylor arbitrarily raised the weights of cattle he purchased for customers in 14 transactions, and invoiced them at falsely increased weights. However, Saylor created a phony set of worksheets and scale tickets purporting to show that he substituted a few heavier cattle for light cattle, which accounted for the increases in weights. His false worksheets and scale tickets and perjured testimony were so convincing that, in the absence of a detailed exposition, the court remanded the proceeding, admonishing the Department to "carefully examine the record in this case

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Dec. 499, 515, 539-50 (1974), *aff'd per curiam,* 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller,* 33 Agric. Dec. 53, 64-80, *aff'd per curiam,* 498 F.2d 1088, 1089 (5th Cir. 1974).

and to give clear and cogent reasons for whatever result it reaches on remand" (723 F.2d at 584).

On remand, Saylor filed four briefs relying on the falsely created documents and perjured testimony. However, after the Judicial Officer took the time and effort required to write a 529-page decision, which included copies of the documentary evidence (328 numbered arrows were added by the Judicial Officer to the documentary evidence to facilitate the explanations), and set forth 173 circumstances that proved conclusively (beyond the possibility of any doubt) that Saylor invoiced customers on the basis of falsely increased weights, Saylor did not even file a petition for reconsideration with the Judicial Officer. He acquiesced in the $10,000 civil penalty and 8-month suspension order without appealing again to the court of appeals.

Since the complainant can never be sure what type of proof will be offered at a hearing, there is a sound basis for decreasing the appropriate sanction in particular cases in order to obtain a consent settlement.

The $10,000 civil penalty and 1-year sanction requested by complainant here is not out of line with numerous severe sanctions that have been issued in recent years under the Packers and Stockyards Act, *e.g., In re Garver,* 45 Agric. Dec. ___ (June 19, 1986) (2-year suspension); *In re Holiday Food Services, Inc.,* 45 Agric. Dec. ___ (May 8, 1986) ($50,000 civil penalty), *appeal docketed,* No. 86-7332 (9th Cir. June 6, 1986); *In re Corn State Meat Co.,* 45 Agric. Dec. ___ (May 8, 1986) ($50,000 civil penalty); *In re Blackfoot Livestock Commission Co.,* 45 Agric. Dec. ___ (Mar. 7, 1986) (6-month suspension), *appeal docketed,* No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Farmers & Ranchers Livestock Auction, Inc.,* 45 Agric. Dec. ___ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor,* 44 Agric. Dec. 2238 (Sept. 20, 1985) (decision on remand) (8-month suspension and $10,000 civil penalty); *In re ITT Continental Baking Co.,* 44 Agric. Dec. ___ (Mar. 18, 1985), *final consent decision,* 44 Agric. Dec. ___ (Oct. 24, 1985) ($10,000 civil penalty); *In re Mid-West Veal Distributors,* 43 Agric. Dec. ___ (July 13, 1984) ($77,000 civil penalty, with $27,000 suspended); *In re Mayer,* 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed,* No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman,* 42 Agric. Dec. ___ (Dec. 12, 1983), *aff'd,* 770 F.2d 888 (10th Cir. 1985) ($20,000 civil penalty).

In *In re Garver,* 45 Agric. Dec. ___, slip op. at 17-21 (June 19, 1986), it is explained that 2-to-5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30-

to-60-day suspension orders would have been issued in comparable cases a few years ago.

In assessing a civil penalty, the Act requires consideration of the "gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). Since respondent Michael Benson is not the owner of a business, the "gravity of the offense" should largely determine the civil penalty here. But, inasmuch as respondent Michael Benson's earning ability is limited (Tr. 268–70, 379–80), the $10,000 civil penalty should be payable in equal monthly installments over a 3-year period.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Michael Benson, his agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale, on a commission basis or otherwise, of that person's livestock;

2. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, for the purpose of purchasing consigned livestock at less than its fair or true market value;

3. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding, or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, which would enable such market agency, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the consignors of livestock to such market agency;

4. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, to split or otherwise share in any profits derived from the resale of livestock purchased from consignments to such market agency; and

5. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency buying livestock on a commission basis, or any employee or agent of such market agency, which would enable such market agency, employee or agent to engage in any act or practice

which operates or would operate as a fraud or deceit upon the market agency or its customers or principals.

Respondent Michael Benson is found to be unfit to engage in business subject to the Packers and Stockyards Act and shall not engage in business or operate subject to the Act as a market agency, buying and selling livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying and selling livestock in commerce, either on his own account or as the employee or agent of the vendor or purchaser, for a period of 1 year.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Michael Benson is assessed a civil penalty in the amount of $10,000, to be paid over a 3-year period (35 monthly payments of $277.78, and the last monthly payment of $277.70), with the first monthly payment due on December 1, 1986, and each payment thereafter due on the first day of the applicable month. The civil penalty is to be paid by checks made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250-1400. If complainant advises respondent that any check was returned unpaid because of insufficient funds or any other reason, all future monthly payments shall be by certified checks.

The cease and desist provisions of this order shall become effective on the day after service of this order. The 1-year prohibition shall become effective on the 60th day after service of this order.

APPENDIX

Excerpt from *In re Saylor*, 44 Agric. Dec. 2238 slip op. at 498-520 (Sept. 20, 1985) (decision on remand).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

In re: RICHARD N. GARVER. P&S Docket No. 6449. Order issued September 29, 1986.

John A. Campbell, Administrative Law Judge.
Peter Train, for complainant.
Thomas Smith, Cincinnati, Ohio, for respondent.

ORDER DENYING PETITION FOR RECONSIDERATION

On August 15, 1986, respondent filed a petition for reconsideration challenging Finding of Fact 11 and arguing that a severe sanction is inappropriate and would have no deterrent effect on respondent or others.

Finding 11, which relates to respondent's sale of property used as security by the bank for its line of credit, and the bank's termination of the line of credit, is fully supported by the record. Moreover, it makes no difference why the bank terminated its line of credit. As stated in the original decision herein, note 2, the "bank's action in withdrawing respondent's line of credit did not cause his loss of at least $700,000 [which is the actual cause of respondent's failure to pay], but merely exposed his insolvent condition."

As to the appropriateness of the sanction, respondent argues that a severe sanction should only be imposed in nonpayment cases where the nonpayment occurred because of fraud. Respondent's argument would, however, emasculate the 1976 payment provisions enacted by Congress. The Act was amended in 1976 to provide (7 U.S.C. § 228b):

> § 228b. *Prompt payment for purchase of livestock*
>
> (a) *Full amount of purchase price required; methods of payment*
>
> Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided,* That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the

point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) *Waiver of prompt payment by written agreement; disclosure requirements*

Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) *Delay in payment or attempt to delay deemed unfair practice*

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

The 1976 payment amendment does not use the term fraud or any synonym thereof. Congress was not concerned merely with fraudulent failures to pay. Congress was concerned with all failures to pay (see the legislative history quoted in the original decision herein at 18). The 1976 payment amendment was enacted because livestock buyers (primarily packers) failed to pay for substantial amounts of livestock. See *In re Beef Nebraska, Inc.*, 44 Agric. Dec.

___ (Nov. 26, 1985), *appeal docketed*, No. 85-2534 (8th Cir. Dec. 31, 1985). As stated in the House Report on the 1976 amendatory legislation (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 5 (Apr. 14, 1976)):

> Between 1958 and early 1975 167 packers failed, leaving livestock producers unpaid for over $43 million worth of livestock. By far the largest of such failures was that of American Beef Packers (ABP), which went bankrupt in January, 1975, leaving producers in 13 states unpaid for a total of over $20 million in livestock sales.

The average loss to livestock sellers as a result of each packer failure from 1958 through early 1975 was $257,485.02 ($43,000,000 ÷167 = $257,485.02). If we omit the one $20 million failure of American Beef Packers, the average loss to livestock sellers from each packer failure from 1958 through early 1975 was $138,554.21 ($23,000,000 ÷166 = $138,554.21). In contrast, respondent Garver's financial failure caused livestock sellers to lose about $700,000, or more than five times the average loss caused by packer failures, excluding American Beef ($700,000 ÷$138,554.21 = 5.05).

Accordingly, respondent Garver's violations are extremely serious, warranting a very severe sanction under the Department's sanction policy, set forth in the original decision herein. The 2-year suspension order issued in this case is not out of line with numerous severe sanctions that have been issued in recent years under the Packers and Stockyards Act, *e.g.*, *In re Welch*, 45 Agric. Dec. ___ (Sept. 25, 1986) (decision as to Michael Benson) (1-year suspension from engaging in business subject to Act and $10,000 civil penalty); *In re Holiday Food Service, Inc.*, 45 Agric. Dec. ___ (May 8, 1986) ($50,000 civil penalty), *appeal docketed*, No. 86-7332 (9th Cir. June 6, 1986); *In re Corn State Meat Co.*, 45 Agric. Dec. ___ (May 8, 1986) ($50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. ___ (Mar. 7, 1986) (6-month suspension), *appeal docketed*, No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. ___ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985) (decision on remand) (8-month suspension and $10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. ___ (Mar. 18, 1985), *final consent decision*, 44 Agric. Dec. ___ (Oct. 24, 1985) ($10,000 civil penalty); *In re Mid-West Veal Distributors*, 43 Agric. Dec. ___ (July 13, 1984) ($77,000 civil penalty, with $27,000 suspended); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re*

Peterman, 42 Agric. Dec. ___ (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985) ($20,000 civil penalty).

If respondent's payment violations had resulted from fraud, a much more severe sanction would have been appropriate.

Respondent argues that there is no deterrent value to a severe sanction where a person merely cannot pay his bills. However, that same argument was rejected in a case under the Perishable Agricultural Commodities Act, *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. ___, slip op. at 19–20 (Dec. 5, 1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished), in which the Judicial Officer stated:

> A number of respondent's creditors expressed the view that a sanction imposed on respondent would not have any deterrent effect on respondent or others in the industry. Judge Palmer also expressed the view (Tr. 268) that severe sanctions have no effect in deterring payment violations since—
>
> > People don't pay their bills, because they don't have the money, and I don't care what you do in any of these cases. That is not going to change one thing.
>
> That view overlooks the fact that a person who fears a severe sanction if he violates the payment provisions of the Act can take steps to minimize the likelihood of payment violations. For example, he can obtain adequate capitalization before starting in business. (The record in this case suggests that respondent was undercapitalized.) He can also refrain from knowingly selling to risky purchasers, who frequently pay a little more than other purchasers, if they pay at all, but who cause serious problems if they fail to pay. In addition, he can avoid letting one firm get too deeply in debt to him and carefully monitor the payment practices of all his debtors.
>
> Adequate clerical staff can also be employed to assure prompt attention to the paperwork involved in produce transactions. (The record here suggests that respondent, at times, had inadequate clerical staff to handle the heavy volume of paperwork.) Where more than one person is involved in buying produce for a firm, reporting and review procedures can be utilized to catch potential problems in their incipiency. (The record here suggests that Mr. Patlan was permitted to freewheel without supervision or review.)

> The records I have reviewed in about 40 payment violation cases have convinced me that there are many steps that can be taken to minimize the likelihood of payment violations. Accordingly, severe sanctions imposed on payment violators should have a significant deterrent effect in the produce industry. *In re Worsley*, 33 Agric. Dec. 1547, 1558–67 (1974).

The same reasoning is applicable to the livestock industry. Furthermore, as stated in the original decision herein (slip op. at 17), violations involving fraud normally deprive a livestock seller of only about 1% of the value of his livestock, whereas a failure to pay deprives the livestock seller of 100% of the value of his livestock. Accordingly, failure to pay violations, whether resulting from fraud or not, warrant a very severe sanction.

For the foregoing reasons, respondent's petition for reconsideration should be denied.

ORDER

Respondent's Petition for Reconsideration is denied.

In re: BARREN RIVER DAIRY SALES, INC., SHIRLEY McCORKLE and HARLAN WARD. P&S Docket No. 6731. Decided September 29, 1986.

Victor Palmer, Administrative Law Judge.
Thomas Heinz, for complainant.
Pro se, for respondents.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Barren River Dairy Sales, Inc., is a corporation with a business mailing address at P.O. Box 259 D, Glasgow, Kentucky 42141.

2. Respondent Barren River Dairy Sales, Inc., is, and at all times material herein was, engaged in the business of buying and selling livestock in commerce for its own account and for the account of others and buying livestock in commerce on a commission basis.

3. Respondent Shirley McCorkle is an individual with a mailing address at Route 1, Magnolia, Kentucky 42757.

4. Respondent Shirley McCorkle is, and at all times material herein was, the ostensible sole owner, manager, director and controller of respondent Barren River Dairy Sales, Inc.

5. Respondent Harlan Ward, is an individual with a mailing address at Route 1, Glasgow, Kentucky 42141.

6. Respondent Harlan Ward is, and at all times material herein was:

(a) The actual owner, manager, director and controller of respondent Barren River Dairy Sales, Inc; and

(b) Registered with the Secretary of Agriculture as a partner in three separate partnerships engaged in livestock businesses. Such registrations are currently inactive.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Barren River Dairy Sales, Inc., its officers, directors, agents, employees, successors and assigns, and respondents Shirley McCorkle and Harlan Ward, their agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent Harlan Ward is suspended as a registrant under the Act, and respondents Barren River Livestock Dairy Sales, Inc., and Shirley McCorkle are prohibited from operating subject to the Act, until they comply fully with the bonding requirements under the

Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension and prohibition.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: TOMMY TURNER. P&S Docket No. 6608. Decided October 3, 1986.

Victor Palmer, Administrative Law Judge.
Ben Bruner, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Tommy Turner, d/b/a Tommy Turner Cattle, hereinafter referred to as the respondent, is an individual whose mailing address is P. O. Box 585, Tulia, Texas 79088.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Engaged in the business of a dealer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Tommy Turner, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to permit their payment upon presentation;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent Turner is prohibited for a period of eighteen (18) months from engaging in business or operating subject to the Act as a market agency, buying or selling livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either on his own account or as the employee or agent of the vendor or purchaser, and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations.

Provided, a supplemental order will be issued terminating the prohibition provision set forth above at any time after the expiration of sixty (60) days upon demonstration by respondent that (1) the unpaid livestock sellers set forth in paragraph III of the complaint have received full payment and (2) that he is in full compliance with the bonding requirements.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH. P&S Docket No. 6174. Decided October 6, 1986.

Victor Palmer, Administrative Law Judge.
Allan Kahan, for complainant.
Pro se, for respondents.

CONSENT DECISION WITH RESPECT TO RONALD HILLMAN

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, and a subsequent Amended Complaint and Notice of Hearing alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Ronald Hillman admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ronald Hillman, hereinafter referred to as respondent Hillman, is an individual whose mailing address is 19120 Menard Place, Tarzana, California 91356.

2. Respondent Hillman is, and at all times material herein was:

(a) Secretary of Landmark Beef Processors and a principle owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of the corporate respondent;

(b) With John M. Burbank, Alan Silverberg, and Chaim Treibatch, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and

(c) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent Ronald Hillman having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Ronald Hillman, his agents and employees, individually or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, for meat and meat food products purchased;

2. Preparing and using any false, misleading, incorrect or incomplete financial statements or inventory reports for the purpose of inducing suppliers and vendors of meat and meat food products to sell or otherwise transfer such products to respondents.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Packers and Stockyards Act and the regulations, including, but not limited to: (1) invoices and other accountings which disclose all purchases and sales of meat or meat food products; (2) records of all receipts and disbursements; (3) a general ledger of accounts disclosing respondent's assets, liabilities, income, expenses and net worth; and (4) an accurate and current inventory record.

Respondent shall keep and maintain, and shall not destroy or otherwise dispose of, any purchase invoices, sales invoices, inventory records, or similar accounts and records documenting the purchase and sale of meat or meat food products for a minimum period of two years. In addition, respondent shall strictly comply with the provisions of section 203.4 of the statements of general policy (9 CFR § 203.4).

Respondent Ronald Hillman is hereby assessed a civil penalty in the amount of Ten Thousand Dollars ($10,000.00), payable within thirty (30) days of the effective date of this decision.

The provisions of this order shall become effective on the first day after service of this decision on respondent Ronald Hillman.

Copies hereof shall be served upon the parties.

In re: PORK CUTTERS, INC., DON BIRAKOWSKY, and MARGA BIRAKOWSKY. P&S Docket No. 6457. Decided August 29, 1986.

William J. Weber, Administrative Law Judge.
Allan Kahan, for complainant.
Kevin Nash, New York, N.Y., for respondent.

DECISION AND ORDER

Complainant has failed to sustain the burden of proof to establish that respondents have willfully engaged in an unfair, unjustly

discriminatory or deceptive practice in violation of § 202(a) of the Packers and Stockyards ("Act") (7 USC 192(a)) by reason of respondents' failure to pay some $945,000 for meat and meat food products purchased by respondent.

Respondents purchased "packer style hogs," i.e., hog carcasses cut in half to be further cut for commercial and wholesale uses, and sold to wholesalers, jobbers and provision houses in the New York City area.

Respondents, Don and Marga Birakowsky started the business on a shoestring in 1964, doing all the work themselves. Don's only skill was with a knife, and Marga was without any experience in administration or bookkeeping. However, the business at first was so small that the two of them operated it, working almost round the clock, by themselves. Marga learned bookkeeping from an accountant who came in once a month.

Their sole supplier since 1964 was Arbogast and Bastian, Inc., (A&B). Short-term credit was given to respondents and as the relationship grew and strengthened, the credit terms lengthened to about 40 days.

Respondents agreed to pay A&B for delivered hog carcasses on a formula price based on the nationally reported averaged price for prime live hog sales in four designated cities. Later a $3.50 "kill fee" was added to the formula. The relationship apparently was mutually beneficial for some years.

A bookkeeper, salesman, driver, and eleven butchers or butcher helpers were eventually employed in respondents' business.

About 1980, the supplier, A&B underwent a change of management.

Respondent Marga Birakowsky was forced to cut back her working time in the business, from the mid-1970's, due to the terminal illnesses of her son, and in the 1980's, her mother. Marga was also ill some of the time herself.

In the 1980's, respondents' business slowed, but respondents believed it was due to a general business slowdown. In 1983 their financial situation became critical. In checking, Marga Birakowsky discovered the pricing formula had been unilaterally changed by A&B when A&B changed management.[1]

The effect of the change was a substantial hidden price increase to respondents.

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[1] The findings concerning the relationship with A&B are subject to a caveat discussed letter.

Marga Birakowsky was convinced that A&B had cheated them. When she confronted A&B's officers with these charges, they gave evasive responses.

A financial crisis was reached where respondents could not continue in business and they sought legal assistance. Their attorney recommended bankruptcy. When A&B was notified, A&B requested a meeting with respondents and respondents' attorney in August 1983. (TR p. 192)

"Overcharges" claimed by respondents were discussed at the August 1983 meeting with A&B. A&B promised to "work out" the claimed "overcharges" if given "time." (TR p. 193) A new price formula at reduced rates to compensate respondents for past overcharges was agreed to. (TR p. 194) Respondents then agreed to continue in business and abandoned the bankruptcy proposal.

Respondents continued to buy from A&B, and pay the outstanding invoices. A&B needed the disputed invoices paid, as well as the subsequent invoices at the newly adjusted price, because of A&B's banking arrangements. Refusal to pay the disputed invoices would have precipated immediate failure for both respondents and A&B at that time.

About 9 months later, in May 1984, A&B failed. Respondents having relied on A&B as a sole supplier for over 18 years, also failed. Respondents owed A&B about $945,000 for the last 40 days purchases.[2]

The accumulated unrecovered losses from the A&B "overcharges" plus additional losses when respondents failed to continue to supply their customers finally killed respondents' business.

Pork Cutters was unable to pay A&B, in part because of the accumulated losses from 1980 due to A&B's "overcharges." In respondents perception, the "overcharges" by A&B were not yet "worked out" and should be used as an offset against the $945,000.

Respondents were so acutely sensitive to debts that they closed their business for a short time in August 1983, because they wanted to avoid "going deeper into debt." (TR p. 231-232) Then the meeting with A&B promising to "work out" the claimed "overcharges" by a new price formula gave respondents new hope. But when the business failed, the "overcharges" had not yet been "worked out," as the Birakowsky's saw it.

A&B had brought suit against respondents for $740,000 and respondents had counterclaimed for the alleged fraudulent "overcharging" by A&B. (TR p. 231) The August 1983 meeting apparent-

[2] During the last 40 days respondent paid A&B about $980,000 for earlier purchases. (TR P. 138)

ly put this litigation on the backburner, while the parties "worked out" their differences under the new pricing formula.

Pork Cutters computed the alleged overcharges in a conservative manner, based on averages for prime hogs only (not all the delivered hogs fell into the prime category). This gave A&B the benefit of doubt on any differences in the calculations. Calculating each individual transaction at the lesser price appropriate for non-prime hogs would have resulted in even greater overcharges, Marga believed.

The "overcharges" were calculated by Marga for their civil litigation with A&B (TR p. 185), and not as an afterthought to raise as a (fictional) defense in this disciplinary proceeding.

In the last half of 1981, Pork Cutters computed overcharges of $276,972.59 arising from $6,500,704.45 in purchases billed by A&B to Pork Cutters. Pork Cutters recomputing the billings on the original price formula, claims the billings should have been $6,223,731.86. (TR p. 212)

During 1982, Pork Cutters computed alleged overcharges of $917,199.23 on purchases of $12,111,266.47. (TR p. 187)

Overcharges of $542,756.05 were computed by pork cutters on 1983 purchases of $5,552,826.69. (TR p. 219-220)

Pork Cutters thus computed a total of more than $1.7 million "overcharges" which more than offset, in its view, any obligation it owed.

When complainant's investigator went to Pork Cutters' office to check their records, only Don Birakowsky was there. He had no knowledge of the books and records and urged the investigator to return on an agreed date when Mrs. Birakowsky was expected to be there. The investigator agreed and did so.

Mrs. Birakowsky's mother was terminally ill and Mrs. Birakowsky was directing all of her time and energy to her mother. When the investigator returned on the agreed date, Mrs. Birakowsky was not there. However, Don saw that the investigator had access to all the records he desired.

Throughout to the investigation, from the initial stages, the question of A&B's overcharges offsetting Pork Cutters' obligations to A&B were raised by the Birakowskys. (TR p. 17, 18, 21, 22, 106, 132, 133, 136, 259, 260, and 261)

Complainant's investigator made a thorough and full investigation to the extent that he could. However, due to the serious illness of Mrs. Birakowsky's mother, the lack of understanding by the Birakowskys of the seriousness of the investigation, and unfortunate legal advice, the Birakowskys failed to provide the degree of cooperation that the law required and their best interest should have

provided. Respondents refusal or failure to cooperate for whatever justification was a subject that also arose frequently. (TR p. 21, 66, 67, 107, 137, 138, and RE9, 10). That failure to cooperate was unjustified and unwise and probably in violation of the regulations. However, that failure should not be a barrier to consideration of respondents contentions of overcharges offsetting the failures to pay.

The Birakowskys testimony is exceptionally persuasive, and warrants full probative value.[3]

Complainant makes out a well documented, and in fact admitted, failure to pay over $945,000.00. But the respondents evidence indicating very large overcharges cannot be casually brushed aside as irrelevant and inconsequential.

Complainant did not call anyone from A&B in rebuttal. Without question, that would be important to decide the merit of the overcharge issues. However, the ultimate merits of the overcharge issue between A&B and Pork Cutters is not being determined here. That will be decided in their civil litigation.

The issue here is whether respondents' evidence is sufficiently probative to explain and justify the failure to pay A&B. This is a disciplinary action, not a civil suit for damages or collection of overdue bills.

The complaint charges respondents "willfully" engaged in an "unfair, unjustly discriminatory, or deceptive practice." (7 USC 192(a)) This hinges on whether respondents' failure was "unjustifiable."

Complainant agrees that "justification" is a hinge issue. Complainant argues that respondents "unjustifiably" refused to pay A&B. Pages 7–8, complainant's Proposed Findings of Fact, Conclusions, and Brief in support thereof filed 5/2/86.

In essence, respondents claim to have been defrauded by A&B when A&B unilaterally changed the agreed pricing formula, increasing the price significantly. This record shows no changes in that agreed pricing formula for 16 years, except for adding the $3.50 "kill fee."

In this context it cannot be said that respondents were unreasonably careless or "unjustified" in relying on the integrity of their supplier. Respondents may have been imprudent or naive, but that should not trigger heavy disciplinary penalties based on unfair trade practices.

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[3] In 31 years as a trial Judge, the Birakowskys rank very high for sincerity, persuasiveness, credibility and probative value.

On this record, it is uncontroverted that a problem existed in the summer of 1983 that brought A&B and Pork Cutters together to discuss their mutual obligations and responsibilities. Thereafter, Pork Cutters abandoned bankruptcy and continued to do business with A&B under a new, reduced pricing formula.

The evidence in this record explains the price reduction as A&B's effort to "work out" the "overcharges." Complainant argues that the price concession was made for A&B's advantage (and needs), rather than to "work out" a dispute with respondents. The credible evidence here supports respondents' position contrary to complainant's argument.

No criticism is implied concerning complainant's investigator and none should be inferred. The investigator was thorough, complete and vainly tried to pry from respondents the information necessary to support or verify their claims of overcharges.

Considering the life history of respondents, it is not difficult to understand their fear and reluctance to cooperate with governmental authorities, although, it was a serious mistake here. That failure however, should not bar them from serious consideration of their plea and evidence they present concerning it.

Other than the dispute with A&B concerning the pricing formula, this record is devoid of anything suggesting a lack of integrity and sincerity in respondent's testimony and evidence. That is not to say that each jot and tittle is accurate and fully in conformance with reality. That is not necessary.

Complainant here seeks a $90,000.00 civil penalty from the individual respondents. The corporate respondent is not operating and is probably insolvent. The issues are seriously disputed. Complainant has established that respondents have failed to pay $945,000 to A&B for the last 40 days purchases.

However, respondents have established that a serious dispute exists between A&B and respondents, that efforts were made to resolve it, that both parties acted on that resolution for 9 months. Further, according to respondents, the resolution was "working out" the differences, but the unworked out portion far exceeded respondents' obligations to A&B at the time the businesses failed. Although, the record does not support each item of respondents' testimony by documentary evidence, that is not necessary here. The credibility, persuasiveness, and consistency of respondents evidence is strong.

It is not being determined here what obligatons A&B might have to Pork Cutters but merely that Pork Cutters' evidence is suffi-

ciently meritorious to justify their failure to pay until the dispute is resolved in an appropriate civil forum.[4]

Regardless of the ultimate outcome there, the evidence here establishes that a serious, extensive dispute exists between respondents and A&B, concerning possible fraud, which relates to and arises from possible "overcharges" by A&B.

This justifies respondents failure to pay til that dispute is resolved. A $90,000.00 civil penalty should not be assessed against the Birakowskys individually.

Considering all the evidence in this record, the complainant has failed to sustain the burden of proof. There is not a preponderance of the evidence showing respondents' willfully failed to promptly pay obligations it owed to A&B. The evidence establishes that the outstanding obligations from Pork Cutters to A&B were the subject of serious and still unresolved dispute.

* * * * * * *

ORDER

The complaint is dismissed with prejudice.

[The Decision and Order became final on October 14, 1986.—Ed.]

In re: OZARK COUNTY CATTLE COMPANY, INC., DWIGHT LEDBETTER, LEDBETTER LAND AND CATTLE COMPANY, INC., and H.H. LEDBETTER, NATIONAL ORDER BUYING COMPANY OF ST. JOSEPH, MISSOURI and THOMAS D. RUNYAN, DIXIE NATIONAL STOCKYARDS, INC., ABRAHAM CATTLE COMPANY, INC., and DR. LEROY ABRAHAM, and JEFFREY JACKSON. P&S Docket No. 6743. Decided October 15, 1986.

William Weber, Administrative Law Judge.
Ben Bruner, for complainant.
Dee Wampler, Springfield, Mo., for respondents.

CONSENT DECISION WITH RESPECT TO OZARK COUNTY CATTLE COMPANY, INC., AND DWIGHT LEDBETTER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Depart-

[4] Complainant argues that the Uniform Commercial Code is a potential barrier to respondents' claimed "overcharges" against A&B. That may or may not be accurate. However, a legally perfect state of mind should not be a prerequisite here for "justification."

ment of Agriculture, alleging that the financial condition of respondents Ozark County Cattle Company, Inc., and National Order Buying Company of St. Joseph, Missouri, does not meet the requirements of the Act and that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Ozark County Cattle Company, Inc., and Dwight Ledbetter admit the jurisdictional allegations in paragraph I of the complaint as they pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ozark County Cattle Company, Inc., hereinafter referred to as respondent Ozark, is a corporation organized and existing under the laws of the State of Missouri. Its mailing address is P. O. Box 397, Gainesville, Missouri 65655–0397.

2. Respondent Ozark at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis;

(b) Engaged in the business of buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

3. Respondent Dwight Ledbetter is an individual whose business mailing address is P. O. Box 397, Gainesville, Missouri 65655–0397.

4. Respondent Ledbetter at all times material herein was:

(a) President of respondent Ozark;

(b) Owner of 100% of the outstanding stock of respondent Ozark; and

(c) Responsible for the direction, management and control of respondent Ozark.

CONCLUSIONS

Respondents Ozark County Cattle Company, Inc., and Dwight Ledbetter having admitted the jurisdictional facts as they pertain to them and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Ozark County Cattle Company, Inc., and respondent Dwight Ledbetter, their officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while their current liabilities exceed their current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Exchanging drafts or checks with any person for the purpose or with the effect on concealing the true amount of funds available in any checking or other bank account, or of creating a false "float" or balance in any such account.

Respondent Ozark County Cattle Company, Inc., is suspended as a registrant under the Act for a period of ten (10) years and thereafter until it demonstrates that it is no longer insolvent. When respondent demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the ten (10) year period.

Respondent Dwight Ledbetter is prohibited from operating subject to the Packers and Stockyards Act for a period of ten (10) years, provided that after the expiration of eighteen (18) months of the prohibition, a supplemental order will be issued permitting respondent Dwight Ledbetter to work as a salaried employee of a registrant.

The provisions of this order shall become effective on the sixth day after service of this order on respondents Ozark County Cattle Company, Inc., and Dwight Ledbetter.

Copies of this decision shall be served upon the parties.

In re: BURKHART ENTERPRISES, INC., d/b/a BURKHART LIVESTOCK, and DENZIL E. BURKHART, P&S Docket No. 6700. Decided October 16, 1986.

Dorothea A. Baker, Administrative Law Judge.
John Casey, for complainant.
Brack Jones, Beaumont, Texas, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 et seq.) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Burkhart Enterprises, Inc. and Denzil E. Burkhart admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Burkhart Enterprises, Inc., hereinafter referred to as the corporate respondent, at all times material herein was a corporation organized and existing under the laws of the State of Texas, and was doing business as Burkhart Livestock, with a principal place of business located at Route 7, Box 155, Beaumont, Texas.

2. The corporate respondent among other things at all times material herein was:

a. Engaged in the business of buying and selling livestock in commerce for its own account as a dealer; and

b. Registered with the Secretary of Agriculture as a dealer to buy and sell cattle in commerce for its own account.

3. Denzil E. Burkhart, hereinafter referred to as the individual respondent, is an individual and, at all times material herein, was the President of the corporate respondent, and residing at the same address.

4. The individual respondent among other things at all times material herein was:

a. Responsible for the direction, management, and control of the corporate respondent; and

b. Engaged in the business of a dealer, buying and selling livestock in commerce.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Burkhart Enterprises, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and Denzil E. Burkhart, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock and in purported payment therefor issuing checks without having sufficient funds on deposit and available in the account on which such checks are drawn to pay such checks when presented.

2. Purchasing livestock and failing to pay when due the full purchase price of such livestock.

Respondent Burkhart Enterprises, Inc. is suspended as a registrant under the Act for a period of five (5) years.

Respondent Denzil E. Burkhart is prohibited from engaging in business in any capacity subject to the Act for a period of five (5) years, provided, however, that upon application by respondent Denzil E. Burkhart to the Packers and Stockyards Administration, a supplemental order may be issued terminating this prohibition after 45 days, upon demonstration that all unpaid livestock sellers have been paid in full, and provided further that this prohibition may be modified upon application to the Packers and Stockyards Administration to permit respondent Denzil E. Burkhart to be employed by a registrant, after expiration of the 45 day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: SUE VIRTUE, P&S Docket No. 6701. Decided October 16, 1986.

Victor Palmer, Administrative Law Judge.
Peter Train, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Sue Virtue, hereinafter referred to as the respondent, is an individual whose business mailing address is 11783 Blake Road, Galt, California 95632.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for her own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for her own account. Such registration has been inactive since April 3, 1980.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Sue Virtue, her agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an

adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until she complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that she is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: MANUEL PERRY. P&S Docket No. 6513. Decided September 10, 1986.

Dorothea A. Baker, Administrative Law Judge.
Allan Kahan, for complainant.
Max Mickelsen, Petaluma, Calif., for respondent.

DECISION AND ORDER

This is an administrative, disciplinary proceeding under Title III of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181, *et seq.*), hereinafter sometimes referred to as the Act, instituted by a Complaint, filed on March 29, 1985, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The Complaint alleges that Respondent Manual Perry, in connection with his activities as a dealer subject to the Act, sold ten (10) calves to Rancho Veal Corporation, a packer. In connection with the sale, Respondent signed a "guaranty" stating that no animal being sold "contained a non-permitted residue of a drug in its edible tissue; that since the last drug administered to the animal . . . the withdrawal period . . . has passed; and that all label warnings and directions "for use have been followed in the administration of any drugs to the animal." Although Rancho Veal Corporation purchased only "certified" calves, there is controversey as to the extent, if any, that such certification was relied upon by Rancho Veal in the purchase and slaughter of the calves in this case.

However, after slaughter and testing, two of the calves were found to contain violative levels of residues of an antibiotic drug.

Upon the basis of the aforesaid, the Respondent is alleged to have "engaged in unfair and deceptive practices" in willful violation of section 312(a) of the Act (7 U.S.C. 213 (a)).

On April 25, 1985, Respondent filed an Answer to the Complaint in which he admitted the facts of the transaction set forth in the Complaint, denied that he willfully engaged in any unfair or deceptive practice or act, and denied any intential, willful or negligent marketing of any calves for slaughter that he knew or should have known contained violative levels of drug residues. Respondent's Answer further denied that Rancho Veal Corporation relied on the written "guaranty" in its purchase, marketing or slaughter of livestock.

The Agency Complainant indicates that this is a case of first impression and is meant to send a message to Respondent and to the industry in general, that the "certification" program hereinafter described will be strictly enforced with significant penalties.

The Respondent contends that the facts do not justify the stance taken by Complainant and that *written* regulatory requirements were unclear or non-existent as to the proper method of achieving "certification".

The case takes on particular importance to three agencies within the Government: The Packers and Stockyards Administration, United States Department of Agriculture, which brought the Complaint; the Food, Safety, and Inspection Service of the Department of Agriculture which is charged with inspecting meat and insuring that it is wholesome and safe to eat; and, the Food and Drug Administration which sets standards with respect to the amounts of residues which can be contained in food for human consumption.

Said Governmental agencies, particularly, the Packers and Stockyards Administration, believe that the practice of certifying something as being drug free, when Respondent was in no position to be able to so certify such fact, and the effect on the packers, as well as the potential danger to the meat supply of America, constitutes an unfair and deceptive practice under the Packers and Stockyards Act.

The case also takes on importance because of the background against which it is thrust. It was discovered in 1981, that there was a problem with sulfa and antibiotic residues in bob veal meat nationwide, and, commencing in 1982, and continuing until February, 1984, when it was decided that the program "had failed miserably", there was an effort to resolve the problem and to try to educate the farmers. This did not work, nothwithstanding the expenditure of $2 million in funds. In trying another approach, an "interim rule with request for comments" was published in the Federal Register,

Thursday, June 7, 1984 (42 F.R. 23602) relating to drug residues in young calves.

An oral hearing took place on May 13, 15, and 16, 1986, in Sacramento, California, before Administrative Law Judge Dorothea A. Baker. Respondent was represented by Max A. Mickelsen, Esquire, 205 Keller Street, P.O. Box 2538, Petaluma, California. Complainant was represented by Allen R. Kahan, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250. Complainant called sixteen witnesses and offered nineteen exhibits. Respondent called two witnesses and offered two exhibits. The transcript of the hearing comprises four hundred fifty-four (454) pages. References to specific pages in the transcript will hereinafter be designated by the prefix "Tr.".

In due course, the parties filed briefs, with the last brief having been filed August 4, 1986.

FINDINGS OF FACT

1. Manuel Perry, hereinafter referred to as the Respondent, is an individual whose business mailing address is 673 Lohrman Lane, Petaluma, California 94952.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and,

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock on a commission basis in commerce.

3. Respondent regularly purchases "bob" calves, i.e., calves less than three weeks old and weighing less than 150 pounds, from dairy farmers in the Galt and Lodi, California area. He follows a procedure, in purchasing said "bob" calves of specifically inquiring as to whether the calves have been "medicated". The health of the calves may require such medication and, as herein pertinent, there is nothing illegal in the administration of such medication. As to any calves Respondent is advised have been medicated, they are marked and sold for "raising" (kept for a week or so), instead of for slaughter.

4. After Complainant concluded that its prior program relative to voluntary certification of drug free animals was not working, Complainant, in May of 1984, caused to be distributed to auction markets and to others a "flyer" relative to the certification program, but this was not sent to dealers such as the Respondent Perry (Tr. 130, 131). In June of 1984, there was published in the Federal Register, aforementioned, proposed regulations where identification

and voluntary certification of drug free animals were contemplated.

5. On January 4, 1985, Respondent received a letter, dated January 2, 1985, from the Packers and Stockyards Administration's Lawndale, California, office informing him that two veal calves which he had previously sold to Rancho Veal Corporation in December of 1984, had been found to contain violative drug residues which caused the carcasses to be condemned. The letter informed Respondent of the requirements of obtaining certifications from the producers of the animals that the animals were "drug free". More specifically, the letter advised: "A calf dealer cannot represent a calf to be drug free unless he has a valid certification from the producer." . . . "Also, certification without knowledge of whether or not drugs have been administered would be considered a false certification." . . . "You must also retain evidence in your records that the calf was certified by the producer." The letter further informed Respondent of the position of the Packers and Stockyards Administration that providing false certifications by a dealer was considered an unfair and deceptive practice contrary to Section 312 of the Packers and Stockyards Act, and that such violations could subject him to both criminal penalties, and to a civil penalty of up to $10,000 for each violation.

6. On January 7, 1985, Respondent Perry made a telephone call to Mr. Kenneth Freeze, Regional Supervisor of the Lawndale, California, office of the Packers and Stockyards Administration to discuss the contents of the letter he had received. Respondent Perry stated to Mr. Freeze that he had been in business for 25 years and that he had never had any trouble with the Packers and Stockyards Administration and that he was too old to get into trouble now. Mr. Freeze told Respondent not to sign any more certifications with Rancho Veal unless he had written certifications for the animals involved, contained in his records, and signed by the producers. Respondent was told that the giving of certifications to Rancho Veal without the corresponding written certifications from the producers would be considered an unfair practice contrary to the Packers and Stockyards Act and could subject him to a civil penalty of up to $10,000 for each violation. Respondent Perry, in his testimony indicated that he did not remember if Mr. Freeze told him to have the producers sign anything.

7. On or about January 15, 1985, Respondent purchased forty-eight (48) bob veal calves (sometimes referred to as "drop calves") from a number (approximately ten) of dairy farmers in the Galt, and Lodi, California, area. By reason of past inquiries and instructions to said dairy farmers and/or their employees, Respondent be-

lieved that the said calves were not medicated. However, he did not ask his usual question as to medication or not of the calves.

8. Respondent disposed of thirty-eight (38) of the calves to a calf feeder in the Petaluma, California, area.

9. Respondent sold the remaining ten (10) calves to Rancho Veal Corporation, a packer located in Petaluma, California. When a calf was condemned, Respondent did not get paid for it. In order to sell the said calves to Rancho Veal, Respondent signed a document presented to him by Rancho Veal, which, because of its importance to this case, is reproduced herein in full:

10. A scrutiny of Complainant's Exhibit 10. as aforesaid, reveals several things: It is labeled "Draft"; it was contemplated that the guarantor would be the "producer or auction market" (Respondent was neither); and, such guarantee is to be applicable to each subsequent shipment or other deliveries of animals etc. Mr. Perry was indicated to be the person giving the guaranty. Said document does not use the word certify or certification anywhere in the document. Without seeking to make meaningless distinctions, "certification" has been said to be the act of certifying a document containing a certified statement especially as to the truth of something; whereas, "guaranty" is said to be an undertaking to answer for the payment of a debt or the performance of a duty of another in case of the other's default or miscarriage. It is doubtful that any distinction is made by the Complainant between a certification and a guaranty, and, certainly, while the Respondent was waiting to unload and sell his calves, and was told he had to sign a form to do so, he probably was not concerned too much with the language in the form. He believed that the calves which he wanted to sell did meet the requirements, based upon his past understanding with the dairy farmers.

11. After the calves were slaughtered, a small number of the calf carcasses (known as the lot sample) purchased by Rancho Veal on January 15, 1985, which had been the subject of the guaranty set forth above and stated to be "drug free", were tested by Dr. Lee T. Watt, DVM, the Federal meat inspector, the Food Safety and Inspection Service, U.S. Department of Agriculture, to determine if any of the edible tissue of the animals, which included the muscle, liver, and kidney, contained violative levels of sulfa or other antibiotic residues. Two of the animals belonging to the Respondent Perry, which were in the sample tested by Dr. Watt, tested positive.

12. Portions of tissue from the muscle, liver and kidney from both of Respondent's calves which tested positive were sent to the Western Laboratory of the Food Safety Inspection Service of the U.

MANUEL PERRY
Volume 45 Number 5

1983

DRAFT

Food and Drug Administration
DEPARTMENT OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C.

Guaranty

To: RANCHO VEAL CORP. (dealer or packer)

1-15 (date)

1522 PETALUMA BLVD NO. (address)
PETALUMA, CA 94952

_____ (producer or auction market) hereby guarantees; that no animal listed herein is adulterated within the meaning of the Federal Food, Drug and Cosmetic Act in that it contains a nonpermitted residue of a drug in its edible tissue; that since the last drug was administered to the animal by injection, oral application, or topical application, the withdrawal period specified in the labeling of the drug has passed; and that all label warnings and directions for use have been followed in the administration of any drug to the animal. Each subsequent shipment or other deliveries of animals is hereby guaranteed as of the date of such shipments or delivery, to be, on such dates, not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act.

Number	Ear tag or Other Identification
10	

COMPLAINANT'S EXHIBIT NO. 10
PAGE ____ OF ____

Manuel Perry
SIGNATURE OF PERSON GIVING GUARANTY

_____
POST OFFICE ADDRESS

S. Department of Agriculture to confirm the initial test and to determine the particular drug involved, as well as the amount of violative drug residue present. Bio-assay tests were run on the various tissue samples from the liver, muscle, and kidney of the two carcasses. The test confirmed the presence of violative levels of Neomycin in the kidneys of the two carcasses in the amounts of 17.55 and 13.35 ppm. The maximum permissable level or "tolerance level" is 0.25 ppm. Thus, the kidneys of the two carcasses contained levels of a non-permitted drug in excess of sixty-nine (69) and fifty-three (53) times the permissible tolerance.

13. Whether the Complainant's Exhibit 10, signed by the Respondent, be regarded as a "certification", "guarantee" or a simple statement, the evidence clearly shows that the calves delivered to Rancho Veal on January 15, 1985, were represented to be drug free when in fact at least two were not. This is a violation of section 312 of the Packers and Stockyards Act.

14. Although the Respondent has set forth arguments relative to the lack of intent to be in violation, good faith effort and intent to comply, extenuating circumstances relating to his instructions to the dairy farmers, and a position that alludes to the lack of specificity as to the manner required for compliance with the program, nevertheless, the evidence establishes that the Respondent did receive earlier notice in the letter of January 2, 1985, of the consequences of giving false certifications, and, there was contained in such letter, in the last full paragraph, the following statement:

> Section 401 of the Packers and Stockyards Act requires every packer, stockyard owner, market agency, and dealer to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business". To meet this requirement in transactions involving baby calves certified as drug free, you must keep a record of all calves purchased and sold, including the name and address of the seller, the name and address of the person to whom sold, the tag number or other identity of each animal purchased and sold, and the amount paid or received in each transaction. *You must also retain evidence in your records that the calf was certified by the producer.* (emphasis added)

Furthermore, the Respondent had a telephone conversation with Mr. Freeze who further explained the certification program to him.

15. The record evidence herein does not show a *knowing*, wanton disregard of the program requirements on the part of the Respondent, but, rather, less than a diligent attempt to comply therewith. The Respondent believed that it was sufficient that he made in-

quiry, on a regular basis, of the dairy farmers or the person taking care of the calves, as to whether the calves were medicated, and, that he informed each of the dairymen of his desire to have calves that were not medicated, although there was no evidence presented that he specifically did either of those things on the date of the transactions herein involved.

The Complainant admits that the Respondent "occasionally" inquired about the status of the calves. The weight of the evidence is that the Respondent made such inquiries on a regular basis, although on the day in question, the Respondent testified that he may have failed to ask his usual question.

Events have shown that the methods used by the Respondent could not be relied upon, particularly in light of the fact that prior to January, 1985, the Respondent did not consistently identify the calves with a unique back-tag number, and they easily could become co-mingled once on his truck. This is not to say that the producers mislead the Respondent, as their testimony shows:

(Mr. Simoes)

Q. "Okay. Did you mark the calves which might have been treated with electrolytes, or other medication?"

A. "Well, all the Calves that have been treated, we marked the cages."

(Tr. 278)

Q. Okay, in January of 1985, did Perry ask about the calves which he purchased, and whether they had been medicated?

A. Oh, he asked me all along if the calves had been medicated.

Q. Okay, if you weren't there, who would he have asked?

A. He asks my workers. I—I mark the cages so they can tell him. (Tr. 280)

Q. Do you identify them in such a fashion? You know, do you mark them?

A. Well, when I treat them, I mark the cages. (Tr. 284)

Q. Okay, if he knew they were medicated——

A. Put's a mark over the back. (Tr. 285)

Judge BAKER: You would not know what the directions on the label state?

WITNESS: No. Well, I get—the directions I got I get from the—I go to the veterinarian, and they'll tell me what to use, and I use.

Judge BAKER: And they read it to you.

WITNESS: Yeah. Yeah.

(Tr. 287)

16. The action of the Respondent, under the circumstances of this case, in representing, by means of a written statement or "guaranty" that the calves were drug free, when they were not, is a willful violation of the Packers and Stockyards Act, as that term has been interpreted by the Department of Agriculture.

17. Dr. Waguespack, the Regional Director of Food Safety Inspection Service's Southwest Region, comprised of eight States, testified, in detail concerning the program and its objectives. He was a most knowledgeable witness and explained the desirable effects the program would have on the industry if the written certification practice were adhered to, but, he admitted that after the expenditure of large amounts of money and time, the program was not working as expected.

18. Dr. Waguespack further indicated, in his testimony that there is nothing in the regulations which requires a written certification signed by the producers, although according to him, a certification was valid only if written. He stated that there was no set form for such certification and it could be a simple statement which followed the calves, and, that one piece of paper can follow many animals as long as identity is maintained. Of importance in his testimony was the assertion that the producer would not be certifying that there was no drug residue in the calves, but, only that he did not administer same, or, if he did, what occurred, and the withdrawal period.

19. As Complainant sets forth, and as the evidence shows, Rancho Veal had good reason why reliance on certified calves was to its advantage:

(1) Labor cost savings;
(2) Less overtime;
(3) Less disruptions of a packer's operations; and
(4) More efficient use of a packer's cooler.

As compared to the testimony of the general advantage to a packer of certified calves, there was no direct and convincing evidence

that Rancho Veal relied upon Exhibit 10, paid any heed thereto or was harmed in any way, although at the time it was purchasing only certified calves. Respondent had dealt with said concern over a period of years, and, Rancho Veal knew that Respondent was not a producer. However, it is not necessary that actual reliance be shown. It is sufficient that Rancho Veal had a right to place reliance on such guaranty or certification.

20. The fact that some of the dairymen and/or their employees did not speak or read English has not been shown to be relevant or material to the issues of this case. In any event Respondent had no difficulty in conversing with such individuals because he spoke several languages.

21. The giving of false certificates constitutes a serious danger to the public health by potentially permitting violative levels of drug residues to enter the food supply.

22. The Respondent gave a false certificate to Rancho Veal Corporation on January 15, 1985.

23. The Respondent has willfully violated section 312(a) of the Packers and Stockyards Act.

CONCLUSIONS

The evidence is free of conflict in that Respondent, on January 15, 1985, sold ten bob calves to Rancho Veal Corporation, after having purchased them from dairy farmers; that Respondent signed a "guaranty" indicating such calves to be drug free; and, that subsequent testing showed two calves to have drug residues.

The Complainant views this as a most important case and one of first impression. Accordingly, its approach to the sanction sought was expressed by Mr. Davis, who, while recognizing that Respondent was a "small" operation, stated in his testimony:

> Q. But you are still recommending the $5000 sanction?
>
> A. Yes.
>
> Q. Because you want the attention of the industry?
>
> A. Yes. We believe that it is appropriate to address a penalty that not only addresses the individual involved, but addresses the problem within an industry and serves notice on the industry as well." (Tr. 435).

Essentially, and in summary form, the Complainant maintains that the action of the Respondent was a "willful" one as that term is defined by the Secretary of Agriculture; that Respondent voluntarily executed the calf drug guaranty or certification; that the Re-

spondent signed a valid certification, irrespective of the name it is given; that despite the absence of specific language requiring that certifications have to be in writing, the Respondent herein had actual notification that certifications were to be in written form; that Rancho Veal relied upon the certification; and, that the sanction being sought is warranted, reasonable and meets the requirements of the Act.

Although large amounts of money have been spent, and much time devoted thereto, Complainant's witnesses admit the absence of satisfactory industry recognition of its program. It should be noted, as herein pertinent, that there was nothing illegal in administering the pertinent drugs involved to the calves. However, under Complainant's program, it was necessary that the applicable withdrawal period have expired, prior to certification that the calves were drug free.

Calves can be sold certified, or, non-certified—and that is a choice which the buyer can make. If a buyer finds that a seller is wrongly stating that calves are drug free, when they are not, the buyer can refuse to do business with such seller, as well as take whatever legal remedy is available to him. As the evidence shows, there is a tendency toward non-certified calves, notwithstanding the Complainant's program.

The record, as a whole, supports the contentions of the Complainant, except for its argument that Rancho Veal relied upon the certification. There is not enough evidence of record to show that, in this case, Rancho Veal did, in fact, rely upon the guaranty signed by Respondent. However, whether it did, or not, *Rancho Veal had a right to make such reliance.*

A concern raised by the Respondent is the one which addresses the issue of whether the Complainant, in the absence of regulatory directive, can require the generation of data to implement a program relative to drug residues, which admittedly had not been successful in the past with respect to its enforcement. The provisions of the Act, and the published regulations, as applied by the Complainant, require dealers such as Respondent to *generate, and maintain,* in their records written certifications. Yet, nowhere is this clearly spelled out so that persons, unaccustomed with technical language and implications, can understand it. In the subject case, the record shows that the Respondent had actual notice of what the Complainant expected.

The many contentions raised by the Respondent are ones deserving of attention and consideration, both of which have been accorded thereto.

The Respondent is charged with willfully violating Section 312(a) of the Packers and Stockyards Act, as amended. The Respondent indicated difficulty in delineating what, if any, violation of Section 312(a) was committed. The questions posed by Respondent are:

(1) Was the alleged violation the fact that two bob calves were sold with illegal drug residues?

(2) Was the violation the signing of the Guaranty presented to Respondent by Rancho Veal?

The position of the Complainant is that the violation was the signing of the guaranty without having a basis for knowing whether it was true or false.

The Respondent, in its pleadings, and by evidence adduced at the oral hearing, emphasized that there is no published regulation requiring a *written* certification. Although Section 401 of the Act requires certain record keeping requirements, which truly reflect the transactions engaged in by a dealer, it does not speak of generating data that customarily is not present in such transactions. Thus, the Complainant is expanding upon the previously known requirements by mandating that dealers, such as Respondent, if they want to sell calves, as drug free, obtain written certifications *from the producers* that the animal either has not been administered drugs, or if it has, that the necessary withdrawal period has passed. If this is done, then, even if the animal is subsequently condemned for drug residues, the dealer has committed no violation of the Act.

Among other concerns raised by Respondent, on brief, is that the Complainant's arguments, in its initial brief, do not display a working knowledge of the calf certification program, such as, that as to all medicated calves there was a ready, willing and able market with the industry. The dairymen knew, and the Complainant acknowledges, that calves sold for veal brought substantially more money than calves sold for slaughter. It was to the dairymen's benefit to deliver a healthy type calf rather than a sick one which would have to go to slaughter.

The Complainant suggests that the producers-dairymen who testified may have lacked candor with respect to their operations and may have been stretching the truth. The Judge finds that this is not justified on the record, and, that the testimony of such producers-dairymen was forthright and credible.

The realistic way those dairymen dealt with marketing their calves negates that there was any economic or profit motive behind their testimony. It made a lot more sense, economically, for those dairymen to mark calves as medicated, hold them for a week or

two, or some other applicable period, and then sell a healthy calf to the Respondent that would have a market value of $40. or $50. to a veal producer, as opposed to receiving approximately $15. for a non-medicated calf.

Mr. Singleton, President and owner of Rancho Veal Corporation, verified this analysis:

> "Q. What incentive is there for a livestock dealer to sell a medicated calf to a slaughter house such as yours?
>
> A. There's no incentive. It's like throwing $15, or $20, or $30 out the window, or whatever the calf is worth. If you knowingly know it's medicated." (Tr. 179)

Continuing on, the Respondent argues, on brief, that the most confusing aspect of Complainant's case is the contention that Respondent engaged in a deceptive and unfair practice by signing the aforesaid guaranty. The record herein adequately supports the reasons the Complainant has engaged in its drug certification program, even though during the years 1982-to the middle of 1984, it was not working satisfactorily. These reasons are well set forth in Complainant's brief and are not reiterated herein.

The Complainant spent considerable time in its presentation of the case to outline the history and procedure of the drug residue program instituted by the Food Safety and Inspection Service of the United States Department of Agriculture, in cooperation with the Food and Drug Administration and the Packers and Stockyards Administration. An explanation of the historical reasons for instituting the program; the resources expended to achieve the goal of removing violative amounts of sulfa and other antibiotic drugs in the veal meat supply; the procedures used to insure the integrity of the test; what success, if any, the program, including the educational aspects, has had in reducing the incidence of violative levels of drug residues; and the potential serious threat to public health as a result of violative residues of sulfa and antibiotic drugs in our Nation's meat supply, all were the subject of considerable evidence because of the importance thereof to all three Governmental agencies involved in the program.

As Dr. Waguespack testified, in 1981 the Food and Drug Administration and the Food Safety and Inspection Service of the United States Department of Agriculture both became very concerned over the problem of sulfa and antibiotic residues being found in bob calves. Testing disclosed that levels of sulfa and antibiotic residue contamination at levels of 100 to 1000 times the tolerance levels established by the Food and Drug Administration were being found

and constituted a threat to the health of consumers. (CX 1,p.4) In early 1982, a group of individuals representing industry, professional organizations, all the farm organizations and associations dealing with livestock, handling, growing, selling of milk, and meatpackers, met and worked for two years trying to resolve the problem by educating the farmers not to use medication or not to abuse medication in the bob veal meat supply. (Tr. 11) In February, 1984, the Food Safety and Inspection Service determined that the educational program was not working after having spent more than Two Million Dollars ($2,000,000.00) in trying to get the word out through state extension services. The Food Safety and Inspection Service, the Food and Drug Administration and the Packers and Stockyards Administration then joined together to develop a regulation that could effectively address the problem. (Tr. 11-12) Because the FSIS is limited in its jurisdiction to the premises of the packing plants where it conducts meat inspection, but still has the responsibility to insure that the meat supply is safe and unadulterated by chemicals or disease, they joined with the Packers and Stockyards Administration to formulate a procedure that would be effective in reducing the problem—the voluntary certification program.

The certification program which was adopted permits the packer to slaughter calves which are certified "drug-free", chill them, and ship them to their customers without any retention or delay. A sample lot of three animals is tested, irrespective of the size of the certified lot, using the CAST test, to determine whether the certification is valid. However, the certified calves which are not in the test sample are *not* retained pending the results of the CAST test. Thus, the certification permits the unrestricted movement of the calf carcasses through the packing house without "tying-up" valuable cooler space within the packer's plant, and allows the packer to operate normally.

Non-certified lots, on the other hand, are not treated the same. A much larger sample of animals is selected from the group of non-certified calves. This can range from the entire population of calves in a small lot to as many as thirty (30) in a large lot of the animals. While the CAST test is performed on the sample lot, the entire group of non-certified calves is *retained* pending the results of the CAST test. Since the CAST test results take approximately sixteen (16) hours to be determined, the entire lot of non-certified calves must remain in the packer's cooler for this extra day. In addition, if any of the CAST tests taken on the animals in a sample lot of non-certified animals tests positive, the CAST test is performed on each and every one of the remaining calves in the non-certified lot.

Those carcasses testing positive are retained by the packer pending verification of the test, or are condemned immediately. Thus, there is a very real possibility of non-certified calves being retained for a total of *two* days, clogging the packer's valuable cooler space.

The testing of the slaughtered calves, done by the Federal meat inspector, is performed by making an incision into one of the calve's kidneys with a clean, unused razor blade, inserting a sterile cotton-tipped swab into the kidney to absorb the kidney fluid, placing the fluid-soaked swab tip onto an agar plate which has been seeded with bacterial spores, and incubating the plate for a period of sixteen (16) hours. After the incubation period is completed, the agar layer in the area around the head of the swab is carefully observed to see if there is an area that is clear of bacterial spore growth, the area known as the "Zone of Inhibition". A "Zone of Inhibition" 18mm or more constitutes a positive test, and indicates the presence of sulfa or other antibiotics. A "Zone of Inhibition" of less than 18mm, or a plate in which there is no zone of inhibition and the bacterial spore growth is to be seen everywhere except the area around the antibiotic disk, constitutes a negative test.

When a CAST test result is positive, the meat inspector removes one of the kidneys of the carcass involved, as well as portions of the animal's muscle tissue and liver, places each of the samples in separate specimen bags carrying a unique serial number for the particular animal, issues a special form providing particular information about the animal involved which also contains the serial number, and sends the sample, in a temperature controlled condition, to the laboratory of the Food Safety and Inspection Service for confirmation of the CAST test and determination of both the actual amount of the drug, as well as the exact nature of the drug involved. (Testimony of Dr. Watt, Tr. 193–194)

Upon receipt of the tissue sample, the laboratory checks the tissue to insure that it has not deteriorated as a result of temperature, logs the sample in, giving it an internal serial number, and then repeats the CAST test using the very same procedure that the meat inspector used at the plant. If this second CAST test is also positive, the various tissues are subjected to an extensive test, known as a bio-assay, to determine what drug is present in which tissue, and its concentration. During the entire testing procedure, both in the packing plant itself as well as in the laboratory, extreme caution and attention is given to maintaining the sample's identity so that whatever the results of the tests, they can be related back to the exact calf which was involved. (Testimony of Dr. Chiu, Tr. 58–67)

In actual practice, the Western Laboratory, which was the laboratory where the bio-assays of the Respondent's calves occurred and which is supervised by Dr. Chiu, has a confirmation of positive results of approximately ninety percent (90%), with some months showing confirmations of ninety-five percent (95%) of the samples tested. (Tr. 68)

Both the Food Safety and Inspection Service and the Packers and Stockyards Administration have devoted substantial resources, both in terms of time and money, in implementing, educating the industry, and policing the program to assure its success. Dr. Waguespack testified about the extensive travel that he and other members of the FSIS engaged in, often with the participation of administrative officials of the Packers and Stockyards Administration, to inform market owners, packers, dairy organizations and others of the importance of the program and how it would work. (Tr. 15) Mr. Harold Davis, Director of the Livestock Marketing Division of the Packers and Stockyards Administration, testified of his extensive involvement and time commitment with the program, and the extensive travel he made, as representative of the Packers and Stockyards Administration, in preparation to implement the program nationwide. Kenneth Freeze, Regional Supervisor of the Lawndale, California, office of the Packers and Stockyards Administration, told of distributing the one page flyers as to the various markets affected, and which he wanted them to distribute to their customers, as well as his office spending more than one man-year each year on this program.

Complainant points out that the Food Safety and Inspection Service is aiming for a 1% positive CAST rate, from a high of 7.7% rate, before they are satisfied and willing to consider the program a practical success. There is evidence of record indicating that the number of "certified" calves going to slaughter is decreasing, and, the number of non-certified ones going to slaughter is increasing,—thus reflecting a choice by the industry to choose between the two.

When asked if there was any problem with aminoglyocides, tetracyclines, sulfonamides and other antibiotics, in amounts above the FDA established tolerance levels in meat used for human consumption, in amounts above the FDA established tolerance level, Dr. Judith Weissinger, Pharmacologist with the Residue Evaluation Branch of the Food and Drug Administration's Center for Veterinary Medicine, testified:

> These tolerances have been established and the withdrawal periods set in order to maintain the safety of the human food supply.

> If you have a situation such as veal calf which is slaughtered at a very early age which has residues, and veal calf meat is used for sausage and hot dogs, all beef hot dogs, veal baby food. . . . an antibiotic residue, . . . such as penicillin. Just a small amount of that penicillin can cause hypersensitivity or allergic reaction. And a baby that is allergic to penicillin could get that in a veal baby food jar. So you'd have to be really sure that these bob veal calves don't have it. (Tr. 96-97)

Dr. Weissinger further testified about the dangers that residues of neomycin, the drug found in the Respondent's calves, above tolerance levels, post to the population:

> Well, it's illegal if it's above tolerance. And it's a problem because its a drug which could cause problems in the human population.
>
> For instance, the toxicities associated with neomycin include ototoxicity and nephrotoxicity; and I'll explain those. Nephrotoxicity what happens is the binding to the kidney tissue causes a decrease in kidney function; therefore, there is more of a build-up of neomycin. And that build up could cause an ototoxicity which is damage to the eighth cranial nerve, which ends up being manifested as deafness or a similar inbalance in the motor system . . . the whole population is susceptible but in infants with immature renal function and ability to excrete neomycin; the elderly with their difficulty in renal excretion, again, decreased renal function with age; and anybody with renal disease or any kind of renal compromise would certainly not be as able to excrete neomycin as a healthy person.
>
> But even healthy people bind it to their kidneys as do calves. (Tr. 98-99)

The Respondent high-lights a focal point of controversy—i.e., there is nothing in the published regulations which requires a *written* certification. The Complainant maintains, as Mr. Davis explained, that the Respondent gave a false certification which constitutes a willful violation of Section 312(a) of the Act. Had the Respondent had written certifications from the producers in his records, even though drug residues were found in two calves, Respondent would not have been in violation of the Act.

The Complainant argues that its requirement of written certification is associated with the national program instituted by the Food Safety and Inspection Service of the United States Depart-

ment of Agriculture in cooperation with the Food and Drug Administration, as set forth herein. It is further contended, based upon interpretation and implication, not readily apparent in the published regulations, that a "guarantee" or "certification" is given voluntarily by the producer of the bob Calves which are to be slaughtered, and that a dealer or market agency can "certify" calves as long as the dealer or market agency has the corresponding written certifications, from the actual producers, contained in his books and records. Although the Complainant states this on brief, the testimony is to the contrary. The rules and regulations (Complainant's Exhibit I) are clear that only a producer may certify a calf. There is no provision anywhere in the regulations for certification of calves by anyone other than a producer. That was reemphasized by MR. WAGUESPACK (Tr. 38)

Q: But suppose that dealer certified the calf, as I understand what you said, that if he didn't treat the calf in any way during the time he had it, he could certify it as to his possession of the calf.

A: He could, but we wouldn't accept it because the certification must come from the producer.

Q: So you wouldn't even rely on it.

A: That's right.

Q: It would be a wasted piece of material.

A: As far as we're concerned, we wouldn't accept it.

It seems that what the Complainant desires, to make its program effective, is to have a certification made by the producer of the calf at birth and thereafter until it is sold. From then on, reliance may be placed on such certification by those who subsequently may have the animal. Any subsequent certification would have to be premised on the original producer's certification.

Mr. Harold Davis, Director of Livestock Marketing Division, United States Department of Agriculture, testified with respect to the position of the Packers and Stockyards Administration, thusly:

"A. We believe that, for a livestock dealer, which Mr. Perry is, to certify that the calves were drug-free for slaughter when he—without the appropriate backup certification from the livestock producers or the dairymen, is an unfair and deceptive practice under the provisions of 312(a) of the Packers and Stockyards Act in that it permits an animal which may contain a drug residue to be slaughtered without the appropriate sampling and testing requirements set forth in the Regulations under (sic) FSIS, and offers the very real potential of animals moving into the food channels for human consumption which do, in fact, have residue or certain residues without ever having been tested or sampled for residue.

In the case here, we are talking about two calves which had residues; but there is no way of knowing how many calves may have had residues which were not caught because of the certifications which allowed the calves to be slaughtered without being tested." (Tr. 429)

Mr. Davis, after hearing all the testimony, made an assessment of the Respondent's conduct as follows:

"* * * that this type of practice is one which simply demonstrates that the individual involved was exercising *a careless disregard* for the requirements of the program and what the program was attempting to do." (Tr. 430). Emphasis added.

Respondent has set forth arguments relative to the lack of intent to be in violation, recited good faith efforts and intent to comply, extenuating circumstances, and a position that alludes to the lack of specificity as to the manner required for compliance with the program. Since there is no published standard nor regulation requiring a writing, the only way the Respondent would have been aware that an oral statement by the dairy farmers would not suffice, was by reason of his telephone call to Mr. Freeze, which he indicated he did not recall or understand in the same manner as Mr. Freeze, and, the contents of the letter of January 2, 1985, which specifically made reference to the record keeping requirements of Section 401 of the Act.

It is obvious that the program is premised upon implication that the certification must be in writing, but, as testified to by Mr. Davis, it could have been on a tape recording, which became a part

of the Respondent's records. Of course, when standards are less than specific, this gives rise to subjective interpretation and implication, and, possible uncertainty as to what is required for legal compliance. However, in this case, I believe that the Respondent had been adequately advised of the written certification requirements. The record herein does not reflect arbitrary nor capricious action on the part of the Complainant,—it is reasonable to require a certification in writing. Nor, does it show a wanton disregard of the program requirements on the part of the Respondent, but, rather less than a knowledgeable, diligent attempt to comply therewith.

The cumulative evidence herein shows that the Respondent, seventy years old, made an effort to ascertain what he could do to keep out of trouble when he telephoned Mr. Freeze after receiving the letter dated January 2, 1985; that subsequent to January 15, 1985, he has taken steps to maintain the identity of the medicated calves; and, that Mr. Vedder, a Marketing Specialist and investigator, found Mr. Perry "very cooperative". (Tr. 148)

Mr. Singleton, President and owner of Rancho Veal, indicated a business relationship with Respondent of approximately 19 years, and, that he had been buying bob calves from Respondent for slaughter for approximately 4 or 5 years. (Tr. 168). Had Rancho Veal been dissatisfied with the business relationship with Respondent, Rancho Veal could have discontinued buying calves from Respondent, or, could have pursued legal remedy for breach of guaranty.

A majority of the producers from whom the purchases, as herein pertinent, were made, testified. From the Respondent's viewpoint, he had dealt with these same producers-dairymen over a period of years, and had continuously told them to let him know if any calf had been medicated. All the producers who testified so confirmed this understanding with the Respondent. The Respondent testified that on the day in question, he may have failed to ask his usual question relative to medication. He relied upon a past course of conduct, apparently, when he signed the guaranty presented to him by Rancho Veal, which is designated for the producer or auction yard, of which Respondent was neither.

The testimony of the producers corroborates that of the Respondent. Mr. DeKuyer indicated that although the Respondent did not inquire as to medication every time—"He don't have to mention that, because everybody's aware of it." (Tr. 227). Mr. Costa testified that Respondent always asked about medication (Tr. 240), and that slips were signed differentiating between medicated and non-medicated calves. (Tr. 243). Mr. Vandenberg's testimony was that Re-

spondent was "very picky" about calves, and always asked if the calves had been treated, and that when Respondent purchased medicated calves, they were marked, (Tr. 254), although, Respondent usually told Mr. Vandenberg to keep the medicated ones.

Although an affidavit had been obtained ahead of time by the agency from some of the testifying producers, including one from Mr. Vandenberg, it is believed that the live testimony of Mr. Vandenberg as to "marking" of the calves was the more accurate.

The import of the testimony of other testifying producers was substantially the same—that Respondent usually asked if the calves were medicated (Mr. Captein, Tr. 268–274); that in Mr. Simoes case, the receipt showed which calves were medicated, and with respect to the calves purchased from him, Mr. Simoes' calves were treated as medicated calves. (Tr. 289). Mr. Van Exel indicated—"the ones with medication, he (Mr. Perry) don't want them" and, Mr. Van Exel, the same as the other producers, knew which calves had been medicated. (Tr. 325). Similar testimony was given by Kooyman and Mr. Borges.

Apparently, such oral representations and arrangements which Respondent had with the producers were sufficient for him to rely thereon. Circumstances proved that this was an erroneous reliance because two calves showed up with impermissible drug level residues. Perhaps contributing thereto was the failure of Respondent to maintain the identify of the calves, which precluded a meaningful association of "marked" calves with the appropriate producer.

The evidence indicates, through the testimony of Dr. Bennett, a witness for the Respondent, that there are at least five conceivable scenarios by which a calf may possess antibiotic residues at slaughter in a situation where producers have not administered those drugs with prior knowledge or intent. Those situations were described as follows:

1. Milk from medicated cows unknowingly being switched with milk from non-medicated cows.

2. A calf may suckle a cow which has been medicated.

3. It's possible for incidental exposure to calves of antibiotics when employees are treating calves.

4. The opportunity for milk which has been medicated and intended for one calf to contaminate other milk sources.

5. The possibility of a young calf to suckle a cow that has just been recently dry-cow medicated.

As DR. BENNETT went on to state, the problem is compounded in California as follows:

> Judge BAKER: ". . . DR. BENNETT, in these various scenarios that you have set forth, namely five, is it true that they could occur without the dairy herd's owner knowing about them?
>
> WITNESS: Yes, particularly California, because the larger farms and the number of employees who are operating without the direct supervision of the dairy owner/operator.

However, it was not shown, by record evidence, that any of the possibilities mentioned by Dr. Bennett happened in this case.

Although Respondent made an effort to understand what was required of him, the evidence indicates that he either did not have a clear understanding as to what was meant by certification being in writing (Tr. 343) and the necessity for identification of the animals, or, he did not make sufficient effort to achieve compliance.

Notwithstanding the above, the Respondent's own testimony is sufficient in itself to establish a violation of Section 312 of the Act, as alleged in the Complaint. Respondent testified that he was told, "* * * before you unload these calves, you'd better certify them." (Tr. 344, 349)—"Well, they told me it was a new law that I had to sign." (Tr. 345). Respondent went by the producers' understanding he had with them, and he had no document in this records indicating that the calves were drug free. (Tr. 345, 348). Although the Respondent may have marked medicated calves with chalk on the head or hip, he acknowledged that he did not back tag the animals until after January 15, 1985 (Tr. 353, 362). With respect to the two calves which were condemned from the January 15, 1985, sale, the Respondent did not know the source thereof. (Tr. 375).

When questioned about whether he asked the dairymen on January 14, 1985, whether the calves were medicated, or not, Respondent Perry replied:

> "No. I do not remember if I asked all the dairymen on January 14, 1985, if they had given any kind of medication. I could have asked a few of them. But maybe I didn't as (to) them all." (Tr. 380)

Respondent sums up the situation most accurately himself when he testified regarding the guaranty which he signed, "—But I shouldn't have done it." (Tr. 343)

The Respondent further contests the Complainant's characterization of Respondent's conduct on January 14, and 15, 1985, as a willful and wanton disregard of the requirements of the Act. According to the Department's interpretation and definition of "willfulness", the Respondent must be so designated. The Complainant's brief

sets forth the position of the Department of Agriculture as to what is meant by the term "willful". Respondent has not shown why such interpretation is not applicable here.

The meaning of the word "willful" in administrative proceedings brought under the Packers and Stockyards Act is found in numerous cases.

In *In re J.A. Speight*, 33 Agric. Dec. 280, 302 (1974), a case brought under the Packers and Stockyards Act, the Judicial Officer gave the following definition of "willful" within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)):

> A violation is willful within the meaning of the term in a regulatory statute, if the violator 1) intentionally does an act which is prohibited—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements (*Goodman* v. *Benson*, 286 F.2d 896, 900 (C.A. Ky. 1961)

See also *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182 (1972); *In re Rayville Livestock Auction, Inc.*, Agric. Dec. 886, 896 (7th Cir. 9161); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 609 (1968); and *In re Smithfield Livestock Market, Inc.*, Agric. Dec. 1546 (1977).

Although the issue of giving a false calf drug certification is one of first impression before the Secretary, the issue of whether the giving of a false record constitutes an unfair and deceptive practice under section 312(a) of the Act has been decided previously. In both *In re Rayville Livestock Auction, Inc.*, 30 Agric. Dec. 886 (1971); and *In re Red River Livestock Auction, Inc.*, 30 Agric. Dec. 898 (1971), the Judicial Officer held it to be a violation for the Respondents therein to have created and given false records in connection with livestock transactions which concealed the fact that the animals they were selling were either "brucellosis-reactor" or "brucellosis-exposed" animals.

In the present case, the Respondent Perry's actions were contrary to the Act and willful. He intentionally did an act which was prohibited and acted with careless disregard of the statutory requirements after he had been informed of them twice—once by letter and once by oral communication, even though there may have been some confusion and misunderstanding on his part.

Additionally, as further pointed out by Complainant on brief, the contentions of Respondent that his actions were not willful, as that term is used by the Department of Agriculture under its regulatory statutes, have been considered at length and rejected.

The case of *In re: James J. Miller*, 33 A.D. 53 (1974), sets forth a thorough explanation of the meaning of the term "willful". In part, it is stated:

> A violation is wilful, within the meaning of the term in a regulatory statute, if the violator "1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard to statutory requirements." *Goodman* v. *Benson*, 286 F.2d 896, 900 (C.A. 7, 1961). *Accord, United States* v. *Illinois Cent. R. Co.*, 303 U.S. 239, 242–44 (1938); *Gearhart & Otis, Inc.* v. *Securities & Exch. Com'n.*, 348 F.2d 798, 802–803 (C.A.D.C., 1965); *Eastern Produce Co.* v. *Benson*, 278 F.2d 606, 609 (C.A. 3, 1960); *Riss & Company* v. *United States*, 262 F.2d 245, 247–251 (C.A. 8, 1958); *United States* v. *Gris*, 247 F.2d 860, 864 (C.A. 2, 1957); *Trenton Chemical Co.* v. *United States*, 201 F.2d 776, 777–780 (C.A. 6, 1953), *cert. denied*, 345 U.S. 994; *Dennis* v. *United States*, 171 F.2d 986, 990–91 (C.A.D.C., 1948), affirmed on other grounds, 339 U.S. 162 (1950); *American Surety Co.* v. *Sullivan*, 7 F.2d 605, 606 (C.A. 2, 1925); *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 162 F. 835, 840–942 (C.A. 8, 1908), *cert. denied*, 212 U.S. 579); *Schwebel* v. *Orrick*, 153 F. Supp. 701, 705 (D.C.D.C., 1957), affirmed on other grounds, 251 F.2d 919 (C.A.D.C., 1958), *cert. denied*, 356 U.S. 927; *In re David G. Henner*, 30 Agric. Dec. 1151, 1260–1263 (1971); *In re American Fruit Purveyor's, Inc.*, 30 Agric. Dec. 1542, 1587 (1971). *See, also, Great Western Food Distributors* v. *Brannan*, 201 F.2d 476, 484 (C.A. 7, 1953), *cert. denied*, 345 U.S. 997.
>
> Wilfulness means "no more than that the person charged with the duty knows what he is doing," and it "does not mean that, in addition, he must suppose that he is breaking the law." *Townsend* v. *United States*, 95 F.2d 352, 358 (C.A.D.C., 1938), *cert. denied*, 303 U.S. 664; *Fields* v. *United States*, 164 F.2d 97, 100 (C.A.D.C., 1947), *cert. denied*, 332 U.S. 851. It is only in statutes involving turpitude that "wilful" includes evil purpose, criminal intent, or the like. *Spies* v. *United States*, 317 U.S. 492, 497–499 (1943).
>
> In *Trenton Chemical Co.* v. *United States*, 201 F.2d 776, 777–780 (C.A. 6, 1953), *cert. denied*, 345 U.S. 994, the Court held that a company which exceeded its quota, under a regulatory order establishing quotas as to grain used by

distillers, "wilfully" violated the quota restriction, subjecting it to criminal prosecution. The defendant contended that it used grain products, not grain, and "that it had been advised by its attorney that it was not illegal to use grain products in its distilling operations," but the "District Judge declined to permit the * * * [Company] to show at the trial that it acted in good faith and on advice of counsel that its acts were not illegal, in using the materials in question" (201 F.2d at 778, 779). In sustaining the judgment of the District Court, the Court of Appeals held that inasmuch as the regulatory statute did not prescribe acts "in themselves wrong," evidence of "bad faith or evil purpose on the part of the defendant was not necessary to constitute a violation of the act, but it was sufficient if the prohibited act was intentional or voluntary" (201 F.2d at 780).

Similarly, in *Chicago, St. P., M. & Co. Ry. Co.* v. *United States*, 162 F. 835, 840-842 (C.A. 8, 1908), *cert. denied*, 212 U.S. 579, the Court upheld the conviction of the defendants under the Elkins Act on the ground that they "willfully" granted rebates to a shipper, notwithstanding the reliance by the defendants on decisions by the Interstate Commerce Commission which, according to the Court, "might well have afforded ground for belief by defendants that their act * * * was justifiable and lawful" (162 F. at 840-41). The Court said that to "hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous doctrine. It would in many cases justify a violation of statutes expressive of public policy concerning which there may obviously be and frequently are as many different opinions as there are different individuals affected by them" (*id*, at 842). *See also, Sinclair* v. *United States*, 279 U.S. 263, 299 (1929); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 70-71, 85-86 (1908); *United States* v. *Union Pac. R. Co.*, 169 F. 65, 67 (C.A. 8, 1909).

It was held in *Dennis* v. *United States*, 171 F.2d 986, 990-991 (C.A.D.C., 1948), affirmed on other grounds, 339 U.S. 162 (1950), that in order to prove a wilful failure to appear before a Congressional Committee, it is not necessary to show that the act of refusal was done from a bad purpose or an evil motive. The Court held that the mere fact that

> the defendant claimed to have followed the advice "is no defense," and that "[i]f it were, many corporations, organizations and even individuals would maintain counsel permanently for the purpose of advising them against doing anything that they do not wish to do" (171 F.2d at 991).

Thus, the Respondent's actions were willful under the Act, as that term is defined by the Secretary.

The Act vests in the Secretary authority to impose sanctions with a view to enforcement of his statutory and regulatory mandates. This is carried out, in these administrative, disciplinary cases through the Agency and by the Secretary's Judicial Officer. The exercise of their discretion with respect to the imposition of sanctions is accorded deference by the courts, which recognize that choice of a sanction is peculiarly a matter for administrative competence. *Butz* v. *Glover Livestock Commission Co., Inc., 411 U.S. 182 (1972); F.T.C.* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967).

As both parties are aware, the sanction sought by the Complainant is well within the statutory limits. However, it is not without reason to consider the Respondent's argument that the imposition of a $5000. penalty is not justified on the facts, even though the Complainant may want to make an example of the Respondent to shore up a program, which, admittedly, until mid 1984, was not accomplishing what it set out to do. This is a case of initial impression. Accordingly, I believe that any change in the requested sanction should be made by the Judicial Officer, on appeal.

In the *Glover* case, *supra*, the United States Supreme Court was explicit when it stated that the breadth of the grant of authority to the Secretary to impose sanctions strongly implies a congressional purpose to permit the Secretary to make such imposition to deter repeated violations of the Act, whether intentional or negligent. When the Secretary's practice is to employ a sanction which, in his judgment, best serves to deter violations and achieve the objectives of the statute, then such choice of remedy is not to be overturned unless unwarranted in law or without justification in fact.

Respondent Perry has shown no illegality associated with the Complainant's requested sanction, which is warranted in both law and fact.

The reason for the requested Cease and Desist Order, and, the $5000. sanction was explained by Mr. Davis in his testimony, after having listened to the testimony of Respondent Perry, on the stand:

> Q Why does the Administration seek such a civil penalty and a cease and desist order?

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> A The civil penalty, in this case, is based, at least in part, on what we believe is a necessary deterrent effect, not only for Mr. Perry, but for the industry as a whole, to recognize and understand that the false certification or the certification without the background and without the knowledge of whether or not an animal has been treated—we believe that the civil penalty must be of an amount sufficient that the industry will set up and take notice that this is a problem and that a person who does do this can and will be appropriately prosecuted under the law, so that the industry is served affective notice that, if they are to sign a certification, they must know what they are signing and they must treat it as a serious matter.
>
> And the Administration believes that anything short of a significant civil penalty simply will not serve the notice that is necessary and will not provide the deterrent effect that is needed to address the problems in the residue program.

As further justification for the requested sanction, Complainant makes reference to the Consent Order agreed to in the *Van der Geest & Sons, Inc.*, case, P. & S. Docket No. 6484 (December 26, 1985) wherein a $4000. civil penalty was imposed. This is the only other administrative case cited by the Complainant on the "same issue". I agree with the Respondent that such case is lacking in precedental value herein. At best, the facts in the *Van der Geest* case have to be derived from a reading of the Complaint therein. Also, it is not known what matters were discussed and were a part of the negotiating process. From a reading of the Complaint therein, it would appear that *Van der Geest* is a rather large business since it is a corporation, whereas the Respondent is a single person characterized by Complainant as a small operation. Also, the Complaint against the Respondent here deals with one violation, whereas, in *Van der Geest*, there were four or more alleged violations. Another most important difference is that the Complaint in *Van der Geest* charges the corporate respondent therein with actually administering drugs and consigning the calves for sale without waiting for the withdrawal period, a clear violation of the calf certification program. At no time was Respondent Perry charged with administering drugs or has there been any implication that he affirmately caused drug residues. On this, and other contentions, the Respondent argues for a nominal penalty or at least one less than that sought by the Complainant. Under the circumstances, such a request can not be granted by the Administrative Law Judge, who

is not the policy maker for program sanctions within the United States Department of Agriculture. That is a matter which the Judicial Officer has emphatically and clearly addressed in his many decisions. The Department's sanction policy has been reiterated in two recent cases: *Corn State Meat Company, Inc., et al,* P & S Docket No. 6427 (May 8, 1986); and, *Holiday Food Services, Inc.*, P & S Docket No. 6488 (May 8, 1986).

A consideration of the record as a whole indicates that Complainant did consider the size of the Respondent's business, Respondent's testimony at the hearing, his ability to pay the sanction, and the necessity therefor, in order to deter the Respondent and others in the industry from permitting calves with drug residues entering into the current of commerce without the proper safe-guards.

The Complainant has shown a rational and considered relationship between the sanction sought and the seriousness of the violation.

Accordingly, the Order below is issued:

ORDER

Respondent Manuel Perry, individually or through any corporate or other device, in connection with activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Preparing and issuing certifications or any other documents which state that drugs have not been administered to livestock, or that if drugs have been administered to livestock that the withdrawal period specified on the drug label has been followed, unless Respondent knows from his own personal knowledge that such facts are true or has received signed statements from the producer of said livestock that drugs have not been administered to livestock, or that if drugs have been administered to livestock that the withdrawal period specified on the drug label has been followed; and

2. Representing in any manner to purchasers of livestock, to agents or employees of such purchasers, or to any other persons involved in the marketing or slaughter of livestock, that drugs have not been administered to livestock, or that if drugs have been administered to livestock, the withdrawal periods specified on the drug labels have been followed, when such representations are incorrect.

Respondent shall keep accounts, records and memoranda that fully and correctly disclose all transactions involved in his business as a market agency and dealer subject to the Act, including written statements from producers that certify that the calves which are sold to Respondent have not been treated with animal drugs or, if

so treated, the withdrawal period as prescribed on the drug's label has passed. Respondent shall keep such memoranda for all calves which he sells or consigns to a packer or other person and so certifies or guarantees the same to the packer or other person.

In accordance with Section 312(b) of the Act (7 U.S.C., section 213(b)), Respondent Perry is assessed a civil penalty in the amount of Five Thousand Dollars ($5000.00).

All contentions, requests, motions, and otherwise of the parties have been duly considered, and, to the extent, if any, not ruled upon and which may be inconsistent with this Decision and Order, they are hereby denied.

This Decision and Order shall become final thirty-five days after service thereof unless appealed to the Secretary's Judicial Officer within thirty days, as set forth in the Rules of Practice and Procedure, 7 CFR sec. 1.131, *et seq.*

Copies hereof shall be served upon the parties.

[The Decision and Order became final on October 20, 1986.—Ed.]

In re: CRAIG LANDEEN. P&S Docket No. 6626. Decided October 21, 1986.

William A. Weber, Administrative Law Judge.
Andrew Stanton, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

On October 17, 1986, Judge William J. Weber certified to the Judicial Officer the question as to whether adequate service was made on respondent of the complaint and proposed default decision.

The complaint alleges that respondent engaged in business as a market agency, buying livestock in commerce on a commission basis, without being registered with the Secretary or furnishing the required bond. The complaint further alleges that during June and July 1985, respondent purchased livestock and failed to pay approximately $17,614.57 for his livestock purchases.

The complaint was sent to respondent's last known address by certified mail, but was returned as "Unclaimed." Thereafter, the Hearing Clerk sent a copy of the complaint to respondent at the same address by regular mail, which was also "Unclaimed." The Motion for Adoption of Proposed Decision was sent by certified

mail to respondent at the same address, but the envelope was returned marked "MOVED, LEFT NO ADDRESS." (The return receipt card for this document shows that it was received by "Stewart," who is not identified in the file.) Thereafter, the Hearing Clerk sent the Motion for Adoption of Proposed Decision to respondent at the same address by regular mail, but the letter was returned marked "NOT DELIVERABLE AS ADDRESSED—UNABLE TO FORWARD."

Service by regular mail after respondent failed to accept delivery (i.e., failed to pick up the documents at his post office box or leave a forwarding address) complies with the Department's rules of practice, and meets the requirements of due process. The rules of practice provide (7 CFR § 1.147(b)):

> (b) *Service; proof of service.* Copies of all such documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, or by some other employee of the Department, or by a U.S. Marshal or deputy marshal. Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served, or to the president, secretary, or other executive officer or any director of the corporation or association to be served, or to the attorney of record representing such individual, partnership, corporation, organization, or association; or (2) by leaving a copy of the document or paper at the principal office or place of business or residence of such individual, partnership, corporation, organization, or association, or of the attorney or agent of record and mailing by regular mail another copy to such person at such address; or (3) *by registering or certifying and mailing a copy of the document or paper, addressed to such individual,* partnership, corporation, organization, or association, or to the attorney or agent of record, *at the last known residence or principal office or place of business of such person: Provided, That if the registered or certified document or paper is returned undelivered because the addressee refused or failed to accept delivery, the document or paper shall be served by remailing it by regular mail.* Proof of service hereunder shall be made by the certificate of the person who actually made the service: *Provided, That if the service be made by mail, as outlined in paragraph (b)(3) of this section, proof of service shall be made by* the return post-office receipt, in the

> case of registered or certified mail, or by *the certificate of the person who mailed the matter by regular mail.* The certificate and post-office receipt contemplated herein shall be filed with the Hearing Clerk, and made a part of the record of the proceeding. [Emphasis added.]

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). And *see NLRB* v. *Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ___ (Sept. 23, 1985).

The Department's rules of practice providing for service by certified mail addressed to respondent's last known place of business, followed here, meet the requirement of due process of law. As held in *Stateside Machinery Co., Ltd.* v. *Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

> Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S.Ct. at 343 (emphasis added); see *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

A person who engages in the highly regulated livestock industry as a market agency or dealer has an obligation to register with the Secretary on forms which include his address (7 U.S.C. § 203; 9 CFR § 201.10).

Prior to 1984, the regulations expressly required market agencies and dealers to report any change of address within 10 days after making such change (9 CFR § 201.13 (1984)). This regulation was removed effective September 19, 1984 (49 Fed. Reg. 33,001, 33,003

(1984)). However, the regulation was removed only because under normal circumstances the agency could obtain the information from other sources. In the notice of proposed rule making with respect to the removal of 9 CFR § 201.13, the Administrator states (47 Fed. Reg. 20,311, 20,312 (1982)):

> The proposed removal of regulation 201.13, which presently requires registrants to report any change in name, address, management or control, would ease current industry reporting requirements. This information can be obtained from annual reports, state agencies and from other industry sources, and the removal of this regulation will not adversely affect the agency's ability to enforce the Act.

If a market agency or dealer changes his address without leaving forwarding information with anyone, he has no one but himself to blame if he fails to receive important legal documents. Accordingly, the proposed default decision and order should be issued.

In re: ROSS CATTLE CO., INC. and WILLIAM W. ROSS, ROBERT L. KLEINPETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676. Decided October 21, 1986.

John Campbell, Administrative Law Judge.
Jory Hochberg, for complainant.
Daniel Olsen, Kansas City, Mo., for respondent Robert L. Kleinpeter.

CONSENT DECISION WITH RESPECT TO ROBERT L. KLEINPETER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Robert L. Kleinpeter admits the jurisdictional allegations in paragraph II of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations as they pertain to him, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Robert L. Kleinpeter is an individual doing business as R. L. Kleinpeter Cattle Co. whose business mailing address is 8867 Highland Road, Suite 135, Baton Rouge, Louisiana 70808.

2. Respondent Kleinpeter is, and at all times material was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account.

CONCLUSIONS

Respondent Robert L. Kleinpeter having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Robert L. Kleinpeter, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and

3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Robert L. Kleinpeter is suspended as a registrant under the Act for a period of 28 days.

The provisions of this order shall become effective on November 16, 1986 after service of this decision upon the parties.

Copies of this decision shall be served upon the parties.

In re: ROSS CATTLE, INC., and WILLIAM W. ROSS, ROBERT L. KLEINPETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676. Decided October 21, 1986.

John Campbell, Administrative Law Judge.
Jory Hochberg, for complainant.
Daniel Olsen, Kansas City, Mo., for respondent John Mousley Yates.

CONSENT DECISION WITH RESPECT TO JOHN MOUSLEY YATES

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent John Mousley Yates admits the jurisdictional allegations in paragraph III of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations as they pertain to him, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(a) John Mousley Yates is an individual doing business as John Yates Cattle Co. whose business address is Route 4, Box 434, Franklinton, Louisiana 70438.

(b) Respondent John Mousley Yates is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

Respondent John Mousley Yates, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, John Mousley Yates, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and

3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Respondent Yates is suspended as a registrant under the Act for a period of 28 days.

The provisions of this order shall become effective on November 16, 1986.

Copies of this decision shall be served upon the parties.

In re: ROSS CATTLE CO., INC., and WILLIAM W. ROSS, ROBERT L. KLEINPETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676. Decided October 21, 1986.

John Campbell, Administrative Law Judge.

Jory Hochberg, for complainant.

Richard Fitzpatrick, Poplarville, MS., for respondents Johnson and McCoy.

CONSENT DECISION WITH RESPECT TO LEE M. JOHNSON AND LEWIS T. McCOY

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Johnson and McCoy admit the jurisdictional allegations in paragraph V of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations as they pertain to them, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lee M. Johnson and Lewis T. McCoy are partners doing business as Big Spring Cattle whose business mailing address is Box 324, Picayune, Mississippi 39466.

2. Respondents Johnson and McCoy are, and at all times material herein were:

(a) Engaged in the business of buying and selling livestock in commerce for their own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account.

CONCLUSIONS

Respondents Johnson and McCoy having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Lee M. Johnson and Lewis T. McCoy, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and

3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Lee M. Johnson and Lewis T. McCoy are suspended as registrants under the Act for a period of 28 days.

The provisions of this order shall become effective on November 16, 1986.

Copies of this decision shall be served upon the parties.

In re: JACK S. TAYLOR. P&S Docket No. 6727. Decided October 23, 1986.

Victor Palmer, Administrative Law Judge.
Ben Bruner, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jack S. Taylor, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 846, Burley, Idaho 83318.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jack S. Taylor, his agents and employees, directly or through any corporate or other device, shall cease and desist from

engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Thousand Dollars ($3,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: LEONARD & HARRAL PACKING CO., INC., d/b/a L&H PACKING COMPANY. P&S Docket No. 6723. Decided October 27, 1986.

Victor W. Palmer, Administrative Law Judge.
Edward Silverstein, for complainant.
Michael W. Fox, San Antonio, Texas, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Leonard & Harral Packing Co., Inc., doing business as L & H Packing Company (hereinafter "respondent") is a corporation whose business mailing address is P. O. Box 14514, San Antonio, Texas 78214.

2. Respondent is, and at all material times herein was:

(a) Engaged in the business of buying and selling livestock in commerce for purposes of slaughter, and manufacturing or preparing meats or meat food products for sale of shipment in commerce; and

(b) A packer within the meaning of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Leonard & Harral Packing Co., Inc., d/b/a L & H Packing Company, its successors and assigns, its officers, directors, agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and

2. Issuing drafts in payment for livestock purchased on a cash basis.

In accordance with section 203(b) of the Act (7 U.S.C. 193(b)), the respondent is assessed a civil money penalty in the amount of Ten Thousand Dollars ($10,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: W.A. GREEN LIVESTOCK CO., INC. and W.A. GREEN. P&S Docket No. 6605. Decided October 30, 1986.

Victor Palmer, Administrative Law Judge.
Dennis Becker, for complainant.
Richard C. Stamper, El Centro, Calif., for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent does not meet the requirements of the Act, and that the respondents have wilfully violated the Act. This deci-

sion is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. W. A. Green Livestock Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of California, with its principal place of business located at Davis, California. The corporate respondent's business mailing address is P. O. Box 486, Davis, California 95617.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for its own account and for the account of others; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. W. A. Green, hereinafter referred to as the individual respondent, is an individual respondent whose business mailing address is P. O. Box 486, Davis, California 95617.

4. The individual respondent is, and at all times material herein was:

(a) Owner and Vice President of the corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent; and

(c) Not registered with the Secretary of Agriculture.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent W. A. Green Livestock Co., Inc., its officers, directors, agents, employees, successors and assigns, and respondent W. A. Green, directly or through any corporate or other device, in connection with their business operations as a dealer or market agency, shall cease and desist from:

1. Engaging in business while insolvent, *i.e.*, while current liabilities exceed current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent W. A. Green Livestock, Inc., is suspended as a registrant under the Act for a period of 60 days and thereafter until it demonstrates that it is no longer insolvent. When respondent W. A. Green Livestock, Inc., demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 60-day period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: ROSS CATTLE CO., INC., and WILLIAM W. ROSS, ROBERT L. KLEINPETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676. Decided October 31, 1986.

John A. Campbell, Administrative Law Judge.
Jory Hochberg, for complainant.
Donald Walsh, Liberty, MS., for respondent Benny Mason Vine, Jr.

CONSENT DECISION WITH RESPECT TO BENNY MASON VINE, JR.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Benny Mason Vine, Jr. admits the jurisdictional allegations in paragraph IV of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations as they pertain to him, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Benny Mason Vine, Jr. is an individual doing business as Mason Vine Cattle Company whose business mailing address is P. O. Box 815, Centerville, Mississippi 39631.

2. Respondent Vine is, and at all times material was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account.

CONCLUSIONS

Respondent Benny Mason Vine, Jr. having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Benny Mason Vine, Jr., directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and

3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Benny Mason Vine, Jr. is suspended as a registrant under the Act for a period of 14 days.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Vine is assessed a civil penalty in the amount of Five Thousand Dollars ($5,000.00).

The provisions of this order shall become effective on November 9, 1986.

Copies of this decision shall be served upon the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: CACHE VALLEY AUCTION, INC., DAVID W. BECKSTEAD, and EDDIE S. JENSEN. P&S Docket No. 6203. Order issued October 1, 1986.

Victor Palmer, Administrative Law Judge.
Peter Train, for complainant.
Dallin J. Phillips, Presto, Idaho, for respondent.

SUPPLEMENTAL ORDER

On September 4, 1984, an order was issued in the above-captioned matter which, *inter alia,* suspended respondent Cache Valley Auction, Inc., as a registrant under the Act for a period of fourteen days and thereafter until it demonstrates that the deficit in its custodial account for shippers' proceeds has been eliminated and that it is no longer insolvent.

Cache Valley Auction, Inc., has demonstrated that it is currently solvent and that it has corrected the deficit in its custodial account. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued September 4, 1984, is terminated. The order shall remain in full force and effect in all other respects.

In re: JIMMY HIGGINS. P&S Docket No. 6589. Order issued October 7, 1986.

William J. Weber, Administrative Law Judge.
Ben Bruner, for complainant.
D. Russell Thomas, Murfreesboro, Tn., for respondent.

SUPPLEMENTAL ORDER

On August 27, 1986, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act until he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued August 27, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: JOHN A. SCHOLL. P&S Docket No. 6684. Order issued October 7, 1986.

William Weber, Administrative Law Judge.
Roberta Swartzendruber, for complainant.
Pro se, for respondent.

SUPPLEMENTAL ORDER

On June 13, 1986, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations.

Respondent has now complied fully with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued June 13, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: BOBBY M. HACKER. P&S Docket No. 6658. Order issued October 15, 1986.

William Weber, Administrative Law Judge.
Jory Hochberg, for complainant.
Pro se, for respondent.

SUPPLEMENTAL ORDER

On September 18, 1986, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act until such time as he filed and maintained an adequate surety bond or its equivalent as required by the Act and the regulations.

Respondent has now filed an adequate bond or its equivalent as required by the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued September 18, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: GRO-TEX INVESTMENTS, INC., and RUSSEL I. DECORDOVA. P&S Docket No. 6670. Order issued October 17, 1986.

John A. Campbell, Administrative Law Judge.
Peter Train, for complainant.
Pro se, for respondent.

SUPPLEMENTAL ORDER

On August 27, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent DeCordova as a registrant under the Act and prohibited respondent Gro-Tex Investments, Inc., from operating subject to the Act until such time as they comply fully with the bonding requirements under the Act and the regulations.

Respondents have now provided the required bonding coverage. Accordingly,

IT IS HEREBY ORDERED that the suspension and prohibition provisions of the order issued August 27, 1986, are terminated. The order shall remain in full force and effect in all other respects.

In re: GRANT OTIS. P&S Docket No. 6223. Order issued October 28, 1986.

Victor W. Palmer, Administrative Law Judge.
Thomas C. Heinz, for complainant.
Pro se, for respondent.

SUPPLEMENTAL ORDER

On December 30, 1983, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with the bonding requirements of the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued, is terminated. The order shall remain in full force and effect in all other respects.

REPARATION DECISIONS

MITCHELL LIVESTOCK AUCTION CO., *v.* DANIEL LAMMERS, STANLEY SCHMIDT, and Larry Ryken d/b/a YANKTON LIVESTOCK AUCTION MARKET; and DANIEL LAMMERS *v.* LARRY RYKEN d/b/a YANKTON LIVESTOCK AUCTION MARKET. P&S Docket No. 5996. Decided September 19, 1986.

Insufficient funds check—Failure to deposit proceeds—Dismissal.

Directed Larry Ryden d/b/a Yankton Livestock Auction Market, to pay Mitchell Livestock Auction Co., $45,334.58 plus interest at a 13% rate until paid. Daniel Lammers had issued an insufficient funds check to pay for livestock bought from Mitchell Livestock, but Ryden caused the insufficient funds check by wrongfully failing to remit to Lammers the proceeds generated by Ryden's resale of the same livestock. Lammers complaint against Ryden dismissed.

Judicial Officer, Donald Campbell.
Burleigh E. Boldt, for complainant Mitchell Livestock Auction Co.
Carleton R. Hay, for complainant Daniel Lammers.
Robert M. Cook, for respondents.

DECISION AND ORDER

PRELIMINARY STATEMENT

These are two reparation proceedings under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*) (hereinafter "the Act"), begun by complaints filed by Mitchell Livestock Auction, Inc. (hereinafter "Mitchell"), on November 24, 1981, and by Daniel Lammers (hereinafter "Lammers") on September 22, 1981. Taken together, the complaints alleged in substance that Lammers issued an insufficient funds check to pay for livestock purchased from Mitchell by Lammers and Stanley Schmidt (hereinafter "Schmidt"), and that Larry Ryken d/b/a Yankton Livestock (hereinafter "Ryken") caused the insufficient funds check by wrongfully failing to remit to Lammers the proceeds generated by Ryken's resale of the same livestock. Mitchell sought reparation of $45,334.58 from Lammers, Schmidt and Ryken. Lammers' reparation claim against Ryken was for $52,634.14, later reduced to $49,404.13.

Copies of the complaints and the investigation reports prepared by the Packers and Stockyards Administration were served on the respondents who duly filed answers. Lammers admitted owing Mitchell the amount claimed. Schmidt filed a general denial. Ryken denied the allegations in both complaints, alleged a cross-claim in Docket No. 5994 against Lammers and Schmidt for $3,259.67, arising out of unspecified transactions, and an identical counterclaim against Lammers in Docket No. 5996 for the same amount. Ryken later abandoned his cross-claim against Schmidt

and at hearing increased his counterclaim against Lammers to $32,853.47. In his answers to the complaints, Ryken also alleged Iowa Beef Processors, Inc., of Dakota City, Nebraska (hereinafter "IBP"), to be an indispensable party to these proceedings and requested leave to file a cross-claim against that company. The request was not granted since the Act does not give the Secretary jurisdiction to order a packer to pay reparation, and IBP is a packer (7 U.S.C. §§ 209, 210).

As a result of decisions by a South Dakota Circuit Court involving Mitchell, IBP, Ryken, Lammers and Schmidt, on December 27, 1984, Mitchell withdrew its complaint in Docket No. 5994 against Lammers and Schmidt, thereby resting its entire claim against Ryken.

Pursuant to respondents' requests for an oral hearing, a hearing was held on March 19, 1985, in Sioux Falls, South Dakota, before Thomas C. Heinz of the Office of the General Counsel of this Department. Mitchell was represented by Burleigh E. Boldt, Esquire, of Mitchell, South Dakota. Lamers was represented by Carleton R. Hoy, Esquire, of Sioux Falls, and Ryken was represented by Robert M. Cook, Esquire, Norfolk, Nebraska. Six witnesses testified. Mitchell introduced two exhibits, and Ryken introduced eleven exhibits into the record. Briefing by the parties was completed on July 15, 1985.

FINDINGS OF FACT

1. Mitchell is a corporation which at all times material herein was engaged in business as a dealer buying and selling livestock in commerce for its own account and as a market agency selling livestock in commerce on a commission basis at a posted stockyard at Mitchell, South Dakota, and is so registered with the Secretary of Agriculture under the Act.

2. Lammers is an individual who at all times material herein was engaged in business as a dealer buying and selling livestock in commerce for his own account and for the account of others with his principal place of business located at Fordyce, Nebraska.

3. Ryken is an individual who at all times material herein was engaged in business as a dealer buying and selling livestock in commerce for his own account and as a market agency selling livestock in commerce on a commission basis at a posted stockyard with the name "Yankton Livestock Auction Market" at Yankton, South Dakota, and is so registered with the Secretary under the Act.

4. From December 1980 until September 1, 1981, Lammers was employed by Ryken as a field man soliciting cattle to be sold at

Ryken's Yankton Livestock Auction Market. During that period Lammers also purchased livestock in his own name at various locations and consigned them to Ryken for resale. In addition, Lammers regularly purchased livestock from Ryken which he sold to IBP on a grade and yield basis.

5. On August 19, 1981, Lammers bought 109 head of livestock from Mitchell for $53,229.92 and issued a personal check to pay for them. At the time Lammers wrote this check he knew he did not have enough money in his account to cover it. Lammers' consigned all but one of these livestock to Ryken who two days later, on August 21, 1981, sold them at auction for $52,364.60 net, which amount Ryken has not remitted to Lammers.

6. Lammers told Ryken on August 25, 1981, that he had to have the proceeds from the August 21 sale in order to cover the check he had written to pay for the livestock purchased from Mitchell on August 19, 1981.

7. On August 26, 1981, Lammers bought 188 head of livestock from Mitchell for $93,285.08 and issued a personal check to pay for them. At the time Lammers wrote this check he knew he did not have enough money in his account to cover it. Two days later, on August 28, 1981, Lammers consigned 141 head of these livestock to Ryken who sold 112 head at auction for $51,180.42 and issued a check in that amount on his custodial account for shippers' proceeds. On Lammers' instructions, this check was issued to Schmidt, Lammers' uncle and sometime business partner. The remaining 29 head out of the 141 consigned by Lammers were not sold by Ryken but were disposed of elsewhere and are not in controversy here.

8. On September 1, 1981, Mitchell was informed by Lammers' bank that the check Lammers had written on August 19, 1981, was being returned because of insufficient funds. Mitchell immediately contacted Lammers to discuss payment for both his August 19 purchase and his August 26 purchase, since it was clear that Lammers' August 26 check was also going to be returned for insufficient funds. (Both checks indeed were later returned by the bank.) Mitchell and Lammers agreed to meet on September 2, 1981.

9. On September 1, 1981, Lammers' employment with Ryken ended when they met to settle their accounts with each other. Ryken claimed Lammers owed him $91,303.22 but Lammers disagreed. Lammers again told Ryken that he had to have the proceeds check from the August 21 sale to pay Mitchell for the purchase of the livestock on August 19, and although Ryken issued a proceeds check in the correct amount, $52,364.60, Ryken said he wanted it endorsed back to cover an insufficient funds check for $3,620.00 Lammers had issued earlier to Ryken. Lammers testified

that he complied with Ryken's request on the strength of Ryken's promise that he would issue another proceeds check reduced by $3,620.00. Ryken did not do so, and instead applied the entire $52,364.60 proceeds check to reduce the $91,303.22 debt he claimed Lammers owed him as a result of Lammers' various livestock purchases. Lammers also testified that Ryken said "he could give a God damn if Ray Henderson [Mitchell's owner] ever got his money."

10. When Mitchell and Lammers met on September 2, 1986, the Ryken check for $51,180.42 which had been issued to Schmidt was endorsed over to Mitchell to reduce Lammers' debt for the August 19 and August 26 purchases. The debt was reduced another $50,000.00 through a bank money order delivered to Mitchell the following day, leaving $45,334.58 unpaid. No part of this amount has been paid to Mitchell.

SUBSIDIARY FINDINGS OF FACTS AND CONCLUSIONS

Ryken does not dispute that Lammers acquired cattle from Mitchell on August 19 through the use of an insufficient funds check, nor does he dispute that his failure to remit to Lammers the proceeds from the resale of those livestock on August 21 has caused Mitchell to remain unpaid. Rather, Ryken contends he properly used those proceeds to reduce Lammers' pre-existing debt arising out of other transactions. That contention has no merit.

Section 201.39 of the regulations (9 CFR § 201.39) spells out Ryken's duty as a market agency selling consigned livestock regarding the proceeds from the sale of the livestock consigned by Lammers.

> No market agency shall . . . [with exceptions not applicable here] pay the net proceeds or any part thereof, arising from the sale of livestock consigned to it for sale, to any person other than the consignor or shipper of such livestock except upon an order from the Secretary or a court of competent jurisdiction, unless (1) such market agency has reason to believe that such person is the owner of the livestock, (2) such person holds a valid unsatisfied mortgage or lien upon the particular livestock, or (3) such person holds a written order authorizing such payment executed by the owner at the time of or immediately following the consignment of such livestock . . . .

On or before August 25, 1981, Ryken knew Lammers needed the August 21 sale proceeds to pay Mitchell for the purchase of the livestock, but Ryken testified he received a telephone call during

the week of August 24 from an individual from the Production Credit Association suggesting that the livestock consigned by Lammers on August 21 in fact belonged to Schmidt and that the Production Credit Association had a valid mortgage on the livestock. Although this telephone call appeared to corroborate a claim made earlier by Schmidt that he was the true owner of the livestock, Ryken did not give the proceeds to Schmidt or to the Production Credit Association or to Lammers or to Mitchell. Instead, he used the proceeds on September 1 to reduce the debt he claims Lammers owed him as a result of other livestock transactions. As shown in section 201.39 of the regulations, that is an impermissible use of the sale proceeds from consigned livestock. Moreover, Section 201.42 of the regulations (9 CFR § 201.42) provides that the proceeds generated by the sale of consigned livestock are trust funds which may be withdrawn from a market agency's custodial account for shippers' proceeds only for payment of lawful marketing charges and for "payment of the net proceeds to the consignor or shipper, or such other person or persons who the market agency has knowledge is entitled thereto . . ." Ryken as trustee could not offset against these trust funds a debt owed him individually and not as trustee. Doing so constitutes a well-established unjust practice in violation of section 307 of the Act (7 U.S.C. § 208) and the regulations, for which reparation may be awarded. *Rowse* v. *Platte Valley Livestock, Inc.*, 43 Agric. Dec. ___ (Feb. 3, 1984), *aff'd*, 604 F. Supp. 1463, 1467 (D. Neb. 1985); *Mid-South Order Buyers, Inc.* v. *Tige Enterprises*, 34 Agric. Dec. 1691 (1975), and 35 Agric. Dec. 232 (1976), *aff'd, Mid South Order Buyers, Inc.* v. *Platte Valley Livestock, Inc.*, 210 Neb. 382, 394, 315 N.W. 2d 229, 235 (1982); *Rice* v. *Wilcox*, 34 Agric. Dec. 1651 (1975), 35 Agric. Dec. 212 (1976), *aff'd*, 630 F.2d 586 (8th Cir. 1980); *Minot Livestock Auction* v. *Wood Bros., et al.*, 24 Agric. Dec. 459, 465 (1965).

When Lammers issued a check to Mitchell for the August 19 purchase, he received title conditioned upon making the payment due. (UCC §§ 2-507(2) and 2-511(3)) Although Lammers could pass that title to a good-faith purchaser (UCC § 2-403(1)), Ryken was not a purchaser, he was Lammers' agent selling the livestock on commission. Ryken's rights to the sale proceeds could rise no higher than the rights of Lammers, his principal. *Rowse* v. *Platte Valley Livestock*, 604 F. Supp. 1463, 1466 (D. Neb. 1985); *Mid-South Order Buyers, Inc.* v. *Platte Valley Livestock, Inc.*, 210 Neb. 382, 395, 315 N.W. 2d 229, 236 (1982). Since Lammers did not in fact pay for the livestock, he did not acquire title to them, and neither he nor Ryken has a right to the proceeds from their resale. Those proceeds belong to Mitchell which was injured by Lammers' fraudulent pur-

chase using an insufficient funds check and by Ryken's misuse of trust funds in violation of the Act and the regulations. Ryken will be ordered to pay reparation to Mitchell for that portion of the August 21 sale proceeds by which Mitchell remains unpaid. (7 U.S.C. §§ 208(a), 209(a))

Ryken argues that the case of *Mid-Columbia Livestock Exchange, Inc.* v. *Mike Bray, Templeton Sales Yard, Inc., d/b/a Templeton Livestock Market, Richard L. Nock, Duane C. Baxley and Gary A. Davis*, 43 Agric. Dec.____(September 13, 1984) "is on all fours and dispositive of the issues here." That argument is without merit. The *Mid-Columbia* decision dealt only with the issue of whether respondent Templeton Sales Yard, Inc., and its officers were liable for the unpaid purchase price of livestock purchased by respondent Bray from the complainant by virtue of the nature of the business relationship between all of the respondents. Unlike the case at hand, that decision did not address the issue of a market agency's duty regarding the disposition of proceeds from the sale of consigned livestock. Hence *Mid-Columbia* is inapposite to the instant case and is not dispositive of the issues raised here.

Mitchell's cause of action accrued on September 1, 1981, upon receipt of information that Lammers' check was being returned by the bank for insufficient funds. Mitchell's complaint therefore was timely filed on November 24, 1981, within the prescribed 90 day period (9 CFR § 202.103(e)).

Lammers contends Ryken owes him for the following transactions:

DATE	NO.	SPECIES	AMOUNT
7/18/81	16	Hogs	$1,799.52
7/29/81	42	Cattle	24,432.16
7/29/81	39	Cattle	27,274.78
7/29/81	17	Cattle	8,351.50
7/31/81	2	Cattle	978.19
8/21/81	108	Cattle	52,364.60
8/22/81	63	Hogs	7,381.73
			$122,582.48

Lammers concedes he owes Ryken for the following transactions:

DATE	NO.	SPECIES	AMOUNT	
7/31/81	37	Cattle	$19,397.30	
8/4/81	71	Cattle	45,952.85	
6/23/81		Hogs	3,620.00	(NSF Check)

DATE	NO.	SPECIES	AMOUNT	
6/23/81	15	Cattle	4,208.20	(NSF Check)
			$73,178.35	

Subtracting $73,178.35 from $122,582.48 leaves $49,404.13, the amount that Lammers seeks as reparation from Ryken. Of that, Lammers concedes $45,334.58 belongs to Mitchell, leaving $4,069.55 as Lammers' independent claim against Ryken. That claim is based in part on allegations that Ryken has retained proceeds of $7,381.73 from the sale of 63 hogs on August 22, 1981. Ryken denies retaining these proceeds, and there is no evidence in the record to corroborate Lammers' allegations that he has not received the sale proceeds from these 63 hogs. Lammers has therefore failed to sustain his burden to prove his claim by a preponderance of evidence, and his complaint will be dismissed. *See, Lambert* v. *Moran*, 37 Agric. Dec. 1191 (1978); *Riechers* v. *Farrar*, 36 Agric. Dec. 356 (1977); *Agri-Link* v. *J. D. Schultz*, 35 Agric. Dec. 557 (1976).

In his answer to Lammers' complaint in Docket No. 5996 Ryken filed a counterclaim stating:

> Daniel Lammers is indebted to Larry Ryken, d/b/a Yankton Livestock Auction Market in the amount of $3,259.67 arising out of livestock transactions and insufficient fund checks issued by Daniel Lammers which checks are held by Larry Ryken, d/b/a Yankton Livestock Auction Market, as a holder in due course.

This language is identical to Ryken's cross-claim against Lammers in Docket No. 5994.

On brief, Ryken amended his counterclaim as follows:

> In sum, Yankton Livestock, pursuant to the transcript to this proceeding, hereby amends its counterclaim against Lammers which counterclaim arises out of the initial transaction brought by Lammers and alleges that Lammers owes Yankton Livestock the amount of $29,593.78, less credit of $948.53 plus bad check of $4,208.20 for a total due and owing of $32,853.45.

The Rules of Practice governing this proceeding provide that an "amendment cannot state a new and different cause of action if it is filed more than 90 days after accrual of such new and different cause of action . . ." (9 CFR § 202.103f(2)). The Rules provide further: "No counterclaim or cross-claim shall be considered unless it is based on a violation for which the act authorizes reparation to be

ordered to be paid, and filed within 90 days after accrual of the cause of action alleged therein; *Provided*, That a counterclaim not filed within such time limit may be considered if based on a transaction complained of in the complaint." (9 CFR § 202.106(c))

Ryken's original counterclaim does not indicate on what livestock transactions it is based, nor does it indicate whether the alleged insufficient funds checks involved matters over which the Secretary has jurisdiction. It is clear from the amended counterclaim, however, that the original counterclaim was based on Lammers' purchase of 15 cattle from Ryken on June 23, 1981, for which he issued an insufficient funds check in the amount of $4,208.20. From that, Ryken subtracted a credit of $948.53, leaving $3,259.67 as the original counterclaim amount. Ryken's original counterclaim must be dismissed because it was filed in February, 1982, considerably more than 90 days after the cause of action accrued, and it was not based on a transaction complained of in the complaint which did not even mention the June 23, 1981, transaction for $4,208.20.

The cross-claim must be dismissed because it was not filed within 90 days after the cause of action accrued. As for the amended counterclaim, it seeks $29,593.78 in addition to the $3,259.67 request in the original counterclaim. The $29,593.78 claim arises out of a transaction which occurred on August 26, 1981, involving Lammers, his Uncle Schmidt and IBP. Although that transaction was mentioned in Lammers' complaint, no part of Lammers' claim was based on it. Therefore, since Ryken's amended counterclaim for $32,853.45 was not filed within 90 days of the accrual of the cause of action and was not based on a transaction complained of in the complaint, it cannot be considered either.

Even if Ryken's amended counterclaim was free from this fatal defect, it would nevertheless fail for want of proof. The $29,593.78 claim rests entirely on a finding by a referee appointed by the Circuit Court, State of South Dakota, County of Yankton, in the case of *Stanley Schmidt, Plaintiff* v. *Iowa Beef Processors, Inc., Defendant and Third Party Plaintiff* v. *Larry Ryken, d/b/a Yankton Livestock Auction Market and Daniel J. Lammers, Third Party Defendants*. Civ. 82-5. The referee stated in a written report submitted to the court:

> It is our finding and conclusion that Daniel J. Lammers has not paid a balance of $29,593.78 for cattle he purchased from Larry Ryken d/b/a Yankton Livestock Auction Market.

The court did not adopt this finding however. Instead, Circuit Judge E.W. Hertz wrote in a June 8, 1984, memorandum opinion:

> The Referee's report, which is part of the evidence before the court, reveals that IBP has paid for all of the cattle delivered to it by Lammers, but that Ryken had not received $29,593.78 due from these August shipments.

Unlike the referee, Judge Hertz did not conclude that Lammers owed Ryken $29,593.78. In any event, these statements are at best *obiter dicta*, since Ryken did not file a cross-claim against Lammers, his co-defendant. That is, the South Dakota Circuit Court has not adjudicated any factual or legal issues between Lammers and Ryken. Hence the Circuit Court's judgment cannot be deemed *res judicata* in the instant litigation between Lammers and Ryken before the Secretary of Agriculture.

> The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. Where a second action is upon a different claim, demand or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the issues, points or questions actually litigated and determined and not as to matters not litigated in the former action, even though such matters might properly have been determined therein. Indeed, it has been declared that for an issue to be conclusively determined under the doctrine of res judicata, the issue decided in the prior action must have been identical with the issue presented in the later action; and that the plea is not available where the issues in the second action differs in any way from that in the earlier action. Accordingly, before the doctrine of res judicata is applied in such cases, it should appear that the precise question involved in the subsequent action was determined in the former action. These rules prevail whether the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive per se.

46 Am Jur. 2d *Judgments* § 418.

In sum, Ryken's amended counterclaim must be dismissed because it was not timely filed and because it is not based on proof upon which the Secretary may rely.

All contentions of the parties presented for the record have been carefully considered whether or not specifically mentioned herein.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, 42 F.R. 4395, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. §§ 450c–450g. It constitutes an "order for the payment of money" within the meaning of section 309(f) of the Act (7 U.S.C. § 210(f)).

Under that section, if Ryken does not comply with this order within the time limit in this order, Mitchell may within one year of the date of this order file in the district court of the United States for the district in which they reside or in which is located the principal place of business of Ryken, or in any state court having general jurisdiction of the parties, a petition setting forth briefly the causes for which damages are claimed and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and order herein shall be *prima facie* evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon appeal. That section further provides that if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D.C. 20250, for inclusion in the file of this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice be given to the Office of the General Counsel, USDA, Washington, D.C. 20250.

On the Secretary's jurisdiction to issue this order, see discussion in *Neugebauer* v. *Ryken*, Civ. 74–4018, U.S.D.C., D. So. Dak., So. Div. 1975, 34 Agric. Dec. 1712; *Mid-South Order Buyers, Inc.* v. *Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W.2d 229, 41 Agric. Dec. 48 (1982).

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see rule 17 of the Rules of Practice, 9 CFR § 202.117. On respondent's right to judicial review hereof, see *Maly Livestock Commission* v. *Hardin, et al.*, 446 F.2d 4, 30 Agric. Dec. 1063 (8th Cir. 1971). On complainant's right to judicial review hereof, see *United States* v. *I.C.C.*, 337 U.S. 426.

ORDER

Within 30 days of the date hereof, Larry Ryken d/b/a Yankton Livestock Auction Market shall pay to Mitchell Livestock Auction

Co., the sum of $45,334.58 plus interest thereon at the rate of 13 percent per annum from November 1, 1981, until paid.

The complaint of Daniel Lammers against Larry Ryken d/b/a Yankton Livestock Auction Market is hereby dismissed.

The cross-claim in Docket No. 5994, the counterclaim of the same amount in Docket No. 5996, and the amended counterclaim in Docket No. 5996 of Larry Ryken d/b/a Yankton Livestock Auction Market against Daniel Lammers are hereby dismissed.

Copies hereof shall be served upon the parties.

MIKKELSON BEEF *v.* LEE BREITSPRECHER. P&S Docket No. 6284. Decided September 30, 1986.

Burden of proof of damages not carried—Dismissal

Complainant sought damages resulting from loss of yield, death loss and labor cost due to fluke infestation in cattle bought from respondent, alleging respondent knew of the fluke infestation, but concealed that knowledge from complainant at time of consignment. Investigations showed that respondent did not reside in the Victoria, Texas, area, where the livestock originated and where fluke infestation is known to be a common problem, and there is no evidence that respondent was advised of the fluke problem. It was thus ruled that complainant had not carried the burden of proving that repondent concealed the fluke problem and accordingly, the complaint was dismissed.

Jory Hochberg, Presiding Officer.
Ben Goff, Oklahoma City, OK, for complainant.
Jock West, Billings, Montana, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*). Complainant filed a formal complaint on July 14, 1983, alleging the purchase on June 16, 1983, of 274 head of cows which had been consigned by the respondent at the Oklahoma City Stockyards. The complainant seeks damages of $8,796.96, resulting from loss of yield, death loss, and labor costs due to fluke infestation in the cattle. Complainant alleges that respondent had knowledge of the fluke infestation and concealed that knowledge at the time of consignment.

A copy of the investigative report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the rules of practice (9 CFR 202.101 *et seq.*) was served on the complainant. A copy of the complaint and the investigative report was served on respondent, who subsequently

filed an answer and request for oral hearing which was served on the complainant. Thereafter, the complainant filed a reply which was served on the respondent.

An oral hearing was scheduled to take place in Denver, Colorado, on October 3 and 4, 1984. At complainant's request, the hearing was subsequently rescheduled for December 4 and 5, 1984. However, on November 29, 1984, counsel for both parties orally requested and were granted a postponement of the hearing and, in a telephone conference on December 4, 1984, the parties expressed a desire for a written hearing. It was then agreed that ten days after receiving respondent's withdrawal of oral hearing request, complainant's notice of opportunity to file evidence would be filed. However, on June 4, 1985, the oral hearing was rescheduled for August 5 and 6, 1985, as a result of respondent's failure to withdraw its oral hearing request or report the status of the proceeding. Then, on August 2, 1985, respondent filed his withdrawal of oral hearing request and the scheduled oral hearing was postponed. The parties subsequently requested and were granted extensions of time to file written evidence. Neither party filed written evidence or briefs.

FINDINGS OF FACT

1. Mikkelson Beef, Inc., hereinafter referred to as the complainant, is a corporation whose business address is 103 S.E. 8th, Oklahoma City, Ohlahoma 73125. Complainant is engaged in the business of buying livestock in commerce for purposes of slaughter as a packer, within the meaning and subject to the provisions of the Act.

2. Lee Breitsprecher, doing business as Two B Cattle Company, hereinafter referred to as the respondent, is an individual whose business address is 2872 Highway 87 East, Billings, Montana 59101. At all times material herein, respondent was engaged in the business of buying and selling livestock in commerce for his own account as a dealer within the meaning and subject to the provisions of the Act.

3. During the first two weeks of June 1983, respondent purchased approximately 1200 head of cows owned by four separate partnerships and located at different locations in the Victoria, Texas, region.

4. About 700 or 800 of these cattle were sold by respondent to packers in the Nebraska and Oklahoma region during the period from approximately June 13, 1983, to June 20, 1983. The remaining 473 head were consigned by respondent for sale at the Oklahoma City Stockyards, hereinafter the stockyards, on June 16, 1983.

5. The 1200 head sold and consigned by respondent all appeared to be healthy at the time of arriving at the various packing plants and at the stockyards.

6. Complainant purchased 274 of the 473 head consigned by respondent at the stockyards on June 16, 1983.

7. Complainant slaughtered the 274 head at its plant during the period June 17, 1983, through June 20, 1983. Upon slaughter, it was first discovered by complainant that these cattle were heavily infested with liver flukes. All, but about a dozen livers were condemned by the U.S.D.A meat inspector at complainant's plant. Other substantial portions of the cows also had to be removed in order for the carcasses to pass inspection.

8. The complaint in this proceeding was filed within 90 days of the accrual of the cause of action.

CONCLUSIONS

Absent fraud, misrepresentation, concealment or an express warranty, the buyer bears the risk of loss after title passes. *Robert Allen* v. *Clarence Acker*, 34 Agric. Dec. 872 (1975); *Wagner Mills, Inc.* v. *Paul Spence, et al.*, 34 Agric. Dec. 1339 (1975); *Preston* v. *Melady Bros.*, 34 Agric. Dec. 1543 (1975). In the present proceeding the salient issue is whether respondent was aware at the time of consignment of the fluke infestation in the cattle complainant purchased on June 16. There is evidence that respondent received a telephone call from the cattle buyer for Northern State Beef Co., Omaha, Nebraska, on June 15. During that conversation, respondent was told that there was excessive liver condemnation for fluke infestation in 189 head which respondent had delivered to that packer on June 13. It is clear that these 189 head were a portion of the 1200 which respondent purchased in Texas. Nevertheless, this is insufficient in itself to place respondent on notice that the cattle consigned to the stockyards were also infested.

First, as found above, the 1,200 head purchased by respondent were owned by four different partnerships and were being shipped from at least two different locations. The trucker who transported the 189 head to Northern State informed the Packers and Stockyards investigator that those particular cattle came from McFaddin, Texas. The health permits for the livestock purchased by complainant, on the other hand, show that the animals purchased by complainant originated at Refugio, Texas, approximately 30 miles from McFaddin. Complainant's prior knowledge of fluke infestation in one of the herds is not sufficient in itself to place him on notice that this problem existed at other locations. It is noteworthy that after Northern's kill on June 14 revealed the fluke infestation, the

Northern buyer agreed to purchase a second lot of cows which respondent stated were owned by the same people, but were kept at a different location. In addition, there is evidence that some of the 1200 head purchased by respondent and sold to Ken Myers Meat Packing Co., Cincinnati, Ohio, did not have a fluke problem.

Nor can complainant rely on the fact that flukes are known as a common problem in the Victoria, Texas, region to carry its burden of proving that the respondent knew of this problem. Respondent does not reside in that region and there is no evidence that he was advised of the fluke problem. It is also clear from the record that respondent informed the commission firm which handled the June 16 sale that the cattle were from Victoria, Texas. This indicates that he was not attempting to conceal the origin of the cattle from others who may have been familiar with this problem.

In concluding that complainant has not carried its burden of proving that respondent concealed the fluke problem, I have taken into account an investigator's summary of a conversation with an employee of Gibbon Packing Co., Gibbon, Nebraska, which is contained in the record. During this conversation, the employee reportedly stated that Gibbon purchased 140 head from respondent and slaughtered these cattle on June 16. The employee further stated that the cattle were infested with flukes and that he subsequently telephoned respondent to tell him that Gibbon would only purchase additional animals if they were significantly discounted. The respondent then reportedly stated he would just sell the rest of them live. The Gibbon employee also stated that at the time of this transaction, the live-cow market was better in Texas than in Nebraska, so he could not understand why respondent had wanted to sell the cattle in Nebraska.

While this statement raises questions concerning respondent's knowledge and intent, it is not a sworn statement of a witness, but a recitation of a telephone conversation with another individual. Moreover, it seemingly contradicts established facts in the record. One must note that at the time of the conversation, respondent had already consigned the cows at the Oklahoma Stockyards, and these were the only cows which he sold "live" (in fact, the record indicates that respondent had probably already sold all of the 1200 cows at the time of this conversation). Consequently, the statement of this packing plant employee, in its present form and without further development, cannot carry complainant's burden of proof.

ORDER

Accordingly, the complaint in this proceeding, is hereby dismissed.

MOLDENHAUER PROPERTIES *v.* CLAYTON NEUROHR P&S Docket No. 6653. Decided October 6, 1986.

Fraud alleged in livestock sale but no evidence thereof—Dispute held satisfied when payment accepted—Dismissal.

Findings show that respondent Clayton Neurohr bought four semi-truck loads of lambs from complainant Moldenhauer Properties. A dispute then arose regarding payment terms. Complainant, while accepting check, objected to the amount paid for the four loads of lambs. Respondent maintained he did not owe anymore than was paid to complainant by the packers. Satisfaction of the dispute occurred when respondent tendered and complainant accepted the check in payment. Based on these facts, it must be concluded that there was an accord and satisfaction of the dispute. While there was some indication of fraud—understated weights determined after settlement by the Packers and Stockyards Administration—in its execution, present proceeding has neither the evidence nor juridiction to determine respondent's liability, if any, regarding such fraud. Accordingly, complaint was dismissed.

Ben Bruner, Presiding Officer.
Pro se, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*). This proceeding arose out of a dispute between the parties over the payment terms of the sale of four loads of lambs purchased on order to two packers by defendant from complainant during the latter part of December, 1984. Complainant filed a formal complaint on September 16, 1985. On January 31, 1985, complainant agreed to a settlement of the dispute based on live weight records provided by one of respondent's principals. These weights were later determined by the Packers and Stockyards Administration to be false and the complainant chose to continue prosecuting his complaint.

A copy of the investigative report prepared by the Packers and Stockyards Administration of the Department of Agriculture and filed in this proceeding pursuant to the rules of practice (9 CFR § 202.101 *et seq.*) was served on the complainant. A copy of the complaint and the investigation report were served on respondent, who subsequently filed an answer and request for oral hearing which

was served on the complainant. Thereafter, the complainant filed a reply which was served on the respondent.

An oral hearing was held on April 29, 1986. Both sides presented themselves *pro se* until the time of the hearing. The morning of April 29, 1986 respondent arrived at the hearing with counsel and has thereafter been represented by Charles T. Edin, Esq. Complainant has continued *pro se* representation. At the conclusion of the hearing, each party was given 45 days to file additional information for consideration by the presiding officer. In addition, complainant was given 30 days after the receipt of additional information from defendant to respond to that additional information. On June 12, 1986, respondent filed a brief and several affidavits with the U.S.D.A. Hearing Clerk. Complainant did not make any response.

FINDINGS OF FACT

1. Moldenhauer Properties, the complainant, is a partnership engaged in the feeding of cattle and sheep. Ed Moldenhauer, his son Clyde Moldenhauer and their respective spouses are the partners constituting Moldenhauer Properties. The business address of complainant is Route 4, Box 148, Minot, North Dakota 58701.

2. Clayton Neurohr, the respondent, is a livestock dealer and order buyer registered with the Secretary of Agriculture as a "Dealer" and a "Market Agency Buying on Commission." The respondent's address is Box 65, Halliday, North Dakota 58636.

3. In late December 1984, complainant and respondent entered into an agreement whereby respondent would purchase four semitruck loads of lambs from complainant on order. Three loads were purchased on order for Iowa Lamb Corporation of Hawarden, Iowa and one load was purchased for Mid-America Lamb Processing, Inc. of Paulina, Iowa.

4. In January, 1985, a dispute arose between complainant and respondent regarding the payment terms of the agreement. Complainant contended that they were to be paid 63¢/cwt on the live weights of the lambs as determined by the packer at the time of receipt. Respondent contended that he had made clear to complainant that those terms only applied if the lambs yielded 52% after slaughter.

5. On January 31, 1985, respondent agreed to resolve the dispute by paying complainant the difference between what they received from the Iowa Lamb Corporation and 63¢/cwt on the live weights of the animals. With the assistance of Packers and Stockyards Administration officials, using records furnished by Iowa Lamb Corporation, the parties determined $1,408.05 to be the amount due. Re-

spondent issued a check on February 15, 1985 for that amount. Complainant subsequently deposited the check.

6. After the settlement was executed by the parties, the Packers and Stockyards Administration determined that the weights provided by Iowa Lamb Corporation were false and understated the actual live weights of the lambs.

7. The informal complaint was received on January 14, 1985 within 90 days of the accrual of the cause of action.

CONCLUSIONS

The threshold issue is what, if any, effect does the settlement between the parties of January 31, 1985 have on the disposition of this case. More specifically, it must be determined if the settlement constituted an accord and satisfaction of the dispute such that complainant is estopped from seeking further legal redress. Three elements must be present in order for a defense of accord and satisfaction to prevail. First, there must be a bona fide dispute over a preexisting contract. Second, there must be a compromise whereby one party agrees to pay the other party a sum in excess of that which he admitted he owed and the receipt by the other party of a sum less than what he claimed was due him, all for the purpose of settling the dispute. Third, the parties must perform (satisfy) the settlement agreement. *See, Delharme Industries, Inc.* v. *Houston Beechcraft, Inc.*, 669 F.2d 1049 (5th Cir. 1982).

There is no doubt that a bona fide dispute arose regarding the sale by complainant of the four loads of lambs to respondent. Complainant objected to the amount it was paid for the four loads of lambs and respondent maintained throughout that he did not owe any more than what was paid to complainant by the packers.

A more difficult issue is raised regarding whether complainant agreed to discharge its claim in exchange for an amount less than it claimed. Initially, complainant sought approximately $11,000.00 from respondent. Respondent paid complainant $1,408.00 for what he believed was a final settlement. This settlement was mediated by a representative of the Packers and Stockyards Administration. The amount $1,408.00, was arrived at by determining the live weights of the lambs from scale tickets provided to officials of the Packers and Stockyards Administration by Iowa Lamb Corporation and multiplying the total live weight by 63¢ and subtracting the amount paid complainant by Iowa Lamb Corporation. Complainant received a check for $1,408.00 from the respondent and deposited it immediately.

Testimony from both Mitch Moldenhauer, complainant's clerk and Ed Moldenhauer, a principal of complainant indicated that

they did not consider the $1,408.00 settlement to be final. The Packers and Stockyards Administration report of investigation into this dispute, however, states that "[o]n January 31, 1985, Neurohr agreed to make settlement to Moldenhauer. . . . "Settlement" in the ordinary sense of the term implies final. It must therefore be concluded that the Packers and Stockyards Administration official who mediated the dispute believed that a final settlement was reached. It must also be assumed that the Packers and Stockyards Administration official indicated to the complainant that the negotiations were for a final settlement. There is no logical purpose in doing anything less. Although testimony from Mitch and Ed Moldenhauer indicated otherwise, on the whole, it is inconceivable that complainant did not consider the payment of $1408.00 to be a final resolution of the dispute. The second element of an accord and satisfaction is, therefore, satisfied.

Satisfaction of the dispute clearly occurred when respondent tendered and complainant accepted and deposited the check. Based on all of these facts it must be concluded that there was an accord and satisfaction of the dispute of $1408.00.

As in the case of other contracts, this accord and satisfaction could be set aside if there was evidence of fraud, mistake or accident. *See, Kirkpatrick* v. *Templeton Sales Yard*, 33 Agric. Dec. 639 (1974). The record is clear that a determination was made by the Packers and Stockyards Administration and is not disputed by respondent that the scale tickets upon which the settlement was based are false. No evidence is contained in the record that would indicate the respondent fraudulently falsified the scale tickets or even knew of their falsification at the time of the settlement. This proceeding is without jurisdiction over meat packers. Iowa Lamb Corporation is a meat packer and the entity from which the allegedly false scale tickets were acquired. There is also no evidence of what relationship existed between the respondent and Iowa Lamb Corporation at the time of the alleged fraud, thereby precluding any determination of an agency relationship between them at that time. Without more facts and the presence of Iowa Lamb Corporation in this proceeding it is impossible to determine what if any fraud occurred and what part if any might be attributable to the respondent.

An accord and satisfaction of the dispute took place on or about January 31, 1985 and while there is some indication of fraud in its execution, this proceeding has neither the evidence nor the jurisdiction to determine the liability of respondent, if any, regarding that fraud. It is therefore not necessary to reach the merits of com-

plainant's allegations as there is nothing in the record that would abrogate the January 31, 1985 settlement.

ORDER

Accordingly, the complaint in this proceeding is hereby dismissed.

DISCIPLINARY DECISIONS

In re: EMERSON ELLIOTT PRODUCE, respondent. PACA Docket No. 2-6970. Decided September 16, 1986.

Decision by Donald Campbell, Judicial Officer.

Edward Silverstein, for complainant.
Raymond J. Rotella, for respondent.

ORDER DENYING RECONSIDERATION

COMES NOW EMERSON ELLIOTT, by and through his undersigned Attorneys, and asks this Court to reconsider and rehear the August 22, 1986 ruling denying the Motion to Amend Clerical Errors as untimely, and specifically points out to this administrative officer, in all Rules of Civil Procedure, there is never any time set for correcting clerical mistakes in Judgments. See Federal Rules of Civil Procedure, Rule 60(a).

Since the final decision of this Court contains an improper reference to King's Creek Canning Co., Inc., which creditor proceeding was dismissed, and not a ground which could therefore be utilized for disciplinary action, same should be corrected.

WHEREFORE, Emerson Elliott prays for entry of an Order accordingly.

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Edward M. Silverstein, Esquire, Office of the General Counsel, United States Department of Agriculture, Room 2446, South Building, Washington, D.C. 20250 this 5th day of September, 1986.

MOTION DENIED for reasons previously stated. This is not a "clerical mistake".

In re: FELDMAN BROTHERS PRODUCE, INC. and JOSEPH FELDMAN CORPORATIONS a/t/a THE GREAT AMERICAN PRODUCE COMPANY. PACA Docket No. 2-7075. Decided September 18, 1986.

William J. Weber, Administrative Law Judge.
Eric Paul, for complainant.
Stephen A. Markus, Cleveland, Ohio, for respondents.

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*;

hereinafter referred to as the "Act"), instituted by a complaint filed on January 28, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges among other things, that during the period September 1984 through February 1985, Respondent failed to make full payment promptly to 85 sellers, of the agreed purchase prices, or balances thereof, in the total amount of $1,087,262.29 for 324 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce. Such actions were alleged to constitute willful, flagrant and repeated violations of the PACA. A copy of the complaint was served upon Respondents. Respondents filed an Answer admitting their licensing under the PACA and the termination of such licenses upon their failure to pay the required annual license fees. Respondents denied all other material allegations of the complaint and raised a number of affirmative defenses. Respondents and Complainant have now agreed to the entry of the Findings of Fact and a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Feldman Brothers Produce Company, Inc., and Joseph Feldman, Inc., (hereinafter "Respondents"), are Ohio corporations, whose business address was 1730 Hubbard Road, Youngstown, Ohio 44505 and whose mailing address was P. O. Box 1345, Youngstown, Ohio 44505.

Pursuant to the licensing provisions of the PACA, license number 150372 was issued to Feldman Brothers Produce Company, Inc., on March 25, 1984. This license was renewed annually, but terminated on March 25, 1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee. In addition, license number 127106 was issued to Joseph Feldman, Inc., on March 23, 1950. This license was renewed anually, but terminated on March 23, 1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee.

3. The Secretary has jurisdiction over Respondents and the subject matter involved herein.

4. Jacob A. Frydman and Ellyse Frydman were responsibly connected with Respondent, Feldman Brothers, Inc., during the period November 16, 1984 through January 25, 1985.

5. During the period September 1984 through February 1985, Respondents failed to make full payment promptly to numerous sellers of the agreed purchase prices, or balances thereof for numerous lots of perishable agricultural commodities, purchased, received, and accepted in interstate commerce.

CONCLUSIONS

Respondents have committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 5, above, for which the Order below is issued.

ORDER

A finding is made that Respondents have committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), and the facts and circumstances set forth above shall be published.

Neither Jacob A. Frydman nor Ellyse Frydman, shall be involved in the perishable agricultural commodities industry as a responsibly connected person in perpetuity.

This order shall become effective on service.

Copies hereof shall be served upon the parties.

In re: A. LEVY DISTRIBUTING CO., INC. PACA Docket No. 2-7095. Decided August 13, 1986.

Dorothea A. Baker, Administrative Law Judge.
Edward Silverstein, for complainant.
Richard A. Harris, Fresno, Calif., for respondent.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on February 19, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1983 through March 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 29 sellers, 59 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the

agreed purchase prices or balances thereof in the total amount of $132,460.30. Also, it is alleged that, during the period June 1984 through January 1985, respondent, acting as a broker, negotiated transactions on behalf of four principals (two of whom are among the 29 sellers) involving six lots of fruits and vegetables, all being perishable agricultural commodities, in interstate commerce, that it was authorized to collect the proceeds from such transactions on behalf of these principals, that it did make such collections, but that it failed to account truly and correctly to these principals and failed to remit to them a total of $9,764.14.

A copy of the complaint was served upon respondent, which filed an answer thereto in which it generally denied the material allegations in the complaint, but admitted the allegations in the complaint regarding its bankruptcy filing. Complainant now has filed a motion for a decision generally based on respondent's admissions in its bankruptcy proceeding.[1] Based upon these admissions, the precedent which this forum is bound to follow requires that complainant's motion be granted.[2] Therefore, upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, A. Levy Distributing Co., Inc., is a corporation, whose address is 1559 West Shaw Avenue, Fresno, California 93711.

2. Pursuant to the licensing provisions of the Act, license number 830669 was issued to respondent on March 11, 1983, was renewed annually, presently is in effect, and was next subject to renewal on or before March 11, 1987.[3]

3. As more fully set forth in paragraph 5 of the complaint,[4] during the period June 1984 through January 1985, respondent, acting as a broker, negotiated transactions on behalf of four principals, involving six lots of fruits and vegetables, all being perishable agricultural commodities, in interstate commerce. In accordance with agreements between respondent and its principals, respondent

[1] Official notice is taken of the pleadings filed by respondent in this proceeding which was designated Case No. 185-01307, U.S. Bkrtcy. Ct., E.D. CA.

[2] *See Fava & Company, Inc.*, 43 Agric. Dec. ___ (PACA Docket No. 2-6547, December 4, 1984) (Ruling on Certified Question).

[3] The complainant alleged that respondent's license was renewable on March 11, 1986. Official notice is taken of the fact that the Department's records reflect that respondent has renewed its license, and that it is now renewable on March 11, 1987.

[4] This paragraph was misnumbered as ¶ 6 of the complaint, but was actually the fifth paragraph.

was authorized to negotiate sales or consignment transactions of fruits and vegetables, collect the authorized purchase prices or net proceeds for the fruits and vegetables, and remit the proceeds collected to the sellers, less the reasonable brokerage fee. Respondent invoiced the various receivers for the shipments of fruits and vegetables collected the proceeds for said shipments, but failed to account truly and correctly and to remit to the sellers the monies due them which totalled $9,764.14.

4. As more fully set forth in paragraph 6 of the complaint, during the period November 1983 through March 1985 respondent purchased, received and accepted in interstate and foreign commerce, from 29 sellers, 59 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $132,460.30.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 65 transactions set forth in Findings of Fact Nos. 3 and 4, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on September 19, 1986.—Ed.]

In re: AAA PRODUCE COMPANY. PACA Docket No. 2-7324. Decided October 28, 1986.

Dorothea A. Baker, Administrative Law Judge.
Peter Train, for complainant.
Leslie A. Davis, St. Louis, Missouri, for respondent.

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on September 29, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period October, 1985, through March, 1986, respondent AAA failed to make full payment promptly to 18 sellers of the agreed purchase prices, or balances thereof, in the total amount of $451,000.31 for purchases of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce. The complaint further alleges that with respect to certain of these lots of perishable agricultural commodities, purchased in transactions between October, 1985, and February, 1986, 14 of these sellers timely filed written notices preserving statutory trust interests totalling $305,693.91 and that the respondents failed to maintain and dissipated assets subject to such trust. Such actions were alleged to constitute willful, flagrant and repeated violations of the PACA. A copy of the complaint was served upon the respondent. Respondent and complainant have now agreed to the entry of the Findings of Fact and a Decision and Order as set forth herein. Therefore, pursuant to section 1.138 of the Rules of Practice (7 CFR § 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. AAA Produce Company, hereinafter referred to as respondent, is a corporation whose mailing address is 3914 North 25th Street, St. Louis, Missouri 63107.

2. Pursuant to the licensing provisions of the PACA, license number 199643 was issued to the respondent on February 8, 1963. The license is next subject to renewal on or before February 8, 1987.

3. Chad Lombardo, Mike Lombardo, Avis I. Lombardo and Barbara J. Lombardo are individuals whose mailing address is 3914 North 25th Street, St. Louis, Missouri 63107.

4. The owners and officers of respondent AAA are, and at all times material herein were:

(a) Chad Lombardo, President and 10 percent stockholder;

(b) Mike Lombardo, Chairman of the Board and 45 percent stockholder;

(c) Avis I. Lombardo, Vice-President and 45 percent stockholder; and

(d) Barbara J. Lombardo, Secretary.

5. Chad Lombardo, Mike Lombardo, Avis I. Lombardo and Barbara J. Lombardo are responsibly connected with the respondent within the meaning of that term as defined in the PACA (7 U.S.C. § 499a(9)).

6. The Secretary has jurisdiction over respondent and the subject matter involved herein.

7. As set forth more fully in paragraph 6 of the complaint, during the period October, 1985, through March, 1986, respondents failed to make full payment promptly to 18 sellers of the agreed purchase prices, or balances thereof, in the total amount of $451,000.31 for purchases of perishable agricultural commodities, purchased, received, and accepted in interstate commerce.

8. Respondent admits that it received statutory trust notices from some unpaid sellers in the amount of approximately $80,000.00 and that it failed to maintain and wilfully dissipated assets subject to such trust interests.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 7 above and by failing to maintain the trust interests set forth in Findings of Fact No. 9, above, for which the Order below is issued.

ORDER

Respondent AAA's license is revoked, *Provided, however*, that if AAA makes full payment of the amount due and owing referred to in Finding of Fact No. 7 herein on or before December 15, 1986, the revocation will be remitted to a suspension of the license for 90 days commencing on March 1, 1987.

Chad Lombardo, Mike Lombardo, Avis I. Lombardo and Barbara J. Lombardo, as responsibly connected individuals with AAA,

cannot be employed by any licensee under the Act while AAA's license is suspended.

This order shall become effective on December 15, 1986.

Copies hereof shall be served upon the parties.

In re: HANCOCK NELSON a/t/a CFC WHOLESALE GROCER, CARPENTER COOK, Co., ROBERTS WHOLESALE FOODS. PACA Docket No. 2-7159. Decided September 22, 1986.

Edward H. McGrail, Administrative Law Judge.
Andrew Stanton, for complainant.
Pro se, for respondent.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on April 23, 1986, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August 1985 through December 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 39 sellers, 202 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $417,822.50.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Hancock Nelson a/t/a CFC Wholesale Grocer, Carpenter Cook Co., and Roberts Wholesale Foods, is a corporation, whose address is 807 Hampden Avenue, St. Paul, Minnesota 55114.

2. Pursuant to the licensing provisions of the Act, license number 851141 was issued to respondent on May 14, 1985, was renewed annually, presently is in effect, and is next subject to renewal on or before May 14, 1987.

3. As more fully set forth in paragraph 5 of the complaint, during the period August 1985 through December 1985 respondent purchased, received and accepted in interstate and foreign commerce, from 39 sellers, 202 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $417,822.40.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 202 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on October 29, 1986.—Ed.]

REPARATION DECISIONS

MICHAEL S. McKAY d/b/a OLYMPIC PRODUCE *v.* RICHARD SHELTON d/b/a MID-VALLEY BROKERAGE COMPANY. PACA Docket No. 2-7216. Decided September 4, 1986.

Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely formal complaint was filed on February 24, 1986. Complainant seeks to recover $2,268.75 which amount is alleged to be the total purchase price for a trucklot of onions sold to and accepted by respondent on November 22, 1985. Respondent filed an answer to the formal complaint on June 27, 1986, admitting that $934.19 of the amount claimed by complainant was due and owing to complainant on account of the transaction involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $934.19. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

It is noted that, in his answer, respondent claims that no interest should be awarded on this amount because he had previously offered it to complainant who refused it. However, respondent's offer was in settlement of the matter and, had it been accepted, would have resulted in an accord and satisfaction. Therefore, complainant could not have accepted the offer. Accordingly, it is proper to award interest on this amount.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

EVERKRISP VEGETABLES, INC., *v.* ROBERT W. CASTO d/b/a PRIMA CITRUS & FRUIT EXCHANGE. PACA Docket No. 2-7219. Decided September 4, 1986.

Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely formal complaint was filed on February 6, 1986. Complainant seeks to recover $9,920.25 which amount is alleged to be the remaining balance for honeydew melons sold to and accepted by respondent on October 21 and October 29, 1985. Respondent filed an answer to the formal complaint on June 3, 1986, admitting that $622.50 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $622.50. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

NAT FEINN SALES CORPORATION *v.* WEINSTEIN PRODUCE SALES, INC.
PACA Docket No. 2-7329. Decided September 4, 1986.

Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,014.35 in connection with a shipment of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Nat Feinn Sales Corporation, is a corporation whose address is P. O. Box 848, Fresno, California 93712. Respondent, Weinstein Produce Sales, Inc., is a corporation whose address is P. O. Box 7364, Boise, Idaho. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,014.35. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,014.35, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

EARL J. ROY d/b/a AVOYELLES SWEET POTATO AUCTION a/t/a EARL J. ROY PRODUCE *v.* TERRIFIC TOMATO BROKERS, INC., a/t/a TERRIFIC TOMATOES. PACA Docket No. 2-6864. Decided September 5, 1986.

Price dispute—Reparation awarded.

Where complainant alleged parties agreed on firm price and respondent alleged parties agreed on the "market price", and market price was higher than amount complainant alleged as a firm price, reparation was awarded to complainant in the amount of the invoice.

Edward M. Silverstein, Presiding Officer.
Complainant and Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $31,253.00 in connection with two shipments of tomatoes in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. Respondent also was served with a copy of the formal complaint, and filed an answer thereto in which it admitted being obligated to complainant in the amount of $17,326.00, but denied any further liability to complainant. In addition, respondent enclosed its check in the amount of $17,326.00 made payable to the complainant which it authorized the Department to release to complainant as an undisputed amount. Subsequent thereto, that check was made available to complainant who negotiated it.

Although the amount claimed in the formal complaint exceeded $15,000.00, the parties waived oral hearing. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties is considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. The complainant filed a verified opening statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Earl J. Roy, is an individual doing business as Avoyelles Sweet Potato Auction and also trading as Earl J. Roy Produce, whose mailing address is P.O. Box 134, Hessmer, Louisiana 71341.

2. Respondent, Terrific Tomato Brokers, Inc. a/t/a Terrific Tomato Co., is a corporation whose mailing address is 11459 Little Bear Drive, Boca Raton, Florida 33429. At all material times, respondent was licensed under the Act.

3. On or about January 26, 1985, in the course of interstate commerce, complainant, by oral contract, sold to respondent a truckload of green tomatoes, U.S. Combination Grade, consisting of 588

6×6, 719 6×7, and 293 5×6 lugs, f.o.b. Immokalee, Florida. The tomatoes were the subject of a shipping point inspection on the same date and were graded as U.S. Combination Grade. On or about that same date, the complainant invoiced the respondent for the tomatoes at the following prices: $11.00 per lug for the 6×6 tomatoes, $9.00 per lug for the 6×7 tomatoes, and $13.00 per lug for the 5×6 tomatoes for a total f.o.b. price of $16,748.00.

4. On or about January 27, 1985, in the course of interstate commerce, by oral contract, complainant sold to respondent a truckload of green tomatoes, U.S. Combination Grade, consisting of 313 lugs 5×6, 766 lugs 6×6, and 521 lugs 6×7 tomatoes. On that same date, the tomatoes were the subject of a federal shipping point inspection and were graded as U.S. Combination Grade. Also, on that same date, the complainant invoiced the respondent for the tomatoes at the following prices: the 6×6 tomatoes at $9.00 per lug, the 6×7 tomatoes at $8.00 per lug, and the 5×6 tomatoes at $11.00 per lug, for a total f.o.b price of $14,505.00.

5. Each truckload of tomatoes was shipped on the day it was inspected, and was received by the respondent in good order. The respondent also received each of the invoices referenced above. On February 15, 1985, the respondent returned each of the invoices to the complainant, noting on each the following: "The prices on this invoice do not reflect market prices as agreed. Please rebill." Subsequent to receipt thereof, the complainant perfected his right to trust protection pursuant to section 5 of the Act (7 U.S.C. 499e), and resent the invoices to respondent.

6. On or about March 1, 1985, the respondent sent checks to the complainant in the amounts of $7,584.00 and $7,148.00 with respect to the shipments. By letter dated April 8, 1985, the complainant returned these checks to respondent.

7. As reported in the Federal-State Market News for Monday, January 28, 1985, the market price for mature green tomatoes in the relevant sizes, in Florida, on that date, were as follows: 5×6—$20.00, 6×6—$18.00, and 6×7—$16.00. Demand was noted as being "moderate," and the market was noted as being "steady." On the following day, demand was noted as being "light," and the market was noted as being "much lower." Also, on January 29, 1985, the prices for the relevant sizes of mature green tomatoes in Florida was noted as being as follows: 5×6—$15.00, 6×6—$14.00, and 6×7—$12.00.

8. The formal complaint was filed on May 22, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The sole issue in dispute between the parties concerns the price agreed upon for the two truckloads of tomatoes which respondent admits purchasing and receiving from complainant. Complainant alleges that the tomatoes were sold at specific agreed prices. The respondent contends, in contradistinction to this, that the prices were not specifically agreed upon, but rather were to be "market prices." The sales of these tomatoes took place on a Saturday and Sunday preceding a week in which the market prices of tomatoes apparently began to drop drastically. However, irrespective of the fact that the tomato prices dropped drastically on the Tuesday following the Saturday and Sunday sale of these two truckloads of tomatoes, the prices at which the complainant invoiced the respondent ($8.00–$13.00) were lower than even the market prices on that Tuesday ($12.00–$15.00). Therefore, even were we to rule in respondent's favor on the question of whether or not the parties agreed to a specific contract price, and hold that the parties did not so agree, but rather that they agreed the tomatoes were to be billed at the "market price," we would still order it to pay the complainant the prices which the complainant invoiced it. In view of this, we hold that the respondent was obligated to the complainant in the total amount of $31,253.00. It has paid complainant $17,326.00, and remains obligated to complainant in the amount of $13,927.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, the respondent shall pay the complainant, as reparation, $13,927.00 plus interest at the rate of 13% per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

WOODY'S TOMATO CORP., *v.* D. SCOLARO PRODUCE COMPANY. PACA Docket No. 2-6870. Decided September 5, 1986.

Acceptance—Reparation.

Where respondent's customer unloaded tomatoes from truck, respondent is deemed to have accepted them and is liable for contract price.

Edward M. Silverstein, Presiding Officer.
Pro se, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,801.60 in connection with a shipment of tomatoes in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. The respondent filed a verified answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Woody's Tomato Corp., is a corporation whose mailing address is P.O. Box 962, Palmetto, Florida 33561.

2. Respondent, D. Scolaro Produce Co., is a corporation whose mailing address is Tampa Wholesale Produce Market, P.O. Box 11064, Tampa, Florida 33680. At all material times, respondent was licensed under the Act.

3. On or about May 9, 1984, the respondent placed an order with Mott and Simmons Brokerage and Sales Corp., P.O. Box 1105, LaBelle, Florida 33935, for two loads of 6×7 tomatoes. Later that day, the broker confirmed that the order had been placed with Ruskin Vegetable Corp., address unknown. On May 10, respondent was informed by Mott and Simmons that only one of these loads was placed in the gas room, but that the other load would be placed in the gas room later that same day. However, on May 11, Mott and Simmons informed respondent that Ruskin Vegetable Corp. would not be able to fill the order for the second load of 6×7 tomatoes.

Consequently, respondent instructed Mott and Simmons to purchase a second load from someone else. On or about May 15, 1984, Mott and Simmons reported to the respondent that it had placed the order for the second load of 6×7 tomatoes with complainant.

4. On or about May 15, 1984, in the course of interstate commerce, complainant, by oral contract sold to the respondent one truckload of tomatoes consisting of 1,584 cartons, size 6×7, grade Yes Mam, at an agreed price of $3.00 per carton, plus $237.60 for palletizing, $792.00 for gassing, and $20.00 for a temperature recorder, for a total agreed f.o.b. price of $5,801.60.

5. At sometime on the day on which the respondent purchased the subject load of tomatoes from complainant, it lost its customer for the load. It then requested that Mott and Simmons place the load elsewhere. Mott and Simmons was able to place the tomatoes with Fred Karem & Sons, Scranton, Pennsylvania.

6. The load of tomatoes was shipped to respondent's customer, Fred Karem & Sons, in Scranton, Pennsylvania, on or about May 16, 1984. The tomatoes were unloaded from the truck by Fred Karem & Sons. Without having them inspected, Fred Karem & Sons notified the respondent through Mott and Simmons that it was rejecting the load of tomatoes. It then had the load of tomatoes placed on board another truck and shipped to the East Tennessee Produce Co., Knoxville, Tennessee. On May 21, 1984, the tomatoes were the subject of a federal lot inspection at the place of business of East Tennessee Produce Company. The inspection certificate (F 048081) indicates that the tomatoes were unloaded from the truck, that the temperature of the tomatoes was 50 to 59°F, and that the condition of the tomatoes was as follows:

> Average approximately 5% turning or pink, and 85% light red or red. Decay ranges 2 to 22%, average 12%. Bacterial Soft Rot and Gray Mold Rot each mostly in advanced some in early stages. In most samples from 2 to 10 percent, in some none, average 4% damage by numerous sunken discolored areas occurring over the shoulders.

7. The respondent received $3,168.00 from East Tennesse Produce which also paid freight of $700.00.

8. The informal complaint was filed on August 30, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Inasmuch as the respondent's customer in Scranton, Pennsylvania, Fred Karem & Sons, unloaded the tomatoes from the truck, we must conclude that the respondent received and accepted the load

of tomatoes. *Thereon Hooker* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971). Having received and accepted the load of tomatoes, it is obligated to the complainant for the contract price, less any damages caused by a breach of contract committed by the complainant. The burden of proving such a breach and such damages is on respondent. *Sunny Ridge Farms* v. *Edward Dilatush & Co.*, 30 Agric. Dec. 961 (1971). There is no evidence that the complainant committed any breach of contract. Fred Karem & Sons, the respondent's customer in Scranton, Pennsylvania neglected to obtain a federal inspection with regard to the tomatoes. The tomatoes, therefore, were not inspected until May 21 in Knoxville, Tennessee. However, such an inspection, which took place after the tomatoes had been in transport from Florida to Pennsylvania, unloaded in Pennsylvania, reloaded, and then transported from Pennsylvania to Tennessee, over a five day period, cannot be said to reflect the condition of the tomatoes upon arrival in Pennsylvania on May 18, 1984. *Pan-American* v. *Hazzouri*, 25 Agric. Dec. 681 (1966). In view of this, we must conclude that the respondent has failed to prove any breach of contract on the part of the complainant. It is therefore obligated to the complainant for the full contract price, or $5,801.60.

In so concluding, we note that respondent may have had a cause of action against Mott and Simmon and/or Fred Karem & Sons under the Act for their actions or failures to act.[1] However, the existence of such a cause of action would not exculpate respondent from its liability to complainant. Respondent's failure to pay the complainant $5,801.60 is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, the respondent shall pay to complainant $5,801.60, as reparation, plus interest in the amount of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

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[1] Of course, it would have had to have made a timely filing of its complaint against one or both of them. *See* 7 U.S.C. § 499f.

S&H, INC. d/b/a IDA-PRIDE POTATO Co., *v.* GARY WATKINS PRODUCE Co., INC. PACA Docket No. 2-6884. Decided Sept. 5, 1986.

Broker—Risk of lack of authority of agents rests on party dealing with agent. Broker's apparent authority not shown. Reparation awarded.

Where buyer did not inquire to determine whether shipper's agent had actual authority to receive payment buyer assumed risk of each of authority and apparent authority cannot be implied on basis of buyer's limited experience with a different broker which in fact, had authority from the shipper to receive payment.

Thomas C. Heinz, Presiding Officer.
Fred J. Hahn, for complainant, Hazelton, Idaho.
William B. Schaeffer, Jr., Houston, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $19,370.00 in connection with the sale and shipment of a carload lot of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon respondent, which filed an answer denying liability. Although the amount claimed as damages exceeds $15,000, because neither party requested an oral hearing, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is being used in this proceeding. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. Both parties used their opportunities to submit additional evidence in the form of verified statements and to file briefs.

FINDINGS OF FACT

1. Complainant S&H, Inc., is a corporation doing business as Ida-Pride Potato Co., (hereinafter "Ida-Pride") with a mailing address at P.O. Box 68, Hazelton, Idaho 83335. At the time of the transaction involved herein, Ida-Pride was licensed under the Act.

2. Respondent Gary Watkins Produce Co. (hereinafter "Watkins") is a corporation with a mailing address at 3160 Produce Row, Houston, Texas 77023. At the time of the transaction involved herein, Watkins was licensed under the Act.

3. On or about May 8, 1984, Ida-Pride sold, by oral contract, to Watkins one carload of potatoes in interstate commerce at an agreed delivered price of $23,020.00.

4. The transaction involved herein was negotiated by Steve Weidenbaker, d/b/a Steve's Brokerage Co. of Humble, Texas, (hereinafter "Steve's") who acted as agent for Ida-Pride.

5. The potatoes were shipped on May 11, 1984, to Houston, Texas, where they arrived on May 15, 1984.

6. Without the authorization or knowledge of Ida-Pride, Steve's negotiated a reduction in price for the potatoes from $23,020.00 to $22,427.57 based upon Watkins' count of the different sizes of potatoes unloaded from the railroad car in Houston.

7. Without the authorization or knowledge of Ida-Pride, Steve's billed and collected $22,427.57 from Watkins as payment for the potatoes. Steve's has not remitted any portion of that payment to Ida-Pride.

8. In order to retain its credit with the railroad, Watkins has paid the railroad freight bill of $3,650.00 but has not paid Ida-Pride the remaining $19,370.00 of the purchase price of the carload of potatoes purchased on May 8, 1984.

9. The informal complaint was filed within nine months after the cause of action herein accrued.

SUBSIDIARY FINDINGS OF FACT AND CONCLUSIONS

Watkins contends it did not receive the original bill Ida-Pride mailed to Watkins in May of 1984, but only a copy which arrived in August of 1984, long after it had paid Steve's on June 13, 1984. Watkins argues that if Ida-Pride had used certified mail to send the May billing or if it had followed up within 30 days of shipment, Watkins would have been prevented from paying Steve's based upon Steve's misrepresentation that it was authorized to receive payment. Watkins further argues that Ida-Pride's past use of brokers to bill and collect cloaked Steve's with apparent authority to do so in the instant case, and that Watkins reasonably relied upon that apparent authority. Ida-Pride, on the other hand, contends it only authorized a few established brokers to bill and collect and would not grant such authority to a newly formed company such as Steve's with no established credit rating. Therefore, Ida-Pride argues, Steve's did not have apparent authority to receive payment.

Since there is no requirement that shippers send bills by certified mail or follow-up unpaid billings within 30 days, Watkins' argument in this regard cannot be credited.

Steve's had no actual authority to receive payment. The question is whether it had apparent authority as a result of Ida-Pride conduct. Although Ida-Pride used brokers for approximately 75% of its business, only three long-established firms had been granted au-

thority to bill and collect: C.H. Robinson Company, Tom Lange Company, and Ruby Robinson Company. Watkins had bought and paid for Ida-Pride potatoes through only one of these, C.H. Robinson Company, on only three occasions in September and October of 1983 before the transaction in dispute occurred in May 1984. This very limited experience with C.H. Robinson Company was not sufficient ground for Watkins reasonably to conclude that Steve's had the same authority to bill and collect for Ida-Pride as did C.H. Robinson, particularly when Steve's was a new company without demonstrated financial reliability. A grant of authority to one broker agent by a shipper does not in itself constitute a grant of the same authority to all broker agents of that shipper.

In *Pasco County Peach Association* v. *J.F. Smolley & Company*, 164 F. 2d (4th Cir. 1949), 8 Agric. Dec. 327 (1949), the Fourth Circuit Court refused to imply a seller's agent had authority to receive payment in the absence of actual authority and stated: "The rule was long ago established that when one deals with or through an agent he assumes all the risks of lack of authority in the agent . . . The burden of any necessary diligence to ascertain the agent's authority rests on the party dealing with the agent." 146 F. 2d 880, 883. Further, the mere authority to sell does not confer the authority to receive payment. *J. Manning & Co.* v. *Bass & Swaggerty* 34 Agric. Dec. 1036 (1975). *J. Manning & Co.* v. *Red's Market*, 33 Agric. Dec. 1848, and cases cited at 1851-2 (1974).

When Watkins did not inquire to determine whether Steve's in fact had actual authority to receive payment, it assumed the risk that Steve's did not have such authority, and authority to receive payment cannot be implied under the circumstances of this case. Therefore, payment to Steve's and the later payment of freight to the railroad does not discharge Watkin's liability to Ida-Pride. Failure to pay Ida-Pride the full purchase price of the potatoes minus freight constitutes a violation of section 2 of the Act for which reparation should be awarded.

ORDER

Within 30 days from the date of this order, respondent, Gary Watkins Produce Co., Inc., shall pay to complainant, S&H, Inc., as reparation $19,370.00, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

SUNSHINE STATE PRODUCE SALES, INC. *v.* SUMTER VEGETABLE COOPERATIVE. PACA Docket No. 2-6899. Decided September 5, 1986.

Failure to pay total commission—failure to prove—reparation awarded.

From findings it emerges that complainant and respondent entered into contract whereby complainant would act as grower's agent in sales of respondent's produce. On sales effected, complainant was to receive 6% commission, but respondent failed to pay total due. He alleged he was entitled to credit for six transactions handled by complainant, but in this claim respondent was nebulous and submitted insufficient evidence supporting the claim. Respondent was, accordingly, directed to pay reparation to complainant in the amount of the unpaid commission due, plus interest.

George S. Whitten, Presiding Officer.
Pro se, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $10,332.66 in connection with the shipment in interstate commerce of numerous loads of mixed perishable produce. A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant, and asserting a counterclaim arising out of the same transactions. Complainant filed a reply to the counterclaim.

The amount claimed in neither the formal complaint nor counterclaim exceeds $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Sunshine State Produce Sales, Inc., is a corporation whose address is 1500 West Atlantic Boulevard, Pompano Beach, Florida. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Sumter Vegetable Cooperative, is a corporation whose address is P.O. Box 648, Webster, Florida. At the time of the transactions involved herein respondent was licensed under the Act.

3. At some time during the latter part of April or the early part of May of 1984, complainant and respondent entered into a contract whereby complainant would act as a grower's agent on behalf of respondent in the sale of respondent's produce. Complainant delivered to respondent a written document setting forth the terms of their agreement, and stating that selling charges would be 6% of gross sales, and further stating in relevant part as follows:

> How sales will be made: Naturally we shall do our utmost to sell everything at a firm F.O.B. price. However, authority is granted to us to dispose of your produce according to market, weather and quality conditions as to what we think is to your best advantage. When this becomes necessary, we shall use certain firms with which we have done business for years, also brokers and commission merchants. On such sales, we shall return to you the net proceeds less our customary selling charge. As a normal practice we will not pool or co-mingle various grower's merchandise. However, if it becomes necessary to do so to make a sale, we have the authority to do so.
>
> The Grower's Agent has the authority to make any adjustments or allowances; also the agent will file all claims on behalf of the Growers. In the event of trouble, the Agent shall determine the necessity of inspections or dump certificates.

4. Gross sales amounted to $1,189,822.40, and the 6% commission on such sales amounted to $71,389.34. Of this amount respondent has paid to complainant $58,449.42, leaving a balance of $12,939.92.

5. The informal complaint was filed on October 9, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover commissions earned under its grower's agent contract with respondent. Initially complainant alleged that it was aware of receipts totalling $1,150,731.42, which would warrant commissions in the total amount of $69,043.89. Complainant stated that it had received $58,711.23 of this amount from respondent. Complainant also asserted there were other sales after June, 1984, for which complainant had received no commission. During the informal stages of this

proceeding complainant admitted that it owed an outstanding balance of $4,592.50 to respondent which should be deducted from the total balance due by respondent to complainant.

Respondent, in its answer, agreed with all of the figures submitted by complainant, and referred to above, except that respondent showed that its payment to complainant amounted to $58,449.42, or $261.81 less than claimed by complainant. It is interesting that complainant in making the often repeated assertion that respondent had paid $58,711.23, attached as an exhibit to its complaint a copy of the check issued by respondent to complainant in the amount of $58,449.42, as well as an accounting from respondent showing the same figure. Neither complainant nor respondent ever explained the discrepancy. We can only surmise that the higher figure used by complainant is to be accounted for by complainant's having credited respondent with the $261.81 discussed below relative to "exhibit" 1. In view of this probability we have used the lower payment figure claimed by respondent in all our computations herein. Subtracting this payment figure, or $58,449.42, from the total of the commissions admitted to be due by respondent leaves a balance of $12,939.92. Respondent does not take issue with this amount. It does assert, however, that it is entitled to credit from complainant in the total amount of $19,704.54 in connection with six of the transactions handled by complainant for respondent. Respondent using its lesser payment figure referred to above computed a balance due to it from complainant of $6,764.62. However, respondent completely failed to take into account in its computations the $4,592.50 which complainant admits it has collected in connection with the sales of respondent's produce, and which it admits is due to respondent.

Basically the only disputed items between respondent and complainant are relative to the six transactions referred to above, in connection with which respondent claims a total of $19,704.54 as being due from complainant. These constitute an affirmative defense on respondent's part, and respondent has the burden of proving that the amounts alleged due in connection with these transactions are in fact due. See *Newmiller Farms* v. *Nicolls,* 36 Agric. Dec. 1230 (1977). In its answer respondent set forth each of these six transactions separately, and stated that "there is due complainant $71,389.34 sales commission less the following items: (Exhibits are enclosed for reasons we do not owe this amount)." Respondent then set forth the six separate amounts which total $19,704.54, with an exhibit number beside each, numbered from one to six. Respondent then included an explanation as to each "exhibit". However, except as to item number 6, the exhibits attached to respond-

ent's answer have no real relevance to the items set forth in its answer. We will deal with each of these items separately.

As to "exhibit" 1 respondent asserts that commissions in the amount of $261.81 were taken before adjustments were made to the invoice, and that consequently complainant is not entitled to commissions in such amount. Complainant responded in its reply to the counterclaim that it agreed with this assertion by respondent. Accordingly we conclude that the amount of $261.81 should be deducted from the commissions which would otherwise be due from respondent to complainant.

As to "exhibit" 2 respondent asserts that complainant's representative, Brad Furguson, erroneously shipped large peppers on an order which called for small peppers. Respondent states that Furguson "claims to have made up for this error by overbilling on subsequent invoices". Respondent further asserts that the mistake was not made up for in this manner, and that comparative returns of other growers who were shipping to other sales agents show that such growers were receiving an average of over $2.00 per bushel more for their peppers on the same dates. These nebulous assertions, which are totally unsupported by any documentation, constitute all of respondent's evidence on this point, and on this basis respondent claims that $1,200 is due from complainant to respondent. These claims would be easily dimissed were it not for the fact that complainant in replying to respondent's assertions further muddies the waters by what appears to be an admission. Complainant asserts "as was stated in our letter dated September 7, 1984, there was a $1,200 loss on TWR invoice 5287. TWR made up $900.00 of this $1,200.00 on two other invoices which are noted on the back of invoice 5287. The bookkeeper at Sumter, Mary Ann, is totally aware of this entire situation and has been since the day of occurrence." We are unable to find invoice 5287 anywhere in any of the submissions of the parties in this proceeding. Furthermore, there is no disclosure as to who or what "TWR" is. Complainant has admitted to a $1,200.00 loss on this invoice, but we have no way of knowing how the loss was incurred, whether such loss was the responsibility of complainant. Furthermore complainant apparently claims that $900 of the loss was "made up". On the basis of all of the evidence, such as it is, we conclude that respondent has failed to show that it is due $1,200.00, or any other amount, from complainant as to this transaction.

Respondent asserts that there is due from complainant the sum of $4,173.16 as to "exhibit" 3. While no invoice was submitted to support respondent's assertions, respondent is making this claim relative to 1470 bushels of peppers which were shipped to "De-

Marco". Respondent states that the federal inspection made of these peppers following arrival at destination does not "justify cutting the price to 25% of the original sales price". Respondent does not disclose what the original sales price was, but only claims that $4,173.16 is due from complainant on this transaction. There is no assertion, or evidence, from either party as to when the peppers were shipped, or when they arrived, but there is includedas an exhibit to the report of investigation a copy of the federal inspection dated June 18, 1984, covering a portion of the load of peppers which apparently both parties agree was the load in question. The inspection shows that 900 cartons were inspected according to "applicant's count", that temperatures ranged from 47°F. to 49°F., that the inspection was restricted to "product and lading in all layers of eight stacks nearest rear doors", and that the van was loaded to within 15 feet of the rear doors. Respondent asserts that the inspection was too restricted to be representative of the load and consequently the low returns were not justified. If respondent had submitted documentation showing the original invoice price, and had proven the time of shipment and time of arrival of the peppers, there might have been more substance to respondent's claim. However, under the circumstances of this case, and considering the broad discretion granted to complainant to make adjustments on respondent's merchandise, we are unable to find that respondent has proven that any amount is due from complainant to respondent on this load of peppers.

As to "exhibit" 4 respondent states that "much of what was said about item 3 applies to this exhibit", but does not state specifically what part of what was said concerning item 3 it has reference to. Respondent asserts that it is due $4,959.50 as to item 4. Again, respondent did not submit any invoice, and we have no way of knowing the sale price of this load of produce. A federal inspection covering this load of peppers was also included as an exhibit to the report of investigation. Such inspection covers a load which, according to "applicant's count" consisted of 1444 cartons. The inspection was also made at the place of business of DeMarco Produce in Rosenhayn, New Jersey, and was made on June 21, 1984, at 4:58 p.m. Such inspection shows the temperature of the peppers to have been, at various locations, 48°F. to 49°F. and states that the inspection and certificate are restricted to product and lading in nine stacks nearest rear doors. Respondent again asserts that "this is a very inadequate inspection to justify a reduction in price in 25% of agreed sales price." However, respondent has not shown what the original sales price was and has not shown when the load was shipped, or when it arrived at destination. We conclude that re-

spondent has failed to show that it is due any amount from complainant as to this load.

As to "exhibit" 5 respondent states that it is due the sum of $2,805.07 from complainant. Respondent's justification for claiming this amount is as follows: "A total of $46,751.27 was returned below our packing costs, which are $2.50 per bushel. As per our verbal agreement with Sunshine State Produce Sales, Inc., these items were not to be charged sales fees." Respondent does not show how the claimed $2,805.07 is related to the justification which it gives claiming such amount. We find that respondent has shown no reason why it should be credited with the claimed $2,805.07.

As to "exhibit" 6 respondent sets forth four invoice numbers with amounts totalling $6,305.00 which it states represent amounts paid to complainant, and not remitted to respondent. Complainant's reply is that it has already admitted owing respondent $4,592.50. However, complainant does not go on to state that it does not owe the balance claimed by respondent on these four invoices. Complainant does state at a later point in its reply to respondent's counterclaim that it feels that "the above statements and facts disprove the counterclaim submitted by Sumter Vegetable Cooperative." However, part of the above statements referred to include complainant's admission as to the first "exhibit." We conclude that complainant has in effect admitted that the balance claimed on the invoices set forth as respondent's "exhibit" 6, or $6,305.00, is in fact due to respondent. We also conclude that the $4,592.50 which complainant has admitted owing respondent corresponds to at least some of the invoices referenced in respondent's "exhibit" 6 and that such $4,592.50 must be viewed as a part of the $6,305.00 admittedly due to respondent. Apart from this admission by complainant we would be unable to credit respondent with any of the amounts claimed relative to its "exhibit" 6 since respondent submitted insufficient evidence or documentation that such amounts had indeed been paid to complainant, and not remitted to respondent.

Of the $12,939.92 in commissions which we have found to be due to complainant on the sales of respondent's produce there remains, after offsetting the amounts due from complainant to respondent, a total of $6,373.11. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. Since the above computations take into consideration respondent's counterclaim against complainant, such counterclaim should be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $6,373.11, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

S. STAMOULES, INC., a/t/a STAMOULES PRODUCE CO., *v.* SID GOODMAN & CO. INC. PACA Docket No. 2-6817. Decided September 8, 1986.

The Statement of a Broker, entitled to great weight—An express warranty may be any promise or guarantee by a seller which entices a buyer or consignor to accept goods—Breach of an express warranty justifies rejection.

The parties agreed to a consignment of 1,764 cartons of cantaloupes by complainant to respondent. Complaint made express warranty that the cantaloupes would be in good condition and "not green". Respondent, through statement of broker, proved a breach of that express warranty.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter, "the Act."A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of $9,287.30, in connection with the consignment of 1,764 cartons of cantaloupes in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent and respondent filed a timely answer.

Since the amount claimed as damages does not exceed $15,000, the shortened method of procedure set forth in the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant also filed a brief, while respondent chose not to do so.

FINDINGS OF FACT

1. S. Stamoules, Inc., a/t/a Stamoules Produce Co. is a corporation whose business mailing address is P.O. Box 56, Mendota, California 93640.

2. Sid Goodman & Co., Inc. is a corporation whose business mailing address is Units 2-12 Building A, Maryland Wholesale Produce Market, Jessup, Maryland 20794. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about August 2, 1984, the parties orally agreed to a consignment of 1,764 cartons of S&S brand cantaloupes 12's by complainant to respondent.

4. The contract for this consignment was negotiated by Sunburst Produce, Co., Inc., a licensed broker located in Bonita, California. As a condition of this contract, complainant guaranteed that the cantaloupes would arrive in good color and condition.

5. Upon arrival on or about August 14, 1984, respondent's agents determined that the color and condition of the cantaloupes were not as guaranteed, and communicated a rejection to complainant.

6. Complainant initially sought to find another consignee or a buyer for the melons with the assistance of Sunburst Produce Co., Inc. Subsequently, complainant attemped to refuse the rejection tendered by respondent.

7. An inspection conducted approximately three days after arrival showed that the color and condition of the cantaloupes were not as guaranteed.

8. The formal complaint in this proceeding was filed on March 7, 1985, which was within nine months after the cause of action accrued.

CONCLUSIONS

The record supports the conclusion that the complainant expressly warranted the color and condition of the consignment of cantaloupes and that they were not delivered in conformity with that warranty. The record further supports the conclusion that the complainant accepted respondent's rejection of the cantaloupes. Either one of these conclusions is sufficient to warrant a dismissal of the complaint.

The record supports respondent's contention that at the time of negotiating this contract, respondent specifically informed complainant that it would not accept or handle the melons unless they were not green and were of good quality. The broker who negotiated this contract confirms that this was a requirement of the respondent and that these terms were stated to the complainant, which then guaranteed the shipment in accordance with the re-

quirements of the respondent. The statement of the broker, an impartial third party is entitled to great weight.*Homestead Tomato Packing Co.* v. *Mims Produce* 43 Agric. Dec. ____ 2984; *Kern Ridge Growers* v. *T.J. Power & Co.* 40 Agric. Dec. 425 (1981). In the present proceeding, it is sufficient to carry respondent's burden of proving the existence of an express warranty. *Spada Distributing Co. Inc.* v. *Michael Swanson Brady Produce Co.* 19 Agric. Dec. 88 (1980). An express warranty may be any guarantee or promise by a seller which induces a buyer to purchase goods, or a consignee to accept the goods. *Wine Produce Co.* v. *Arrowhead Growers Sales,* 17 Agric. Dec. 1243 (1958).

The inspection which was performed at respondent's request clearly shows that the cantaloupes were "mostly green" at the time of arrival. This establishes the breach of contract by the complainant. Where the goods delivered are not of the kind or quality contracted for, the buyer or consignee may refuse to accept them. *Franklin Produce Exchange* v. *Kelly,* 17 Agric. Dec. 756 (1958). In this case, respondent's rejection was in clear and unmistakable terms, as it must to be. *Davison Grape Co.* v. *Mercurio* 18 Agric. Dec. 1434 (1959).

Furthermore, the record supports a finding that complainant accepted respondent's rejection of the cantaloupes. The statement of the broker establishes that after the rejection was communicated to complainant, the complainant requested, and the broker provided assistance in attempting to locate another consignee or a buyer. It was only after these attempts were unsuccessful that the complainant decided respondent must pay for the shipment. Complainant's telegrams communicating a refusal to accept the rejection do not change this result since complainant's statements to the broker could be properly interpreted as reversing that refusal. In any event, as concluded above, the rejection was made in clear and unmistakable terms and the respondent was entitled to reject the cantaloupes as a result of complainant's breach of its express warranty.

ORDER

The complaint in this proceeding is hereby dismissed.
Copies of this order shall be served upon the parties.

JOHN K. HARMON d/b/a HARMON COMPANY PRODUCE *v.* PACIFIC GAMBLE ROBINSON COMPANY a/t/a PACIFIC FRUIT AND PRODUCE COMPANY. PACA Docket No. 2-6939. Decided September 8, 1986.

Unloading constitutes acceptance—Proof that commodity is commercially worthless in absence of dump certificate—Use of Market News quotations to establish market price.

Inspection report showing 44% condition damages and receiver's daily shrink report showed some 38% of shipment dumped is sufficient evidence to show 38% commercially worthless so as to justify dumping. Respondent entitled to claim these damages for receiving non-conforming goods.

In dispute over whether there was an agreement to return bins in shipping watermelons, Market News Reports were used to establish complainant charged only market price for watermelons and therefore established that bins were to be returned.

Peter V. Train, Presiding Officer.
Complainant and Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,047.10 in connection with the sale of watermelons in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer alleging that it was not liable for the entire amount claimed because some of the watermelons were damaged and had to be dumped. Respondent asserted that it owed complainant only $1,524.35 after appropriate deductions were taken. An order requiring payment of the undisputed amount was entered on October 7, 1985 and such payment has been made.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Both parties filed opening statements. Respondent filed an answering statement and complainant filed a statement in reply. Respondent also filed a brief in the form

of a closing statement. Complainant declined the opportunity to file a brief.

FINDINGS OF FACT

1. Complainant John K. Harmon, hereinafter referred to as the complainant, is an individual doing business as Harmon Company Produce whose address is 3821 E. Bronco Trail, Phoenix, Arizona 85044.

2. Respondent, Pacific Gamble Robinson Company, hereinafter referred to as the respondent, is a corporation which also trades as Pacific Fruit and Produce Company, whose address is 3140 North Webster, Portland, Oregon 97217.

3. Both parties are, and at all times herein were, licensed with the Secretary of Agriculture to do business under the Act.

4. On June 22, 1984, complainant sold to respondent one truckload of striped, number one quality watermelons in interstate commerce at an agreed price of 7¢ a pound. The total invoice price was $3,417.10 which included a charge for additional pallets required in shipping the watermelons in an open bed truck, f.o.b. The invoice price did not include a charge for the 42 bins in which the watermelons were shipped.

5. The truck arrived at respondent's place of business on June 25, 1984, where they were received and accepted. A federal inspection was made of the watermelons on June 25, 1984. The report shows that 40 bins of watermelons were inspected in respondent's warehouse. The relevant results were as follows:

> Condition: Generally firm. Average 4% damage by transit rubs. From 1 to 3 melons per sample (20 to 60%), average 35% damage including 10% serious damage by internal rind spot. Decay in most samples 1 to 2 melons per sample (5 to 10%), many none, average 5%. Decay is brown, moist, firm and has a sour odor.

6. Watermelons weighting 18,100 pounds were dumped by respondent. Respondent did not obtain an official dump certificate.

7. The formal complaint was filed on March 12, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves the questions of whether the watermelons shipped met the specifications of the contract and if not, whether the receiver-respondent has proved that they were commercially worthless so as to justify being dumped. Another issue to be resolved is whether the respondent agreed to return the bins and pal-

lets used to transport the watermelons as complainant alleged. Respondent asserts that it had to dump 18,100 pounds of watermelons which were damaged. It is well established, however, that by unloading the watermelons respondent accepted the entire load. *See, e.g., Crown Orchard Company* v. *Mid-Valley Products Corp.*, 34 Agric. Dec. 1381 (1975); *Mario Saikhon* v. *Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975). By accepting the watermelons, respondent became liable to complainant for the contract price less any damages resulting from a breach of the contract by complainant. See *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 112 (1971); *Rydell California Potato Co.* v. *The Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957). The question to be resolved, therefore, is whether respondent has met its burden to show a breach by complainant and, if so, how it was damaged by this breach.

Complainant correctly points out that once the watermelons were taken off the truck and placed in respondent's warehouse, there is no absolute assurance that the watermelons inspected on June 25, 1984, were the watermelons he shipped. Respondent, however, has presented a sworn statement that the watermelons inspected were complainant's, and supported that statement with its inventory report showing that there was only one other small load of watermelons in its possession on the date. Additionally it is noted that the inspection report itself indicates that it inspected 40 bins weighing 45,250 pounds. While, in fact, 42 bins were shipped the figures given are sufficiently close to warrant a finding that the watermelons inspected were those shipped by complainant.

An examination of the inspection report clearly establishes that complainant breached the contract by failing to ship watermelons in conformity with the contract. The inspection report indicates that there was an average of 35% damage including 10% serious damage by internal rind spot. Additionally there was an average 5% decay and 4% damage by transit rub. This is well in excess of the tolerances allowed. See 7 CFR §§ 51.1970–1987.

Respondent asserts that it had to dump 18,100 pounds of watermelons. This is in excess of 38 percent of the load. Under section 46.22 of the regulations (7 CFR § 46.22), respondent has to provide an official dump certificate or other adequate evidence that the produce was commercially worthless if 5 percent or more of a shipment is dumped. No dump certificate was provided. Rather, respondent provided a copy of the federal inspection report for lot 357, and what it calls a Daily Shrinkage Report showing that it dumped 18,100 pounds of watermelons from lot 357 on June 26, 1984. Neither an inspection report showing condition defects or re-

spondent's self generated Daily Shrinkage Report alone are sufficient to show that the produce was commercially worthless. However, where the inspection report shows damage of 44 percent from various factors, we find that the report together with the respondent's shrinkage report constitutes sufficiently adequate evidence that some 38 percent of the load was commercially worthless. *Homestead Pole Bean Co-op, Inc.* v. *Wayne F. Jones,* PACA 2-6345, 43 Agric. Dec. ____, (1984); *Eggren & Sons, Inc.* v. *Wood Co.,* 11 Agric. Dec. 1032 (1952). The inspection report together with the Daily Shrinkage Report constitutes sufficient evidence that respondent properly dumped the watermelons.

Respondent claims damages of $2,127.40 calculated as follows:

$234.65 for an erroneous overcharge of $.005 per pound
$1,267.00 for the cost of the dumped watermelons
$47.70 for 3 hours labor in repacking the load
$543.00 for the freight paid on the dumped watermelons
$35.05 for the USDA inspection fee

The overcharge was corrected in the complaint herein and thus is no longer an issue. Complainant has not asserted that these calculations are unreasonable. The other deductions do seem reasonable and justified under the circumstances and will be allowed with the exception of the inspection fees which have been consistently disallowed since they are considered an expense for obtaining evidence. *See, e.g., Ritepak Produce* v. *Green Grove Markets* 29 Agric. Dec. 165, 170 (1970). Total damages are therefore $1,857.70.

The final issue to be resolved in this case is whether the parties agreed that the respondent would return the bins and pallets issued in transporting the watermelons. There is no explicit agreement, but complainant asserts that it is common industry practice for receivers to return the bins. Additionally, complainant argues that had there not been an agreement for the return of the bins, he would have charged for the bins. Instead he alleges he only charged the market price (7¢ per pound). Respondent offers the sworn statement of its Nogales, Arizona manager who denies there was an agreement to return the bins, and denies that it is common industry practice to return bins.

Complainant offers no evidence that the market price of the watermelons alone was 7¢ per pound, but official notice may be taken of relevant market price quotations from applicable Federal Market News Service reports. *Arico Distributors, Inc.* v. *Mandell, Spector, Rudolph Co.,* 24 Agric. Dec. 1155 (1965). A review of the Market News Service report for the Phoenix, Arizona area for watermelons on June 22, 1984 substantiates complainant's claim that

the 7¢ per-pound charged was the market price. See Volume LVIX, Vegetable and Fruit Report No. 182, June 22, 1984. Therefore, we believe complainant has met its burden to show by a preponderance of the evidence that the invoice price was only for the watermelons, with the bins to be returned to complainant. Complainant has valued the unreturned bins and pallets at $630.00 which was unchallenged by respondent.

In summary, because respondent accepted the watermelons it is liable for the invoice price including the value of the bins less any damages sustained by complainant's failure to ship watermelons conforming to the terms of the contract. Respondent's damages are $1,857.70. This leaves $2,189.40 owing on the contract. Respondent has already paid $1,524.35 which was not in dispute. The amount still unpaid is thus 665.05. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act. Reparation should be awarded to complainant in the amount of $665.05, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $665.05, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

Copies hereof shall be served upon the parties.

GAC PRODUCE CO., INC., *v.* G & J PRODUCE, INC. PACA Docket No. 2-6942. Decided September 8, 1986.

Disputed price—Liable less sum already paid.

Complainant sold various consignments of tomatoes to respondent, who paid complainant only part of the total amount due. The broker who negotiated the contracts between the parties affirmed to the Department that an adjustment was made in regard to a third load of tomatoes, but he failed to state the amount of the adjustment. Thus, his assertion that an adjustment was made is of no value in that it failed to specify the adjustment amount. The same broker affirmed there were two price reductions agreed to by complainant who, however, disputed the amounts involved. Total balance found due from respondent to complainant was $8,400.80. Accordingly, respondent was directed to pay that amount to complainant with 13% interest yearly until paid.

George S. Whitten, Presiding Officer.
Pro se, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $16,723.40 in connection with the shipment in interstate commerce of three truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, neither party requested an oral hearing, and accordingly the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered a part of the evidence in this proceeding as is the Department's report of investigation. The answer, since it was not verified, is not in evidence. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, GAC Produce Co., Inc., is a corporation whose address is P.O. Box 1231, Nogales, Arizona.

2. Respondent, G & J Produce Inc., is a corporation whose address is 2526 Airline Drive, Suite 106, Houston, Texas. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about August 11, 1984, complainant sold to respondent, and shipped from loading point in California to respondent in Houston, Texas, one truckload containing 726 flats of 4×4 pink tomatoes at $10.05 per flat, and 990 flats of 5×5 pink tomatoes at $10.05 per flat, plus 65 cents per flat for palletizing and precooling, or a total of $18,361.20. Respondent accepted the tomatoes on arrival, and has paid complainant $14,928.20 leaving a balance still due of $3,433.00

4. On or about August 13, 1984, complainant sold to respondent, and shipped from loading point in California to respondent in Houston, Texas, one truckload containing 858 flats of 4×4 pink tomatoes at $10.05 per flat, and 858 flats of 4×5 pink tomatoes at $10.05 per flat, plus 65 cents per flat for palletizing and precooling, or a total price of $18,361.20. Following arrival of these tomatoes complainant granted respondent an allowance of $8,322.60 which left a balance of $10,038.60.

5. On or about August 15, 1984, complainant sold to respondent, and shipped from loading point in California to respondent in Houston, Texas, one truckload containing 528 flats of 4×4 pink tomatoes at $8.05, 660 flats of 4×5 pink tomatoes at $8.05, and 528 flats of 5×5 pink tomatoes at $8.05, plus 65 cents per flat for palletizing and precooling, or a total price of $14,929.20.

6. The contracts were negotiated through Go For It Brokerage and Procurement, a broker located in Nogales, Arizona.

7. Respondent made payment to complainant in two installments of $10,000.00 each, or a total of $20,000.00 on the last two shipments of tomatoes.

8. An informal complaint was filed on November 8, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

The brokerage firm that negotiated the contracts between complainant and respondent affirmed in a letter to the Department, which is included as an exhibit to the Department's report of investigation, that there was no adjustment made as to the purchase price on the first load of tomatoes. Respondent apparently is in agreement with this position, and we conclude that there is due a balance of $3,433.00 to complainant as to this load of tomatoes.

The same broker affirmed that there were two reductions in price agreed to by complainant as to the second load of tomatoes shipped on August 13, 1984. The broker asserted that these two adjustments totalled $4.00 per carton, or a total for the load of $6,864, which would leave a balance still due from respondent to complainant of $11,497.20. However, complainant stated in its informal complaint that the allowance granted on this load was $8,322.60, and that the remaining balance due was $10,038.60. When complainant filed the formal complaint it credited respondent with the $10,000.00 payment made on this load, but claimed as a balance still due $8,361.21. Complainant could only claim such figure by virtue of a failure to give respondent credit for the allowance which complainant had previously admitted. On the basis of com-

plainant's admission we find that there remains due as to the August 13, 1984, load of tomatoes only $38.60.

The broker affirmed in its letter to the Department that an adjustment was made in regard to the third load of tomatoes. However, the broker nowhere states the amount of this adjustment. Respondent states in its unverified answer that the adjusted price on the third load was $6.05 per carton. Unfortunately, this assertion by respondent has no evidentiary standing in this proceeding. While an unverified pleading serves to frame the issues between the parties, it is not a part of the evidentiary record. See *Chapman Fruit Co., Inc.* v. *Tri-State Sales Agency,* 44 Agric. Dec. ____, (PACA Docket No. 2-6641), (1985). The broker's assertion that an adjustment was made is of no value since it fails to specify the amount of the adjustment. We conclude that a balance of $4,929.20 remains due on the third load of tomatoes, after deduction of the $10,000.00 paid by respondent. The total amount which we have found to be remaining due from respondent to complainant in this proceeding is $8,400.80. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $8,400.80, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

JOHN W. HEAD PRODUCE CO. *v.* GREENBELT FARMS, INC. PACA Docket No. 2-6968. Decided September 8, 1986.

Complainant's burden to prove contract terms—Breach of contract by failing to ship—Damages from failure to ship—Cover purchase made in good faith and without unreasonable delay.

Complainant failed to sustain its burden of proving that its contracts for the shipment of three loads of watermelons were subject to availability. Respondent entitled to damages due to complainant's breach of contract by failing to ship two of the loads. Respondent's damages are the difference between the contract prices and the prices paid for cover purchases made in good faith and without unreasonable delay. The cover purchases met these standards. Respondent already paid complainant the difference between the contract price for the one accepted load and respondent's damages, and is without further liability.

Andrew Stanton, Presiding Officer.
Complainant and Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,093.90 in connection with the shipment of a truckload of watermelons in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but declined to do so.

FINDINGS OF FACT

1. Complainant, John W. Head Produce Co., is an individual, John Head, whose address is P.O. Box 1532, Arcadia, Florida.

2. Respondent, Greenbelt Farms, Inc., is a corporation whose address is P.O. Box 433, Crystal Springs, Mississippi. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately May 8, 1985, complainant sold to respondent, by oral contract, three truckloads of medium U.S. number one watermelons at $.07 per pound, f.o.b., for shipment to be made on May 10, 11, and 12, 1985. The contract did not provide that shipment was to be subject to availability. The contract was entered into between complainant's owner, John Head, and respondent's employee, J. N. Barron.

4. On May 10, 1985, complainant shipped in interstate commerce to respondent one truckload of watermelons complying with the contract terms, consisting of 46,330 pounds, for a price of $3,243.10. The watermelons were accepted by respondent. Complainant did not ship any additional loads to respondent.

5. On May 15, 1985, respondent sent a telegram to complainant stating as follows: "Refon [sic?] after a week delay and promise of shipment of three trailer loads of good cutters and quality medium gray watermelons at 7 cents pound f.o.b. expect to buy two loads not yet furnished for your account unless you can load one today and one tomorrow advise."

6. After receiving respondent's telegram, complainant replied on May 16, 1985, as follows:

> In reference to your wire dated May 15, 1985 our terms were subject to availability. Thus without availability our agreement is rescinded. If loads become available you'll be advised with new terms. Buying on my account will not be tolerated. As of May 16, 1985 your account with us has an outstanding balance of $3,243.10. Any misuse or mishandling of this account will be pursued with legal action.

7. In a September 17, 1985, affidavit, James B. Baldwin, Secretary-Treasurer of respondent's customer, Ginsburg-Lansburg, Inc., Sioux City, Iowa, stated that on May 15, 1985, he called complainant's John Head to find out why the watermelons his firm had purchased from respondent, one of the two loads complainant failed to ship, had not been loaded onto the truck. Mr. Baldwin stated as follows, in relevant part:

> During the course of the conversation on May 15th with Mr. Head, in which George Albritton (President of Greenbelt Farms, Inc.) was privy via conference call, Mr. Head admitted that he had no intention of filling the order at that time because the market had become stronger and he was loading multiple loads for other people at a higher price. He indicated that Greenbelt Farms, Inc. could not force delivery and that they had no remedy because they failed to issue a written confirmation and did not furnish any purchase order number. Mr. Head did not indicate that supply was any factor in his refusing to deliver.

In a September 24, 1985, affidavit, respondent's president, George Albritton, asserted the same version of events as Mr. Baldwin regarding the May 15, 1985, telephone conversation with Mr. Head.

8. On approximately May 16, 1985, respondent purchased from Pacific Landco, Immokalee, Florida, a truckload of watermelons consisting of 44,920 pounds at $.09 per pound, for a total of $4,042.80. On approximately May 17, 1985, respondent purchased from Charlie Adcock, Jackson, Mississippi, a truckload of water-

melons consisting of 39,850 pounds at $.105 per pound for a total of $4,184.25.

9. On May 24, 1985, respondent sent complainant a check for $1,149.20. Accompanying this was a letter from respondent's Mr. Barron, who said that he had deducted from the $3,242.10 purchase price of the May 10, 1985, load the amount respondent paid in excess of the original contract price for the purchase of two loads of replacement watermelons. Mr. Barron stated that he charged $.02 per pound for 44,920 pounds or $898.40, and $.03 per pound for 39,850 pounds or $1,195.50, for a total price of $2,093.90. Deducting this from the $3,243.10 purchase price of the May 10, 1985, shipment results in $1,149.20, which Mr. Barron claimed to be the balance owed. Complainant accepted the $1,149.20 check as partial payment for the May 10, 1985, load.

10. A formal complaint was filed on July 10, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Complainant alleges that respondent wrongfully deducted $2,093.90 from the $3,243.10 contract price of a load of watermelons shipped on May 10, 1985, and accepted by respondent. Respondent claims that its deductions reflected damages incurred when complainant failed to ship two watermelon loads, in breach of contract, and respondent was therefore forced to pay a higher price in making its replacement purchases.

The parties agree that their contract was for the sale of three loads of watermelons, for shipment on May 10, May 11, and May 12, 1985. Complainant insists that the contract terms provided that shipment would be contingent on availability of the watermelons. Respondent denies the existence of such a contingency and claims that complainant's failure to ship two of the three loads constituted a breach of contract. As the moving party herein, it is complainant's burden to prove by a preponderance of the evidence the contract terms, respondent's breach of contract, and complainant's resulting damages. *Pablo Hernandez d/b/a Pablo Distributors* v. *Paragon Distributing, Inc.*, 42 Agric. Dec. 438 (1983). It is our conclusion that complainant has failed to sustain its burden of proving that the contract provided for shipment to be contingent on the availability of watermelons. Complainant's owner, John Head, has submitted a sworn statement in which he claims that such a provision was part of the contract, but his statement is flatly contradicted by the sworn statement of respondent's employee, J.N. Barron, who negotiated the contract with Mr. Head. In a May 15, 1985,

telegram to respondent, in response to respondent's May 15, 1985, telegram demanding that complainant ship the two loads, Mr. Head asserted that subject to availability terms were part of the contract. However, respondent has submitted affidavits by James B. Baldwin, secretary-treasurer of its customer, Ginsburg-Lansburg, Inc., Sioux City, Iowa, who was supposed to receive one of the loads, and respondent's president, George Albritton. According to Mr. Baldwin and Mr. Albritton, they spoke by telephone on May 15, 1985, with Mr. Head, who stated that he did not intend to fill respondent's order because the market had risen, and he was handling many loads for others at a higher price (Finding of Fact 7). Complainant has never denied that this telephone conversation occurred. This evidence casts grave doubt on complainant's claim that shipment was supposed to be subject to availability, and we find that such a term was not part of the contract. Therefore, by failing to ship two of the three loads of watermelons, complainant breached its contract with respondent.

As damages resulting from complainant's failure to ship, respondent was entitled to make a cover purchase, with complainant liable for the difference between the cost of the cover purchase and the contract price, provided the cover purchase was made in good faith and without unreasonable delay. *Feldman Brothers Produce Co., Inc.* v. *A. Pellegrino & Sons*, 32 Agric. Dec. 1845 (1973); Uniform Commercial Code, Section 2-712. We are satisfied from the evidence that respondent's cover purchases from Pacific Landco., Immokalee, Florida, of 44,920 pounds at $.09 per pound, and Charlie Adcock, Jackson, Mississippi of 39,850 pounds at $.105 per pound, were made in good faith and without unreasonable delay. Therefore, respondent's damages constitute $.02 per pound for 44,920 pounds, or $898.40, and $.035 per pound for 39,850 pounds, or $1,394.75, for a total of $2,293.15. Respondent has claimed only $2,093.90 as its damages, and we shall use this lesser figure. Respondent's liability to complainant is thus $3,243.10 less $2,093.90, or $1,149.20. Having already paid this sum, respondent is without any additional liability, and the complaint therefore should be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

NSG INTERNATIONAL MARKETING INC. *v.* UNION PRODUCE DISTRIBUTORS INC. PACA Docket No. 2-6832. Decided September 9, 1986.

Mistake as to contract terms—Proof of reasonable value of goods by reference to Market News.

Where parties did not agree as to whether agreement was for consignment sale or a guaranteed minimum price, no contract is established. In the absence of prompt and proper resale, the only manner to establish reasonable value of goods accepted was by reference to applicable Market News Reports. A value of $3.50 per box was imputed to the mangos in question and awarded to complainant after deduction of respondent's 18% commission.

Peter V. Train, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $55,476.00 in connection with the sale of four loads of mangos in interstate commerce. At oral hearing, complainant amended its complaint to reduce the amount sought to $40,428.00.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer in which it denied liability for the amount claimed. It asserted that it had agreed to sell the mangos on a consignment basis with a commission charge of 18 percent. It denied complainant's claim that the agreement called for complainant to receive a minimum of $4.50 per box.

An oral hearing was held in Los Angeles, California on January 27, 1986, and June 12, 1986.

Neither party filed proposed findings of fact or briefs after the hearing.

FINDINGS OF FACT

1. Complainant NSG International Marketing, Inc., hereinafter referred to as complainant, is a corporation whose mailing address is 437 Mission Drive, Camarillo, California 93010. At the time of the transactions in question, complainant was a partnership which subsequently transferred all its assets to the corporation.

2. Respondent Union Produce Distributors, Inc., is, and at all times material herein was, a corporation whose mailing address is 1901 Violet Street, Los Angeles, California 90021.

3. Both parties are, and at the time of the transactions involved herein were, licensed to do business under the Act.

4. The parties had an agreement that complainant would ship mangos to respondent who would market them. Respondent would receive an 18 percent commission for its efforts. Pursuant to this agreement, four loads of mangos were shipped from Mexico to respondent's place of business in Los Angeles on August 29, 1984, September 4, 1984, September 5, 1984, and September 6, 1984.

5. On September 20, 1984, one of the four loads was transferred to a company known as Produce Products who assumed responsibility for the marketing of the mangos. It was the transfer of this load that resulted in the amount claimed as damages being reduced at the hearing.

6. The parties agreed that the first shipment was federally inspected on August 31, 1984, Report No. G. 012512. The pertinent results of the report are as follows:

> *Condition:* Mostly firm ripe, many ripe, some hard. Ground color mostly turning yellow to yellow, many-green. From 1 to 4 fruits per sample (13 to 40%), average 26% black discolored areas, average 5% soft bruises scattered throughout pack. Average less than ½ of 1% decay.
>
> Remarks: Inspection and certificate restricted to produce on 10 accessible pallets.

7. Respondent has failed to remit any money to complainant for the three loads which it received.

8. The formal complaint was filed on February 18, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over what was intended by the parties when they sought to enter into an oral contract for the marketing of complainant's mangos. Complainant asserts that the agreement was that it would receive a minimum of $4.50 per box. Respondent, on the other hand, alleges that this agreement was a typical consignment sale whereby respondent was to sell these goods for the highest price possible in exchange for an 18 percent commission.

An examination of Mr. Nolan's testimony on behalf of NSG illustrates the problem. Mr. Nolan testified that in his telephone conversation with Mr. Cliff Cavasos, respondent's employee, he agreed

that respondent would receive the standard 18 percent commission, and then Mr. Cavasos asked what complainant wanted for the mangos. Mr. Nolan told him NSG had a little over $3.50 per box invested in them and they wanted $1.00 per box profit or $4.50 per box. Mr. Cavasos then told him to send the loads to Union (see, e.g., Tr. 16, 49, 67). What is unclear is whether Mr. Cavasos agreed to pay $4.50 per box or whether, after calculating that deducting his 18 percent of the current market price of $5.50 per box would still leave Mr. Nolan with the $4.50 he wanted, Mr. Cavasos simply agreed to handle the mangos on a consignment basis.

Complainant has the burden to prove by a preponderance of the evidence the terms of the contract. Here there is testimony that the 18 percent commission was arrived at because it was the standard industry charge. It is, however, also standard industry practice to make that charge when goods are sold on a consignment basis. While not denying the honesty of Mr. Nolan's beliefs it is unlikely that respondent would have entered into a contract such as described by Mr. Nolan. The contract Mr. Nolan believed he was entering into provided a guarantee of $4.50 per box, and respondent would get an 18 percent commission only so long as the mangos sold for $5.50 or higher. See Tr. 68. Such a contract means that respondent assumed all the risk that fruit that it had never seen would bring at least $5.50 per box. If it brought less than $4.50, respondent would not only not receive any payment for its services but would lose money. Unfortunately Mr. Cavasos was not called as a witness, leaving this tribunal to draw what inferences it can from the evidence. We infer that it was unlikely that Mr. Cavasos intended to enter into such a one-sided agreement. Rather we find that the evidence shows that Mr. Cavasos intended to enter into the standard consignment contract and his statement "okay, send them" was not a guarantee of $4.50, but rather a recognition that the pricing might work out in such a way that Mr. Nolan would receive his desired $4.50.

There was, therefore, no agreement as to price, a critical term of the contract. It is fundamental that where there is a mutual mistake of a material fact between parties negotiating a contract, no contract comes into being. *Cello Vegetable & Produce Co.* v. *John H. Grant Company,* 18 Agric. Dec. 694 (1959); *Mendelson-Zeller Co.* v. *Schwartz Produce Com. Inc.,* 15 Agric. Dec. 1140 (1956). Respondent, in the absence of a contract, is liable for the reasonable market value of the mangos. *Vukasovich, Inc.* v. *W. Chas. Heitmiller Co., Inc.,* 32 Agric. Dec. 1394 (1973). Normally, market value is proved by the proceeds obtained from a prompt and proper resale by the receiver, respondent herein. In this case, however, the evidence

shows that complainant had one load moved to another company because respondent was not, in its view, moving promptly to resell the mangos. Additionally, respondent did not provide accounts of sale showing disposition of the mangos, but merely a statement showing that after expenses and deducting an 18 percent commission, the net proceeds were $10,458 for the first shipment, $7,411.44 for the second shipment and $4,427.85 for the third. There is no showing as to the time period over which the mangos were sold. Respondent has failed to show, therefore, that the purported new proceeds were the result of a prompt and proper resale.

Respondent did submit inspection reports purportedly pertaining to the loads. Complainant challenged the applicability of inspection report number G124262 dated September 22, 1984, alleging that it no longer had mangos at respondent's warehouse on the 22nd, and also inspection report number G012572 dated September 7, 1984 alleging that since it never shipped over 3208 cartons, this inspection report covering 3500 cartons could not be their product. It is not necessary to the resolution of this case, however, to resolve the question of whether these are the proper inspection reports because complainant stipulated that inspection report number G012512 dated August 31, 1984 was for the inspection of its first load (Tr. 33), and testified that all the remaining loads were similar in quality (Tr. 95).

A review of the inspection report for the first load shows that there was an average of 26% black discolored areas and an average of 5% soft bruises. It would certainly be inappropriate to grant complainant $4.50 per box for mangos with this much damage. The damage was apparently due to breakdown in the refrigeration in the trucks, but inasmuch as complainant arranged for the shipping it must bear the responsibility of the breakdown in equipment.

In determining the reasonable value of the goods, therefore, there is no alternative but to refer to the Market News reports compiled by the Department of Agriculture. Official notice may be taken of relevant market price quotations from applicable Federal Market News Service reports. *Artco Distributors, Inc.* v. *Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 1155 91965). The Market News Reports for the Los Angeles, California market during the period August 29, 1984 through September 12, 1984, the period in which the mangos were shipped, and an additional five days after the last load was received showed, a range of $4.50–$5.00 on August 29, 1984 to a price of mostly $5.50 to 6.00 on September 12, 1984. The price on most days during this period was approximately $5.50. See Los Angeles Wholesale Fruit and Vegetable Report, Volume LXX, No. 169–178, August 29, 1984 through September 12, 1984. There

was no specific price quotation for poorer quality fruit. It is noted, however, that on August 24, 1984, approximately one week earlier, mangos in poorer condition were selling for $1.50–3.00 at a time when good fruit was selling in the $3.50–4.50, mostly $4.00–4.50 range. *Id.*, No. 166, August 24, 1984. The market price apparently went up approximately $1.00 between August 24, 1984 and the period in question. We will, therefore, assume that the price of mangoes in poorer condition also went up $1.00, meaning that mangos such as those shipped by complainant should have been sold for between $2.50–$4.00 per box. Having no other basis which to compute a reasonable value, we have determined to assess a value of $3.50 a box for the mangos shipped to respondent. In doing so, we have noted the unverified testimony that complainant received $3.20 per box on the fourth load. We have given a slightly higher value to the other loads because of the approximately two week delay in marketing the fourth load. Complainant shipped a total of 9,399 boxes of mangos which at $3.50 per box had a value of $32,896.50. Respondent's 18 percent commission is $5,921.37 leaving a net value of $26,975.13.

Respondent has failed to pay any money on these loads. Its failure to pay $26,975.13 to complainant is a violation of section 2 of the Act. Reparation should be awarded to complainant in the amount of $26,975.13, with interest.

Although the parties were provided an opportunity to claim necessary fees and expenses, neither party did so. Therefore, none will be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $26,975.13, with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid.

Copies hereof shall be served upon the parties.

JAN T. KING and SANDRA M. KING d/b/a KING PACKING *v.* AGRA, INC. PACA Docket No. 2-6952. Decided September 9, 1986.

Compromise settlement—Broker's confirmation—Failure to object.

Respondent purchased, received and accepted a truck lot of avocados. After arrival, the parties agreed to a compromise settlement indicated by a sworn statement of the broker and complainant's failure to object upon receiving the broker's confirmation evidencing such settlement. Respondent liable only for the amount of the settlement.

Andrew Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,712.00 in connection with the sale and shipment of a trucklot of avocados to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, but respondent elected not submitted any additional evidence. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Jan T. King and Sandra M. King d/b/a King Packing, is a partnership whose address is 300 East 5th Street, Camarillo, California.

2. Respondent, Agra. Inc., is a corporation whose address is 113 New England Produce Center, Chelsea, Massachusetts. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately September 25, 1984, complainant sold to respondent a trucklot of avocados consisting of 120 cartons of 48's at $8.20 per carton and 240 cartons of 40's at $7.20 per carton, for a total contract price of $2,712.00, f.o.b. Richard Kaiser Co., Inc., Salinas, California, acted as the broker in this transaction, through whom both parties communicated.

4. Upon receipt of the avocados, respondent had them federally inspected. The October 1, 1984, inspection revealed an average of

6% decay, with pulp temperatures ranging from 55 to 57% F. Respondent reported these results to the broker, who contacted complainant's Jan King. Mr. King claimed that there was abnormal transportation, evidenced by the high pulp temperatures.

5. In November 1984, respondent informed the broker that it would be needing an allowance of $2,000.00. The broker discussed the situation with complainant's Mr. King who, on November 25, 1984, at 3.30 p.m., informed the broker that he agreed to a compromise settlement of $2.00 per carton for the 40's, with no charge for the 48's. On November 25, 1984, the broker issued a "Confirmation-Change of Order" which reflected the facts of the settlement agreed to by Mr. King. A copy of this document was sent to complainant, who received it without objection. Respondent has provided complainant with an account of sales showing the results of the avocados and a check for $455.00 intended as full payment. Complainant has refused to accept the check.

6. The Department has received a letter from Richard Kaiser, president of the broker, dated February 15, 1985, concerning the transaction at issue. In that letter, Mr. Kiser states in relevant part as follows: "In November Agra reported that he would be needing allowances in excess of $2,000.00. Upon speaking to Jan King he was not happy, but we thought, accepted the settlement. It wasn't until his receipt of Agra's check and King Packing's subsequent complaint to Western Growers that we discovered otherwise."

7. A formal complaint was filed on July 2, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent admits purchasing, receiving, and accepting the trucklot of avocados consisting of 120 cartons of 48's and 240 cartons of 40's. Respondent claims that complainant breached its warranty of suitable shipping condition, as the October 1, 1984, federal inspection taken upon arrival revealed an average of 6% decay. Complainant argues that the warranty was inapplicable, as transportation conditions were abnormal, which is indicated by the high pulp temperatures reported by the inspection. However, it is immaterial whether or not there was breach of warranty by complainant, as it is clear that the parties agreed to a compromise settlement on November 25, 1984.

The broker in this transaction, through whom the parties communicated, has stated in a February 15, 1985, letter to the Department (Finding of Fact 6) that in November, respondent reported that it needed an allowance of $2,000.00. The broker claims that

"[u]pon speaking to Jan King he was not happy, but we thought, accepted the settlement." The broker issued a "Confirmation-Change of Order" on November 25, 1984, which states that on 3:30 p.m. on November 25, 1984, complainant's Jan King agreed to a settlement of $2.00 per carton f.o.b. for the 40's and no charge for the 48's. The broker sent a copy of this document to complainant, who received it without objection (Finding of Fact 5). Complainant denies agreeing to the settlement, arguing that the broker admitted only that he "thought" complainant accepted the settlement. However, this argument is undercut by complainant's failure to object to the broker's confirmation. We have held that such failure is evidence of the contract terms set forth in such confirmation. *Agvest Incorporated* v. *Parker Fruit Corporation,* 37 Agric. Dec. 1104 (1978).

Accordingly, we conclude that the parties agreed to a settlement for $2.00 per carton for the 240 cartons of 40's, or $480.00, and no charge for the 48's. Respondent is thus liable to complainant for $480.00, and its failure to pay such sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the day of this order, respondent shall pay to complainant, as reparation, $480.00, with interest thereon at the rate of 13 per cent per annum from January 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SMITH POTATO, INC., *v.* WOOD BROS. PRODUCE. PACA Docket No. 2-6990. Decided September 9, 1986.

Jurisdiction over respondent—Actual or apparent authority given to individual to make purchase for respondent—Trucker who converts load has no title to pass—Invoice is evidence of contract price if not timely objected to.

Respondent was subject to the jurisdiction of the Act at the time of the purchase, as it was licensed. Respondent gave either actual or apparent authority to Mr. Baker to purchase potatoes on behalf of respondent. Respondent did not have good title to the potatoes, as it bought them from a trucker who had converted them, and thus had no title to pass. Respondent thus liable for the contract price, evidenced by complainant's invoice which respondent received without objection.

Andrew Stanton, Presiding Officer.
Pro se, for complainant.
Jean L. Perrin, Lexington, South Carolina, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,462.00 in connection with the sale of a truckload of potatoes in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Respondent filed an answering statement and complainant filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Smith Potato Inc., is a corporation whose address is P.O. Box 467, Hart, Texas.

2. Respondent, Wood Bros. Produce, is a partnership whose address is P.O. Box 13491, Columbia, South Carolina. At the time of the transaction involved herein, respondent was licensed under the Act, pursuant to a license issued on September 21, 1983, effective until September 21, 1984. That license showed respondent as consisting of B.R. Wood and Troy E. Wood as partners. Troy E. Wood renewed the license on October 19, 1984, without indicating any change in the licensee.

3. On approximately August 18, 1984, complainant loaded onto a truck 850 50 pound bags of U.S. number one potatoes consisting of 416 bags of 2-8 Russetts, 45 bags of 70 ct. Russetts, 50 bags of jo. Russetts, and 339 bags of A-size reds. The potatoes were for delivery to four firms in New Orleans, Louisiana; A.J.'s Produce,

Market Place Produce, M & M Produce, and Bubba Produce. In the course of transit, the truckdriver converted the potatoes, delivering them to respondent in Columbia, South Carolina, who was not a party to the original contract. The potatoes were received at respondent's place of business by respondent's employee, Mike Baker, who paid the driver $2.00 per bag.

4. On August 19, 1984, complainant was informed by the F.B.I. that it had located the stolen potatoes at respondent's place of business. Complainant's president, David Smith, contacted respondent's Mike Baker and demanded payment for the potatoes, stating that he would be sending an invoice for $4,462.00. Complainant sent respondent an invoice for $4,462.00 dated August 22, 1984, which was received by respondent without objection.

5. Respondent has refused to make any payment to complainant for the potatoes.

6. A formal complaint was filed on April 15, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent denies that it is subject to the jurisdiction of the Act. Respondent claims that at the time of the events alleged in the complaint, Wood Brothers Produce, a partnership consisting of Troy E. Wood and B.R. Wood, had been dissolved, due to the death of B.R. Wood several years earlier. Respondent contends that the actions attributed to respondent were actually done by Mike Baker, acting as a sole proprietor, although respondent admits in its answer that Mr. Baker was doing business as Wood Brothers Produce. Respondent also claims that Mr. Baker was not subject to license under the Act. In addition, respondent claims that it is free from liability, as it purchased the potatoes from the truckdriver in good faith and in the ordinary course of business.

The first issue to be resolved is whether respondent was subject to the jurisdiction of the Act during the time of the transaction at issue, August 1984. The report of investigation indicates that respondent was not licensed during this period. This statement is in error, as the Department's license records, of which we take judicial notice, show clearly that on September 21, 1983, licence number 792069 was issued to respondent to extend until September 21, 1984. That license shows respondent as a partnership composed of B.R. Wood and Troy E. Wood. Troy E. Wood renewed the license on October 19, 1984, for an additional year, with no indication on his renewal form of any change in the licensee. Therefore, even if the partnership between Troy E. Wood and B.R. Wood dissolved

years ago upon the death of B.R. Wood, it is clear that respondent was a licensee under the Act through August 1984, and beyond.

Respondent insists that the potatoes were purchased by Mike Baker, a sole proprietorship, although it admits in its answer that Mr. Baker was doing business as Wood Brothers Produce. It is apparently respondent's argument that the acts of Mr. Baker should not be imputed to respondent, the licensee. However, respondent's claim that it was not involved in the transaction at issue is highly dubious in view of respondent's admission that Mr. Baker was doing business under respondent's name, and the clear evidence in the Department's license records that respondent was licensed under the Act at that time. However, even if Mr. Baker was not given any actual authority by respondent to purchase the potatoes, it is evident that Mr. Baker had the apparent authority to do so. Apparent authority is defined as authority which though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing. *Gulf & Western Food Products Co.* v. *Prevor-Meyersohn International, Inc.*, 34 Agric. Dec. 1911 (1975). We can assume from respondent's answer that it knew Mr. Baker was doing business under respondent's name at the time he purchased the potatoes. Thus respondent held out Mr. Baker as possessing the authority to do business on respondent's behalf. This conclusion is supported by the fact that complainant sent respondent an invoice dated August 22, 1984, in the amount of $4,462.00 for the load of potatoes, and respondent does not deny receiving such invoice without objection. Further, respondent did not even deny its involvement in the transaction until its October 21, 1985, answer. Mr. Baker thus had the apparent authority to make the purchase on behalf of respondent.

Respondent claims that it should nonetheless be free from liability because under section 36-2-403 of the Uniform Commercial Code in effect in South Carolina, respondent was a buyer in the ordinary course of business and took good title from the trucker. Respondent is in error. Section 2-403 reads as follows, in relevant part: "1. A purchaser of goods acquires all title which his transferor had or had power to transfer. . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value." However, in the present case, the potatoes were sold to respondent by the trucker, a bailee, to whom the potatoes had been entrusted for delivery to four firms in New Orleans. The trucker did not have a voidable title, but had no title to the potatoes at all. Therefore, there was no title which could have been transferred to respondent. Section 2-403 of the Uniform Commercial Code does not alter this well established principle, as is clearly set forth in 3

Anderson, *Uniform Commerical Code, § 2-403:28 (at 585) and the numerous cases cited therein:*

> The fact that a bailor entrusts the bailee with possession of his property does not give the bailee any ability or power to make an effective sale of the property and the bailor may recover the property from a third person.
>
> When a bailee purports to sell the goods to a dealer and the goods are then purchased by a good faith purchaser for value, no title passes to the latter because the bailee did not have a voidable title but had no title.

Respondent purchased, received and accepted the load of potatoes and is therefore liable to complainant for the contract price. Complainant's president, David Smith, asserts that on approximately August 21, 1984, he spoke to Mr. Baker of respondent, and they agreed that respondent was going to purchase the potatoes at certain specific prices, which Mr. Smith set forth in an invoice and mailed to respondent. Respondent does not deny that this conversation took place, nor that it received the invoice wihout objection. Therefore, we conclude that the contract price for the potatoes was as set forth in the invoice, or $4,462.00. *Sunshine Produce Company* v. *Si Si Fruit Distributors, Inc.*, 34 Agric. Dec. 104 (1975). Respondent's failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $4,462.00, with interest thereon at the rate of 13% per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC. *v.* ALBEE TOMATO CO., INC.
PACA Docket No. 2-6972. Decided September 12, 1986.

Price terms.

The parties agreed that the quoted prices would be in effect only if they held for a five day period. Market News Report listing shows that they held. Therefore, respondent liable for the quoted price.

Andrew Stanton, Presiding Officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $12,800.00 in connection with the sale and shipment of a trucklot of tomatoes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and file briefs, but declined to do so.

FINDINGS OF FACTS

1. Complainant, Homestead Tomato Packing Co. Inc., is a corporation whose address is P.O. Box 3064, Florida City, Florida.

2. Respondent, Albee Tomato Co. Inc., is a corporation whose address is Stores 118–120, Row A, New York City Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On January 18, 1985, complainant sold to respondent a trucklot of tomatoes consisting of 800 cartons of 6×6 tomatoes and 800 cartons of 6×7 tomatoes, 85% or better U.S. number one, f.o.b.

4. The parties agreed on a price of $18.00 per carton for the 6×6 tomatoes and $16.00 per carton for the 6×7 tomatoes, plus $.50 per carton for gassing, $.15 per carton for pallets, and $22.50 for a Ryan temperature recorder, for a total of $28,262.50. It was understood that the tomato prices would be in effect only if the Florida f.o.b. market structure maintained such prices until January 23, 1985. The contract was negotiated through a broker, Stan Scherer Marketing Services, Inc., Miami, Florida, with whom both parties communicated. Shortly after the contract was negotiated, the

broker issued a confirmation of sale reflecting the agreed upon contract terms, except that it did not set forth any prices for the tomatoes.

4. The tomatoes were treated with gas. On January 23, 1985, at respondent's request, the tomatoes were removed from the gassing facility and shipped in interstate commerce to respondent, where they arrived and were accepted.

5. Respondent has paid complainant $15,462.50, leaving $12,800.00 allegedly due and owing.

6. A formal complaint was filed on October 4, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

There is no dispute herein over the quality and condition of the trucklot of tomatoes which respondent admittedly received and accepted. The only point of contention concerns the agreed upon contract price. Respondent claims that at the time of the sale, January 18, 1985, it was agreed that the prices quoted by complainant, $18.00 per carton for the 6×6 tomatoes and $16.00 per carton for the 6×7 tomatoes, would be in effect only if the Florida tomato f.o.b. market structure held at these prices through January 23, 1985.

In a May 13, 1985, letter to the Department, which is part of the report of investigation, the broker generally confirms respondent's account of the pricing arrangement between the parties. We thus assume that respondent's version of the pricing is correct. Therefore, the dispositive question is whether on January 23, 1985, when respondent had the tomatoes removed from the gassing facility and shipped to its place of business, the Florida f.o.b. market was still holding at the prices quoted by complainant. Respondent claims that during the period January 23 to 25, 1985, the entire Florida market structure was pricing 6×6 tomatoes at $8.00 per carton and 6×7 tomatoes at $5.00 per carton. However, respondent has provided absolutely no proof of the existence of these prices. More convincing evidence of the f.o.b. prices can be found in the Market News Service Reports for Winterhaven, Florida, of which we take judicial notice. These reports show prices per carton on January 21, 1985, at $9.00 to $10.00, mostly $9.00 for 6×6 tomatoes, and $7.50 to $8.00 for 6×7 tomatoes; no listings for January 22, or 23, 1985; and on January 24, 1985, $18.00 for 6×6 tomatoes and $16.00 for 6×7 tomatoes. The available listing which most accurately reflects the prevailing f.o.b. prices for Florida tomatoes on January 23, 1985, is that of January 24, 1985, showing prices of $18.00 per carton for the 6×6 tomatoes and $16.00 per carton for the 6×7 to-

matoes, exactly the same as those agreed to by the parties. It is, therefore, clear that these were the prices to be applied on January 23, 1985.

The contract prices for the tomatoes were thus $18.00 per carton for 800 cartons and $16.00 per carton for 800 cartons, plus $.50 per carton for gas, $.15 per carton for pallets, and $22.50 for a Ryan recorder, for a total of $28,262.50. Deducting from this sum the $15,462.50 which respondent has already paid leaves $12,800.00. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $12,800.00, with interest thereon at the rate of 13% per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING, INC., *v.* INTERNATIONAL A.G., INC.
PACA Docket No. 2-7252. Decided September 26, 1986.

Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $58,363.60 in connection with shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including indebtedness to complainant in the amount of $57,850.40. Complainant, in a letter dated August 7, 1986, agreed to accept the amount of $57,850.40 as payment in full. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Fresh Western Marketing, Inc., is a corporation whose address is P. O. Box 5275, Salinas, California. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida 33142. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $57,850.40. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $57,850.40, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served upon the parties.

M & C P FARMS *v.* LLOYD MYERS CO. INC. PACA Docket No. 2-6873. Decided September 29, 1986.

Burden of proof—Duty of broker—Grower makes accomodation purchase.

Where complainant proves broker sold produce for lower price than authorized, broker liable for difference between that price and authorized price. Where broker collects on behalf of seller, he is required to remit the money to seller. A grower which makes an accomodation purchase for its broker is not a dealer where purchase is isolated transaction, but grower should not be allowed to profit on transaction.

Edward M. Silverstein, Presiding Officer.
John N. Bach, Chico, Calif., for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation in the amount of $69,180.25 against respondent in connection with five transactions in interstate and/or foreign commerce involving olives, a perishable agricultural commodity.

A copy of the report of investigation was served upon the parties. In addition, respondent was served with a copy of the formal complaint. It filed an unverified answer thereto generally denying the allegations of the complaint, and also filed a counterclaim against complainant in the amount of $5,000.00 in connection with the same transactions which are made the subject of the complaint.

A hearing was held on March 4, 1986, before Presiding Officer Edward M. Silverstein. At the hearing, complainant was represented by John N. Bach, Esq., 2575 Cohasset Road, Chico, California

95927, and respondent was represented by its president, Lloyd Myers.

FINDINGS OF FACT

1. Complainant, M & C P Farms, is a partnership consisting of Maurice Penna and his wife Cynthia Penna, whose mailing address is Route 1, Box 1694, Orland, California 95963. Complainant was not licensed, nor was it operating subject to license, under the Act during any material time.

2. Respondent Lloyd Myers Co., Inc., is a corporation whose last known mailing address was P.O. Box 55818, Valencia, California 91355. At all material times, respondent was licensed under the Act, or operating subject to license.

3. On or about October 5, 1984, in the course of interstate commerce, complainant sold to James Corotto Produce, Inc. ("Corotto"), 1578 Main Avenue, Clifton, New Jersey 07011, one truckload of sevillano olives consisting of 1,080 cartons, through respondent acting as a broker. Complainant had instructed respondent to sell the olives at a price not less than $10.25 per carton plus 25¢ per carton to cover brokerage, or $10.50 per carton f.o.b. Orland, California. This load was shipped on or about October 15, 1984, and was received and accepted by Corotto. Complainant invoiced Corotto at a price of $10.50 f.o.b. per carton. Corotto, claiming that it only had agreed with respondent to pay $10.00 per carton, remitted $10,800, or $10.00 per carton, to complainant. Respondent failed to issue a brokers memorandum of sale with regard to this shipment.

4. On or about October 6, 1984, in the course of foreign commerce, complainant sold to La Maison De Fruits Et. Le Gumes Supra, Inc. ("La Maison"), 362 Cremazie St. West, Montreal, Quebec, Canada HZPIC7, 1,006 cartons of manzanillo olives at an agreed f.o.b. price of $8.50 per carton ($8,551.00), and 506 cartons of sevillano olives at an agreed f.o.b. price of $11.50 per carton ($5,796) for a total agreed f.o.b. price of $14,347.00, through respondent acting as a broker. On or about the same date, respondent issued a confirmation of sale indicating the above terms, and also indicating that complainant owed it $377.50 (or 25¢ per carton) for brokerage. The load of olives was received and accepted by La Maison.

5. On or about October 13, 1984, in the course of foreign commerce, complainant sold to La Maison, 612 cartons of manzanillo olives at an agreed f.o.b. price of $8.50 per carton ($5,202) and 900 cartons of sevillano olives at an agreed f.o.b. price of $11.50 per carton (10,350) for a total agreed f.o.b. price of $15,552.00, through respondent acting as a broker. The load of olives was received and

accepted by La Maison. Respondent failed to issue a broker's memorandum of sale with regard to this shipment.

6. On or about October 20, 1984, in the course of foreign commerce, complainant sold to La Maison, 1,944 cartons of sevillano olives at an agreed f.o.b. price of $11.50 per carton for a total agreed f.o.b. price of $22,356.00, through respondent acting as a broker. The load of olives was received and accepted by La Maison. On October 24, 1984, 724 cartons from this load were subjected to a Canadian inspection. The inspector reported that the olives were in La Maison's warehouse, and that their condition was as follows: "50% bruised. 29% showing black discolored spots or areas (affecting app. 5% of the surface in aggregate) 2% decay." Respondent failed to issue a broker's memorandum of sale with regard to this shipment.

7. On or about October 25, 1984, complainant, in the course of interstate and foreign commerce, sold to La Maison 1,341 carton of sevillano olives at an agreed f.o.b. price of $11.25 per carton for a total agreed f.o.b. price of $15,086.25. The load of olives was received and accepted by La Maison. Respondent failed to issue a brokers memorandum of sale with regard to this shipment.

8. Complainant invoiced La Maison for the shipments described in ¶¶ 4, 5, and 6 above, and respondent for the shipment described in ¶ 7 above, in accordance with the agreements described in those paragraphs, but has received no payment from either except as described in ¶ 11 below.

9. On or about October 24, 1984, complainant, on behalf of respondent and at the personal request of Lloyd Myers, respondent's president, purchased 291 buckets of processed Sicilian style olives for $4,107.26 from West Coast Products Corporation, whose mailing address is P.O. Box 623, Orland, California 95963. Respondent advanced complainant $5,000.00 to make this purchase for him.

10. During the period October 24, 1984, through November 6, 1984, La Maison paid respondent who was authorized to collect on complainant's behalf, the total sum of $52,739.70 with respect to the olive shipments described in ¶¶ 4, 5, 6, and 7. The total represents the sum of five checks, to wit: No. 5071–$17,776.80; No. 5149–$13,442.40; No. 5150–$14,145.00; No. 5239–$6,705.00; and No. 5240–$670.80.

11. On or about November 21, 1984, respondent sent complainant a check in the amount of $21,271.15, with respect to the October 6, and October 13, 1984, shipments described in ¶¶ 4 and 5 above. In computing the amount due complainant, respondent deducted the $5,000 advance referred to in ¶ 9 above, plus the $20 fee for purchasing the checks used for the advance. Complainant endorsed the

best copy available

$21,271.15 check as follows: "This instrument does not reflect pmt [sic] in full of mentioned invoices on front of check. Advance pmt [sic] does not pertain to any fresh fruit sales—." When the endorsed check reached respondent, it refused to accept the conditional endorsement, and the check was returned to complainant through banking channels.

12. All of the fresh olives sold by complainant to, or through, respondent were grown on land it owned or leased.

13. On or about January 19, 1985, complainant filed an administrative proceeding against La Maison before the Agriculture Canada, Food Production and Inspection Branch, pursuant to the Canadian Agricultural Products Standards Act. This action was voluntarily dismissed and, on or about September 20, 1985, complainant filed an action against La Maison before the Superior Court, District of Montreal Province of Quebec, Canada, designated as docket no. 500–05–008360–859, seeking payment of $66,513.25, with respect to the olives shipped to La Maison as described in ¶¶ 4, 5, 6, and 7, above. In response thereto, La Maison filed an answer indicating that the only sum owing to complainant with respect to those shipments was $52,739.70 and that said amount had been paid to respondent as agent for complainant. La Maison, also, indicated that 724 cartons of the olives had arrived in a deteriorated condition.

14. The complaint was filed on February 12, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

In this reparation proceeding, complainant seeks $69,180.25 from respondent as a consequence of respondent's alleged violations of the Act with respect to five shipments of fresh olives. At the hearing held on this matter, at complainant's request, the verified complaint and reply to respondent's counterclaim were made a part of the record herein and complainant presented one witness and three exhibits. Respondent presented no witnesses. However, at respondent's request, the deposition of Maurice Penna was made part of the record and respondent presented six documents which it had subpoenaed from complainant as exhibits. In addition, two more documents which had been subpoenaed from complainant by respondent, were made part of the record by the Presiding Officer.[1]

[1] One of these documents, the answer of La Maison in the civil proceeding brought by complainant, was entered into evidence, as Exhibit D, at the hearing. The other document, the complaint filed by complainant in the same civil proceeding, was attached to complainant's brief pursuant to the order of the Presiding Offi-

Continued

The complainant alleged that respondent violated the Act by failing "to perform the duties and specifications of a broker" in that it had agreed with the buyers thereof to sell the subject five shipments of olives at a lower price than was agreed to by complainant, and by failing to remit amounts collected on its behalf from one buyer.[2] As to all of its affirmative allegations, complainant has the burden of proof. *New York* v. *Sandler*, 32 Agric. Dec. 707 (1973).

The only transaction for which complainant provided substantive evidence supporting its allegation that respondent failed to negotiate a price agreed to by it was that with Corotto. Complainant invoiced Corotto at a price of $10.50 per carton, but was told by Corotto that it had only agreed with respondent on a price of $10.00 per carton and remitted on this basis. As there was no brokers memorandum of sale issued for this transaction and no memorandum of agreement between complainant and respondent as to the amount at which respondent was authorized to sell the olives, the only substantive evidence in the record on this point is the testimony of complainant's witness Maurice Penna who negotiated its agreement with respondent. Mr. Penna testified that he only authorized respondent to sell the olives for $10.25 plus 25¢ brokerage, or $10.50, per carton. Although respondent had denied this allegation in its unverified answer, it did not seek to rebut Mr. Penna's testimony. We, therefore, must conclude that complainant has satisfied its burden of proving, by a preponderance of the evidence, that respondent had violated its duty by agreeing to sell the olives for a lesser price then agreed upon by complainant. Consequently, it is liable to complainant for the difference between the price agreed upon by complainant ($10.50) and the price at which it agreed to sell the olives to Corotto ($10.00), or 50¢ per carton, or a total of $540.

With regard to the remaining four transactions made the subject of the complaint, i.e., the sales to La Maison, it is not clear to us that respondent agreed to sell the olives to it for a lower price than was agreed upon by complainant. Unlike Corotto transaction, there

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cer and was made part of the record, although not identified by an exhibit number, by virtue of the Presiding Officer's order.

[2] Complainant alleged in its complaint, although it did not offer evidence supporting this allegation, that, as to the last of these loads, respondent was the purchaser. However, it appears that complainant has taken an inconsistent position with regard to this allegation in bringing an action in Canada against La Maison for this shipment. In view of the manner in which the other transactions at issue were handled, we do not believe that respondent agreed to perform other than as a broker with regard to this shipment. *See Florida Tomato* v. *New England*, 32 Agric. Dec. 488 (1973).

is no evidence that respondent agreed with the buyer to sell the olives at a lower price than complainant had agreed upon. Rather the evidence in the record, in particular the one broker's memorandum of sale issued by respondent with respect to these sales, would seem to support a conclusion that respondent did not do so.[3] Therefore, as to these transactions, we must hold that complainant failed to sustain its burden of proving that respondent had violated the Act by agreeing with La Maison to sell the olives at a price lower than authorized by complainant. In doing so, we are cognizant of the fact that respondent was paid a lesser amount by La Maison than it was billed by complainant. However, it appears that La Maison may have received some damaged olives and thereby suffered some damages. Such matters currently are being litigated between complainant and La Maison before a Canadian court and we decline to engage in any prognostication as to the result of that litigation.

Complainant has proven that respondent received $52,739.70 from La Maison with respect to the subject shipments. The $52,739.70 should have been remitted to complainant. Consequently we hold that respondent is liable to complainant in the amount of $52,739.70 with respect to these transactions.

Respondent has filed a counterclaim against complainant in the amount of $5,000. It has the burden of proving, by a preponderance of the evidence, that it is entitled to such amount. *Bushwich Comm'n Co.* v. *Maloney,* 18 Agric. Dec. 1029 (1959). The $5,000 for which respondent seeks reimbursement was advanced by respondent to complainant so that complainant might purchase, on behalf of respondent, 291 buckets of processed olives from a third party. Such a purchase was made by complainant for $4,107.26, but is not indicative of a course of business engaged in by complainant.[4] However, since such a purchase was not made during the course of complaint's business but rather as an accommodation to respondent, it should not be allowed to make a 22% profit from it and, therefore, the $892.74 it retained from the $5,000 ought to be credited to the amount which respondent has been found to owe complainant.

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[3] We are cognizant of the fact that La Maison does not admit the full extent of indebtedness as alleged by complainant, however, that matter is not before us. Our ruling is simply that complainant has failed to prove that respondent agreed with La Maison to sell the olives for a lower price than agreed upon by complainant.

[4] We conclude based on these facts that complainant did not operate subject to the Act during any period of time at issue here and therefore complainant was not operating subject to being licensed.

During the course of this proceeding, respondent has made no attempt to refute or rebut any of the evidence adduced by complainant. In fact, aside from offering some documents in evidence which it had subpoenaed from complainant, in a futile effort to show that complainant was operating subject to the Act, respondent offered no evidence whatsoever as to its affirmative allegations. Instead, in its defense, it merely generally denied the allegations of the complaint in its unsworn answer and relied upon its assertion that complainant failed to sustain its burden of proof in several regards: (1) that complainant is not a valid entity which owned the subject olives; (2) that it failed to prove that respondent was indebted to it; (3) that the Secretary has no jurisdiction over this matter; and (4) that it failed to prove that respondent purchased olives from complainant.[5] To the extent that these claims have any merit they are discussed above.[6]

In view of the above, we conclude that respondent is obligated to complainant in the amount of $52,386.96 ($540 + $52,739.70 −$892.74), and that its failure to pay complainant this amount is a violation of the Act for which reparation plus interest should be awarded.

In addition, as complainant is the prevailing party, it is entitled to reasonable fees and expenses related to the hearing. Complainant has filed a claim for $5,716.78 which is amply documented and has been served upon respondent. As respondent has not objected thereto, and as we find such claim to be reasonable, complainant further should be awarded $5,716.78 as its fees and expenses.

ORDER

Within thirty days from this date of this order, respondent shall pay to complainant, as reparation, $52,386.96 plus interest at the rate of 13% per annum from December 1, 1984, until paid.

Within thirty days from the date of this order, respondent shall pay to complainant, as further reparation, $5,716.78 plus interest at the rate of 13% per annum from the date of this order until paid.

Except as indicated above, the counterclaim is dismissed.

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[5] Respondent also claims that a California statute precludes the complainant from filing this action because it did not file a "fictitious business statement." However, even if complainant was prevented from filing an action in a California court, such a bar is not applicable to actions filed under the Act.

[6] Subsequent to the hearing, respondent filed a motion seeking removal of the presiding officer. As the motion was frivolous, the presiding offer was correct in not certifying the motion to the Judicial Officer and in denying it.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY, INC., *v.* DEMPSEY-SPENCE, INC. PACA Docket No. 2-7273. Decided September 29, 1986.

Dennis Becker, Presiding Officer.
Pro se, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $49,156.05 in connection with shipments of mixed fruit in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant, although respondent claimed in its answer that the indebtedness had been reduced to a balance of $33,910.70. Complainant has verified that the reduced figure is the correct outstanding balance. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Tom Lange Company, Inc., is a corporation whose address is 3100 Produce Row, Room 2B, Houston, Texas 77023. Respondent, Dempsey-Spence, Inc., is a corporation whose address is P. O. Box 3483, Conroe, Texas 77305. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $33,910.70. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $33,910.70, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies of this order shall be served upon the parties.

INMAN FARMS, INC., *v.* SAM COMPTON PRODUCE COMPANY, INC.
PACA Docket No. 2-7019. Decided October 2, 1986.

Eric Paul, Presiding Officer.
Frank D. Upchurch, III, Upchurch, Bailey & Upchurch, St. Augustine, Florida, for complainant.
Stephen P. McCarron, Sures, Dondero & McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $142,110.05 in connection with shipments of perishable agricultural commodities in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. On August 6, 1986, respondent amended its answer to withdraw its denial and to admit to each of the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Inman Farms, Inc., is a Florida corporation whose address is P. O. Box 3776, St. Augustine, Florida 32084. Respondent, Sam Compton Produce Company, Inc., is a corporation whose address is 2208-14 Forest Avenue, Knoxville, Tennessee 37916. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $124,110.05 plus interest at the agreed contract rate of 12 per cent per annum. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $124,110.05, with interest thereon at the rate of 12 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

H. SMITH PACKING CORPORATION *v.* SAM COMPTON PRODUCE COMPANY, INC. PACA Docket No. 2-7054. Decided October 2, 1986.

Eric Paul, Presiding Officer.
Andrew Yaeger, Blaine, Maine, for complainant.
Stephen P. McCarron, Sures, Dondero & McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $42,087.60 in connection with shipments of perishable agricultural commodities in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. On August 6, 1986, respondent amended its answer to withdraw its denial and to admit each of the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, H. Smith Packing Corporation, is a corporation whose address is P.O. Box 189, Blaine, Maine 04734. Respondent, Sam Compton Produce Co., Inc., is a corporation whose address is 2208-14 Forest Avenue, Knoxville, Tennessee 37916. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $42,087.60. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $42,087.60, with interest thereon at the rate of 13 percent per annum from April 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MAINE POTATO GROWERS, INC., *v.* SAM COMPTON PRODUCE COMPANY, INC. PACA Docket No. 2-7063. Decided October 2, 1986.

Eric Paul, Presiding Officer.
Phillips, Olore, Walker & Dunlavey, Presque Isle, Maine, for complainant.
Stephen P. McCarron, Sures, Donero & McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $214,280.38 in connection with shipments of perishable agricultural commodities in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. On August 6, 1986, respondent amended its answer to withdraw its denial and to admit each of the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Maine Potato Growers, Inc., is a corporation whose address is Box 271, Parsons Street, Presque Isle, Maine 04769. Respondent, Sam Compton Produce Company, Inc., is a corporation whose address is 2208-14 Forest Avenue, Knoxville, Tennessee 37916. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $214,280.38. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $214,280.38, with interest thereon at the rate of 13 percent per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SUN-GLO OF IDAHO, INC., *v.* INTERNATIONAL A.G. INC. PACA Docket No. 2-7253. Decided October 2, 1986.

Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,807.50 in connection with shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Sun-Glo of Idaho, Inc., is a corporation whose address is P. O. Box 98, Rexburg, Idaho. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,807.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,807.50, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

Copies of this order shall be served upon the parties.

HILLCREST SALES, INC., *v.* INTERNATIONAL A.G., INC. PACA Docket No. 2-7256. Decided October 2, 1986.

Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $28,462.00 in connection with shipments of plums and grapes in interstate com-

merce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Hillcrest Sales, Inc., is a corporation whose address is 555 E. City Line Avenue, Bala Cynwyd, Pennsylvania. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $28,462.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $28,462.00, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served upon the parties.

RANCHO DOS PALMAS *v.* MARTIN MONTES d/b/a M&M PRODUCE BROKERAGE and/or ANGELO DI GIACOMO. PACA Docket No. 2-6827. Decided October 3, 1986.

Contracts—Manifested mutual assent necessary to formation of—Quasi contract—notice of other parties' interest necessary for equitable liability—Broker liable to shipper for contract price where his false statements resulted in shippers realizing such price.

Broker represented to shipper that he had negotiated a sale contract between shipper and buyer. Broker represented to buyer that the broker was selling the goods to buyer at different price. It was found that no contract was formed between shipper and buyer and that shipper gave buyer defective notice of shipper's interest in goods, so that buyer could not be held to any equitable liability to shipper. Broker was held liable to shipper for original contract price.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondents in the amount of $8,995.20 in connection with two shipments of cantaloupes in interstate commerce.

A copy of the report of investigation made by the Department was served upon each of the parties. A copy of the formal complaint was served upon each respondent. Respondent Angelo Di Giacomo filed an answer to the complaint denying any liability to complainant. Respondent M & M Produce Brokerage defaulted in the filing of an answer.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent Angelo Di Giacomo filed an answering statement, and complainant filed a statement in reply. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Rancho Dos Palmas, is a partnership composed of Michael W. Morgan and John C. Veysey, whose address is 3651 Austin Road, Brawley, California.

2. Respondent, Martin Montes, is an individual doing business as M & M Produce Brokerage, (hereafter Montes) whose address is 43 Dolores Street, Watsonville, California. At the time of the transactions involved herein this respondent was licensed under the Act.

3. Respondent, Angelo Di Giacomo, is a partnership composed of Joseph Pinto and Stanley J. Sussman, whose address is 3300 South Galloway Street, Philadelphia, Pennsylvania. At the time of the transactions involved herein this respondent was licensed under the Act.

4. On or about June 8, 1984, respondent Montes contacted complainant by telephone and secured complainant's agreement to sell to respondent Angelo Di Giacomo one lot consisting of 504 cartons of Rancho Dos Palmas cantaloupes, size 18, at $8.00 per carton, plus 80 cents per carton for cooling and palletizing, and $22.50 for a temperature recorder, for a total price of $4,457.70. On or about the same day respondent Montes contacted respondent Angelo Di Giacomo by telephone, and secured such respondent's agreement to purchase from respondent Montes are lot consisting of 504 cartons of Rancho Dos Palmas cantaloupes, size 18, at $8.00 per carton, plus 80 cents cooling and palletizing, plus 15 cents brokerage, plus one-half of the profits made from the resale of the cantaloupes.

5. On June 9, 1984, complainant shipped the cantaloupes from loading point in Brawley, California, to respondent Angelo Di Giacomo in Philadelphia, Pennsylvania, by truck. On June 11, 1984, complainant mailed respondent Angelo Di Giacomo an invoice reflecting the terms of sale represented to it by respondent Montes.

6. On or about June 13, 1984, respondent Montes contacted complainant by telephone, and secured complainant's agreement to sell to respondent Angelo Di Giacomo one lot consisting of 1050 cartons of Ranchos Dos Palmas cantaloupes of which 546 would be size 12 at $5.00 per carton and 504 would be size 15 at $6.00 per carton, and including a cooling and palletizing charge of 80 cents per carton for the entire load, plus $22.50 for a Ryan temperature recorder, or a total of $6,616.50 f.o.b.

7. On or about June 13, 1984, respondent Montes contacted respondent Angelo Di Giacomo by telephone, and secured such respondent's agreement to purchase from respondent Montes one lot containing 1,050 cartons of cantaloupes of which 504 would be size 15 at $7.00 per carton, and 546 would be size 12 at $5.00 per carton, plus 80 cents per carton for cooling and palletizing, and one-half of the profits.

8. On June 14, 1984, complainant invoiced respondent Angelo Di Giacomo on the basis of the contract terms represented to it by Martin Montes.

9. After both shipments of cantaloupes had been received and accepted by respondent Angelo Di Giacomo, respondent Montes contacted complainant, and negotiated a price adjustment downward of $1.00 per carton for the shipment of June 9, and $1.50 per carton for the shipment of June 13, on the basis of alleged poor condition on arrival.

10. On June 20, 1984, respondent Angelo Di Giacomo sent complainant the following letter:

Gentlemen:

As per instructions of Mr. Martin Montez of M & M Brokerage Co., we are returning to you Invoices #132-84: 6563: and 6563 A. Mr. Montez has stated to me that he is responsible for payment of these invoices.

11. On June 22, 1984, complainant sent new invoices covering each of the shipments of cantaloupes, and showing the respective price adjustments on each shipment. The new invoices in addition to showing the name and address of respondent Angelo Di Giacomo at the top under the printed heading "to" also showed under the printed heading "billed" the name and address of respondent Martin Montes d/b/a M & M Produce Brokerage Co. On the original invoices dated June 11, and June 14, 1984, the space opposite the word "billed" was left blank.

12. Apart from the mailing of the new invoices complainant made no response to the June 20, letter from respondent Angelo Di Giacomo.

13. On June 25, 1984, respondent Montes sent a telegram to respondent Angelo Di Giacomo which stated in relevant part as follows:

PLEASE HANDLE THE FOLLOWING FOR OUR ACCOUNT: . . . LOAD SHIPPED 6/8/84 . . . 504 CANTALOUPE 18'S RANCHO DOS PALMAS LABEL LOAD SHIPPED 6/13/84 . . . 546 CANTALOUPE 12'S RANCHO DOS PALMAS LABEL 504 CANTALOUPE 15'S RANCHO DOS PALMAS LABEL PLEASE REMIT ALL MONIES AND INVOICES TO M & M PRODUCE BROKERAGE COMPANY P.O. BOX 1844 SALINAS CA 93902

14. On July 9, 1984, respondent Angelo Di Giacomo accounted to respondent Montes for the two shipments of cantaloupes on a consignment basis, and remitted net proceeds from the sale of the two shipments of cantaloupes to such respondent.

15. The formal complaint was filed on December 15, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant alleges that the two lots of cantaloupes were sold to respondent Angelo Di Giacomo at the prices represented to complainant by respondent Montes, and asserts that respondent Angelo Di Giacomo's failure to pay complainant directly for the cantaloupes is a breach of its contract for which reparation should be awarded to complainant. Complainant also asserts that, in the

alternative, if it is concluded that respondent Angelo Di Giacomo should not be held liable for the purchase price of the cantaloupes, respondent Montes should be held liable to complainant.

The facts as stated in the findings of fact are clear from the record in this case, and are supported by a preponderance of the evidence. The record discloses that complainant and respondent Angelo Di Giacomo did not deal directly with each other prior to the shipment and receipt of the last load of cantaloupes. Under these circumstances the apparently duplicitous dealings of respondent Montes cannot be deemed to have resulted in a contract of sale between complainant and respondent Angelo Di Giacomo. There is clearly a lack of manifested mutual assent as to these parties. See *Anonymous*, 8 Agric. Dec. 374 (1949). At the most respondent Angelo Di Giacomo could only be held liable to complainant on an equitable basis for the fair market value of the produce which it received from complainant. However, this respondent would only be liable to complainant on such basis if it were possessed of adequate knowledge of complainant's interest in the two shipments of cantaloupe. Normally receipt of the two invoices from complainant would have been sufficient to put respondent Angelo Di Giacomo on notice of complainant's interest in the cantaloupes. See *J. Manning & Co.* v. *Bass & Swaggerty*, 34 Agric. Dec. 1036 (1975). However, in this case respondent Angelo Di Giacomo's letter of June 20, 1984 (see Finding of Fact 10) received no response from complainant. In addition the new invoices sent by complainant, following respondent Angelo Di Giacomo's posting of the June 20, 1984, letter, differed from the preceding invoices, not only in specifying a price adjustment, but also by placing the name and address of respondent Montes under the heading "billed" for the first time. The natural interpretation of this, in the context of the factual situation, was that respondent Montes was being billed for the cantaloupes. We find that respondent Angelo Di Giacomo is not liable to complainant for any amount.

Complainant's request that respondent Montes be held liable in the alternative that respondent Angelo Di Giacomo not be found liable is clearly meritorious. In its complaint complainant requested a total of $8,995.20 from either respondent on the basis of the alleged price adjustment. In its opening statement complainant asserted that the award should be $11,074.20, based upon the original contract price, since there was no evidence in the record that the cantaloupes in fact arrived in poor condition. A copy of the opening statement was served upon respondent Montes and it made no response thereto. Respondent Montes' willingness to confirm to complainant a sale at that price is deemed by us to be an admission

that the produce was at the time worth at least such amount. Complainant's failure to realize that amount for the produce was directly attributable to the false statements made by Montes. We conclude that these false statements violated the Act (see 7 U.S.C. § 499b(4)) and damaged complainant in the amount of $11,074.20. Under the circumstances of this case we find that complainant's request for an award of the original contract price is fully justified. Respondent Martino Montes d/b/a M & M Produce Brokerage's failure to pay complainant $11,074.20 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order respondent Martino Montes d/b/a M & M Produce Brokerage shall pay to complainant, as reparation, $11,074.20, with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

The complaint against Angelo Di Giacomo is dismissed.

Copies of this order shall be served upon the parties.

GRASSO FOODS, INC. *v.* THE QUAKER OATS COMPANY. PACA Docket No. 2-6869. Decided October 3, 1986.

Acceptance—Breach by seller—Damages, Proof of.

Where buyer accepts nonconforming goods but fails to prove damage, it is liable for full contract price.

Edward M. Silverstein, Presiding Officer.
Pro se, for complainant.
Richard L. Frank, Washington, D.C., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $13,200.00 in connection with the shipment of a truckload of frozen diced green pepper.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon the respondent, which filed an answer thereto denying

liability to complainant. In addition, respondent filed a counterclaim against complainant in the amount of $5,210.05 in connection with the same shipment.

Since neither the amount of the formal complaint nor the amount of the counterclaim exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence in this case, as is the department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant submitted a sworn opening statement, respondent filed a sworn answering statement, and complainant filed a sworn statement in reply. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Grasso Foods, Inc., is a corporation whose mailing address is Route 2, Box 11, Swedesboro, New Jersey 08085.

2. Respondent, The Quaker Oats Company, is a corporation whose mailing address is 100 Lee Street, Jackson, Tennessee 38301.

3. At all material times, both complainant and respondent were licensed under the Act or operating subject to license under the Act.

4. In making purchases of frozen diced green peppers, the respondent requires that clumps in the green peppers not exceed 10% by weight of the total shipment.

5. During the 1983 shipping season, respondent purchased approximately 120,000 pounds of frozen diced green peppers from complainant through Jewell-Barksdale Associates, 5440 West Saint Charles Road, Berkeley, Illinois 60163. Of that 120,000 pounds, 80,000 pounds were initially rejected by respondent because the green peppers were frozen in clumps rather than free flowing as required by the contract's specifications. Jewell-Barksdale Associates, therefore, arranged for a local warehouse to recondition the peppers at complainant's expense, and respondent agreed to accept them.

6. During the 1984 shipping season, respondent agreed with Jewell-Barksdale Associates to accept further shipments of frozen diced green peppers from complainant. However, respondent clearly specified that it would not accept any shipment of green peppers which did not comply with their requirement that the peppers not be clump frozen. This information was conveyed to complainant by Jewell-Barksdale Associates, and complainant assured respondent through them that the flowing problem would be resolved.

7. On or about November 8, 1984, the respondent, through Jewell-Barksdale Associates, purchased 40,000 pounds of frozen green peppers from the complainant at a price of 33¢ per pound. The green peppers were required to meet respondent's specification no. 57903 which required that the green peppers not be frozen in clumps, but rather that they be free flowing. A confirmation of sale was issued by Jewell-Barksdale Associates on that same date. The green peppers were received by the respondent on or about November 19, 1984. On that same date, the respondent inspected the shipment of green peppers after it was unloaded from the truck, and discovered that the green peppers were clump frozen. In fact, some of the cartons were found to contain one single clump of green peppers. Since the shipment did not conform to its standards, the respondent attempted to reject the load by notifying Jewell-Barksdale Associates of the fact. Jewell-Barksdale Associates related this notice of rejection to the complainant. However, the complainant refused to accept the rejection. Moreover, when respondent attempted to redeliver the load to the complainant, complainant refused to accept them.

8. Of the 1,000 cases of green peppers which complainant delivered to respondent, the respondent found that 13 satisfied its quality standards and used them. The remaining 987 cases are being stored by the respondent.

9. A formal complaint was filed on March 13, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

It is clear that the complainant shipped a load of frozen diced green peppers to the respondent which did not conform to the parties' contractual agreement. That is, the parties' contract required that the green peppers be frozen in such a way as to allow them to be free flowing, however, the green peppers which the complainant delivered to the respondent were frozen in clumps. The shipment, therefore, did not conform to the parties' contractual agreement. Complainant did not dispute the fact. However, before respondent attempted to reject the load of green peppers, the 1,000 cartons were unloaded from the truck and taken into respondent's business location. Under the regulations, 7 CFR § 46.2(bb)(4), any rejection following an act of acceptance such as unloading is defined as a rejection "without reasonable cause." By unloading the cartons of green peppers, the respondent accepted them. *Julius Peller* v. *Bonnie Lee Super Food Mart*, 16 Agric. Dec. 1018 (1957). Having accepted the green peppers, respondent became liable to complainant for the full contract price less any provable damages. *Rocky Ford*

Dist. Co. v. *Angel Produce*, 29 Agric. Dec. 93 (1970). The respondent has the burden of proof as to such matters. *The Growers-Shipper Pot. Co.* v. *South W. Pro. Co.*, 28 Agric. Dec. 571 (1969).

As noted above, we are satisfied that the respondent has proven that the vast majority of the green peppers delivered by complainant did not satisfy the parties' contractual requirements. However, the respondent has failed to prove that it was damaged thereby. Respondent, in its counterclaim, seeks reimbursement of expenses it allegedly incurred with respect to the subject shipment, to wit: $2,578.89 for freight charges incurred in its attempt to return the peppers to complainant; $2,037.70 for storage charges it allegedly incurred as a result of its storage of the 987 cartons of peppers it has not used; and $599.46 for labor charges it allegedly incurred "to inspect the peppers." Its claim for reimbursement for shipping charges is unwarranted inasmuch as it had no right to ship the green peppers back to the complainant after it accepted them. Moreover, as it accepted the peppers, the storage charge for which it claims reimbursement, as well as its claim for reimbursement for inspection cost, are costs of its own business operations. Such expenses are not reimbursable.

The only way in which the respondent could have proven damages was by a showing that the green peppers delivered had less value than the agreed contract price. One way of its doing so would have been for it to make a prompt and proper resale of them, or at least a valid attempt to do so. Since respondent did not do so, and did not offer any other proof showing that the peppers it accepted had less value than the price it had agreed to pay for them, it has failed to prove it was damaged. *See Dilatush* v. *Sacks Bros.*, 20 Agric. Dec. 626 (1961).

Accordingly, we must hold that the respondent is obligated to the complainant in the amount of $13,200.00 and that the respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded. Moreover, in view of this, respondent's counterclaim should be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $13,200.00 plus interest at the rate of 13% per month from December 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

SUNFRESH DISTRIBUTING COMPANY *v.* SOL SALINS, INC. PACA Docket No. 2-6891. Decided October 3, 1986.

Evidence—Burden of proof.

Complainant alleged that it sold a truck load of grapes to respondent. Respondent claimed that the grapes were purchased from a third party. It was held that complainant failed to meet its burden of proving by a preponderance of the evidence that it sold the grapes to respondent and the complaint was dismissed.

George S. Whitten, Presiding Officer.
Gregory C. Horn, Beverly Hills, California, for complainant.
Howard B. Silberberg, McLean, Virginia, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $14,175.00 in connection with the shipment in interstate commerce of a truckload of grapes.

A copy of the report of investigation and of a supplemental report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, complainant filed a sworn opening statement, and pursuant to section 47.16 of the Rules of Practice respondent requested and was allowed to take the oral depositions of Paul Shipton, president of complainant, and Don E. Collier, employee of complainant at the time of the subject transaction. The depositions were taken with counsel for both parties present, and were subsequently received with evidence. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Sunfresh Distributing Company, is a corporation whose address is 6340 Green Valley Circle, 3-314, Culver City, California.

2. Respondent, Sol Salins, Inc., is a corporation whose address is 1325 Fifth Street, N.E., Washington, D. C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On July 17, 1984, a truckload consisting of 1620 lugs of Thompson seedless grapes, "OH YES" brand, was shipped from Higley Citrus Packers, Higley, Arizona to Sol Salins, Inc., in Washington, D. C.

4. After arrival at the place of business of Sol Salins, Inc., in Washington, D. C., the grapes were federally inspected on July 23, 1984, at 11:15 a.m. The federal inspection shows that the temperatures ranged from 34 to 37 degrees and stated the condition to be as follows:

> Berries generally firm and generally firmly attached to capstems. Stems mostly green, many turning brown and pliable.
>
> Average 3% shatter berries.
>
> Average 5% damage by sunken areas at capstems. From 5 to 25% in one-half of samples, none in remainder, average 7% damage by weak discolored berries. Less ½ of 1% decay.

The inspection certificate went on to state under the heading "REMARKS" that: "Samples showing weak, discolored and sunken areas, generally found in approximately one-half of pallets, located near rear doors." In addition it was stated that the inspection was restricted to the upper two layers of the load.

5. Respondent received an invoice, number 1202, dated July 17, 1984, from Texas Produce, Dallas, Texas, covering 1620 lugs of grapes at $4.50 per lug, for a total of $7,290.00, less freight in the amount of $3,600.00, for a net invoice amount of $3,690.00. On August 1, 1984, respondent issued Texas Produce a check in the amount of $3,690.00 in payment for invoice number 1202.

6. An informal complaint was filed on August 14, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant alleges in its formal complaint, which was signed and sworn to by Paul Shipton, president of complainant corporation, that complainant sold the truckload of grapes to respondent on July 17, 1984, for a total purchase price of $14,175.00 f.o.b. Attached to the formal complaint is a copy of a bill of lading showing the shipper as Higley Citrus Packers of Higley, Arizona, dated July

17, 1984, and covering 1620 lugs of Thompson Seedless grapes, "OH YES" brand. The bill of lading shows that the grapes were loaded and shipped on July 17, 1984. The consignee is shown as Sunfresh Dist. Co., 6340 Green Valley #314, Culver City, Calif. 90230. Under the printed heading "Drop-off instructions" is typed the following: "Salinas, Sol Inc., 1325 5th St. N. E., Washington, D. C. 20002." Both parties admit that this bill of lading is applicable to the subject load of grapes. Complainant's Paul Shipton further alleged in the sworn opening statement that after the grapes were received he received a telephone call from the truck broker stating that there was a problem with the load in Washington, D. C. Mr. Shipton states that he then called respondent, inquired as to the cause of the problem, and was told that the grapes were in poor condition. Mr. Shipton states that he instructed the person on the telephone from respondent to have a federal inspection made, and have the inspector call Mr. Shipton upon conclusion of the inspection. Mr. Shipton further states that approximately two hours passed, and not having heard from the inspector, he called respondent, and was told that the inspection was in progress. Mr. Shipton alleges that he kept a Mr. Lucero of "Higley Citrus Packers" informed as to what was progressing. Mr. Shipton states in addition that after another hour passed he again called respondent to inquire about the results of the inspection, and was told that the inspector had left, but was read the supposed results of the inspection by a representative of respondent. Mr. Shipton asserts that what was read to him over the telephone indicated that that grapes were in very poor condition, and that on the basis of such condition, after contacting Mr. Lucero, he agreed to the grapes being sold by respondent for trucking charges. Mr. Shipton states that he later called the U.S. Department of Agriculture in Washington and determined that the inspection did not show that the grapes were as bad as they had been represented to be by the representative of respondent. Complainant contends, in effect, that the agreement that the grapes could be sold for trucking charges by respondent should be voided, and complainant should be awarded the alleged original contract price of $14,175.00. See *Harte McCabe* v. *Higgins Potato Co.*, 17 Agric. Dec. 1025 (1958).

Respondent's reply to complainant's allegations was made by Richard Salins, secretary of respondent firm, and contained in respondent's answer. There is no showing as to what part or parts of respondent's answer Mr. Salins had personal knowledge. However, Mr. Salins alleges in the answer, on behalf of respondent, that no sale of grapes from complainant to respondent ever took place, and that the grapes which respondent received were purchased from

Texas Produce of Dallas, Texas. Mr. Salins further stated that respondent paid Texas Produce for the grapes. The Department's report of investigation contains, in addition to the documentation already mentioned, a copy of an invoice from Higley Citrus Packers to Sunfresh Distributing Company for a truckload of 1620 lugs of Thompson grapes, "OH YES" brand, at $8.75 per lug or $14,175.00. In addition the invoice states a charge of $22.50 for a Ryan temperature recorder. The invoice shows that the shipment was to be made to "Salins, Sol Inc.", at the address of Sol Salins, Inc., in Washington, D. C., and references "purchase order number 2558". The report of investigation also contains a copy of a Western Union mailgram dated July 24, 1984, from Higley Citrus Packers to Sunfresh Distributors which states as follows:

> ATTN DON COLLIER,
>
> IN REFERENCE TO OUR CONVERSATION THIS MORNING, I AM AUTHORIZING YOU TO HANDLE THE LOAD 302558 TO BE HANDLED FOR OUR ACCOUNT.

The supplemental report of investigation contains an unverified letter from Herman Lucero of Higley Citrus Packers to the Fruit and Vegetable Division of this Department which states in relevant part as follows:

> Gentlemen:
>
> On July 17, 1984 we sold to Sun Fresh Dist. Co., 1620 lugs of Thompson Seedless Grapes which carried the brand of OH YES. We have never heard of or sold anything to Texas Produce Co.

Complainant had the burden of proving by a preponderance of the evidence that it sold the truckload of grapes to respondent. See *Best Pak Potato Co., Inc.* v. *Louis M. Palomo Wholesale Produce,* 32 Agric. Dec. 675 (1973). Complainant did not send an invoice to respondent at the time the contract was entered into nor at any time thereafter. Complainant's Paul Shipton was asked a question during the oral deposition concerning complainant's practice in documenting a sale:

> Q. IN JULY OF 1984, WHEN SUNFRESH WOULD ENTER INTO A TRANSACTION INVOLVING THE SALE OF PRODUCE TO SOME OTHER CONCERN, HOW DID SUNFRESH RECORD A SALE TRANSACTION?

A. WELL, WHEN WE PURCHASE THE MERCHANDISE, WE MAKE UP A PURCHASE ORDER. AND FROM THE PURCHASE ORDER WE, THE SAME DAY THE PURCHASE ORDER IS DRAWN—EXCUSE ME, WHEN THE MERCHANDISE IS SHIPPED, THE SAME DAY WE INVOICE THE CUSTOMER.

OR WE WAIT UNTIL THE MERCHANDISE ARRIVES AND MAKE SURE EVERYTHING IS OKAY AND THEN WE INVOICE THE CUSTOMER. WE HAD TWO DIFFERENT WAYS.

We think it is significant that neither of the ways described by complainant's president were followed in this case. However, complainant's position in this proceeding suffers from even more serious difficulties. Paul Shipton testified during the course of the oral deposition that he had absolutely nothing to do with the contracting of the sale of the subject grapes:

Q. AND AS PRESIDENT, WHAT WERE YOUR DAILY OBLIGATIONS AND DUTIES WITH SUNFRESH?

A. MY DUTIES BEING—BASICALLY I WAS SELLING ONIONS, AND DON WOULD BE SELLING THE WET.

* * * * * * *

Q. WHAT AUTHORITY DID MR. COLLIER HAVE TO BUY AND SELL ON BEHALF OF SUNFRESH IN JULY OF 1984?

A. HE HAD FULL AUTHORITY TO BUY AND SELL, PURCHASE PRODUCE AND SELL IT.

Q. AT WHAT TIME IN JULY OF 1984, DID YOU REQUIRE HIM TO CONSULT WITH YOU BEFORE HE WOULD SET A CERTAIN PRICE ON A PARTICULAR LOT OF PRODUCE OR BUY ONLY AT A CERTAIN PRICE?

A. NO RESTRICTIONS.

Q. SO HE HAD CARTE BLANCHE THEN,——

A. YES.

Q. —TO BUY AND SELL FOR SUNFRESH?

A. YES.

* * * * * * *

Q. WHEN YOU PURCHASED THESE GRAPES FROM HIGLEY IN JULY OF 1984, DID YOU TELL MR. COLLIER TO GO OUT AND TRY TO SELL THEM FOR SUNFRESH?

Mr. HORN: OBJECTION; HE SAID THAT MR. COLLIER PURCHASED THEM. HE DIDN'T SAY THAT HE PURCHASED THEM.

The WITNESS: AND HE SAID "YOU." YOU HAD TO MEAN SUNFRESH.

BY Mr. SILVERBERG:

Q. SUNFRESH, YES.

A. DON COLLIER HANDLED THE WHOLE TRANSACTION.

Q. SO YOU HAD NO FORE KNOWLEDGE OF IT WHATSOEVER?

A. NO. . . .

* * * * * * *

Q. TO YOUR KNOWLEDGE, DID SUNFRESH BECOME INVOLVED AT ALL IN ARRANGING THE TRANSPORTATION OF THE GRAPES TO SALINS?

A. DON COLLIER AGAIN. DON HANDLED THE TRANSACTION.

Mr. Shipton made his noninvolvement in the transaction even clearer when he was questioned by respondent's attorney concerning the sworn opening statement which he submitted. Such statement had been written in the first person, recounted all of the alleged events relative to the transaction, and was signed by Mr. Shipton. The statement begins as follows:

I, PAUL SHIPTON, declare:

I am President of SUNFRESH DISTRIBUTING COMPANY, a California corporation, and the Complainant in the above-entitled action. I am aware of the facts recited in this affidavit through my own personal knowledge, and

if I were to be called as a witness, I could competently testify thereto.

However, respondent's attorney went over each paragraph of the opening statement with Mr. Shipton during the oral deposition testimony, and Mr. Shipton affirmed repeatedly that he had no personal knowledge of the events related in the opening statement until the last paragraph on page 3 where it is alleged that he called the United States Department of Agriculture in Washington and requested a reading of the inspection and that a copy be sent to him.

When we turn to the deposition testimony of Don Collier we are confronted with what amounts to a professed vast ignorance concerning the transaction in question, covered over by an occasional vague recollection. To summarize Mr. Collier's testimony, he admits to being personally involved in the grape transaction, and admits knowing that in July of 1984, grapes were shipped from Arizona to Washington, D. C. However, he doesn't recall by whom and when he was first advised that grapes were available for sale, nor how he first became involved. He did not know whether complainant was a shipper or seller or was acting as a broker. He did not remember whether he personally contacted Salins to see if it wished to purchase grapes, and did not remember whether he entered, or claimed on behalf of Sunfresh to have entered, into a "sale purchase" of the grapes. He did not recall what first got him involved in the grape transaction. He recalled communications that he made to Salins, but did not recall what the communications were or when they occurred. He vaguely recalled that Higley Produce was the grape supplier, and was sure that he talked to Higley about supplying the grapes, but did not remember who he talked to. He recalled problems with the grapes, and discussing the problems with Shipton, and requesting that someone at Salins get a federal inspection of the grapes. However, he did not remember being advised as to the results of the inspection by anyone at Salins, but later vaguely remembered so being advised. He was unable to answer whether he made any kind of memoranda of telephone conversations and discussions during the course of his involvement in the transaction, but later was sure that he did make notes, but could not remember what happened to them. He did not know what complainant's practice and procedure was in July of 1984, as to how it documented its sales of produce. Mr. Collier was confronted by respondent's counsel with the contrast between his memory at the time of the oral deposition, and his prior written statement which had been submitted as a part of the record in the

proceeding. Interestingly the written statement parallels closely in the opening statement sworn to by Paul Shipton. Mr. Collier's testimony was as follows:

Q. THERE CAME A TIME, MR. COLLIER, WHEN YOU HAD OCCASION TO MAKE A WRITTEN STATEMENT UNDER OATH AS TO THIS PARTICULAR TRANSACTION. DO YOU RECALL THAT, SIR?

A. YES, SIR, I DO.

Q. DO YOU RECALL THE CIRCUMSTANCES UNDER WHICH THAT DOCUMENT WAS PREPARED?

A. I.E. UNDER DURESS?

Q. NO. DID SOMEBODY REQUEST THAT YOU PUT IN WRITING YOUR KNOWLEDGE?

A. YES. PAUL SHIPTON.

We freely confess that we do not know who sold the subject grapes to Sol Salins, Inc. Certainly it would seem that respondent should have been able to present far more thorough and convincing evidence concerning the alleged sale of the grapes to respondent by Texas Produce. In addition, we note that Mr. Collier did testify that he didn't believe he had ever heard of a firm called Texas Produce. But then, given a memory like Mr. Collier's, one can easily imagine him having sold the grapes to Texas Produce, and subsequently being unable to recall anything concerning the sale. The resolution of this case lies, not in determining whether Texas Produce sold the grapes to Sol Salins, Inc., but whether complainant has met its burden of proving by a preponderance of the evidence that it sold the grapes to Sol Salins, Inc. We conclude that complainant has not met this burden, and that the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

BLISS PRODUCE COMPANY *v.* AGNES M. FROST and EUGENE A. FROST d/b/a FROST TRUCKING. PACA Docket No. 2-6931. Decided October 3, 1986.

Failure to communicate clear rejection constitutes acceptance—Purchaser who accepts produce has burden of proving breach of contract.
Respondent failed to provide any documentation or other credible evidence to prove a breach of contract in connection with its purchase of a truckload of potatoes.

Jory M. Hochberg, Presiding Officer.
Robert D. Bliss, Greeley, Colorado, for complainant.
David G. Stronge, Bakersfield, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter, "the Act." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of $3,150.80, in connection with the sale of a truckload of potatoes in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an Answer and Counterclaim on July 11, 1984, alleging that it was damaged by the complainant in the amount of $1,150.00. A Reply was thereafter filed by complainant on August 13, 1985.

Since the amount claimed as damages does not exceed $15,000, the shortened method of procedure set forth in the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of additional sworn statements. No further statements were filed by the parties. Complainant filed a brief while respondent chose not to do so.

FINDINGS OF FACT

1. Bliss Produce Company is a corporation whose business mailing address is P.O. Box 816, Greenley, Colorado 80632.

2. Frost Trucking is a partnership composed of Agnes M. Frost and Eugene A. Frost whose business address is Box 272X, Bakersfield, California 93307. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about December 12, 1983, by oral agreement, complainant sold to respondent one truckload of Bulk oversize Kennebec potatoes at the agreed price of $9.00 per cwt., delivered to Venice, California, payment due within thirty days of delivery.

4. Pursuant to this contract, on December 12, 1983, complainant shipped 46,120 pounds of Bulk oversize Kennebec potatoes from Grafton, North Dakota to respondent. This truckload was delivered to respondent at Venice, California on December 15, 1983.

5. Immediately after delivery, respondent was billed $4,150.80 in accordance with the contract terms. During each of the next seven months, complainant sent bills to respondent requesting the remittance of $4,150.80 and stating that the payment was long overdue. In August, 1984, complainant's billing also threatened collection action, and immediately thereafter, respondent sent a payment of $1,000.00 to complainant. Complainant mailed four additional bills to respondent during the next four months requesting payment of the balance of $3,150.80.

6. An informal complaint in this proceeding was filed on September 28, 1984, which was within the nine months after the cause of action accrued. The formal complaint was then filed on March 26, 1985.

CONCLUSIONS

The record in this proceeding clearly supports an order requiring respondent to pay complainant the balance of the amount billed on the potatoes which were delivered to respondent. The following evidence is undisputed. The truckload in question was accepted at the destination and the bill of lading was signed without any mention of a product problem. For seven months following the transaction in question, complainant billed the respondent for a "Long Overdue" obligation on this contract. On its next billing, in August, 1984, complainant referred to a telephone conversation in which respondent agreed to send a check for the invoiced amount. Complainant also threatened legal action on that bill unless the check was sent immediately. Approximately one week later, complainant received a check for $1,000.00 from respondent.

In September, 1984, complainant's monthly billing contained the following statement:

> Thanks for your check in the amount of $1,000.00, leaving a balance due of $3,150.80. Please send check to Bliss Produce Co. P.O. Box 816, Greenley, Co. 80612.
>
> If we do not hear from you, we will have to turn this over for collection. As per my telephone conversation with Mrs.

> Frost 9/6/84, she said you would be in this weekend. PLEASE SEND CHECK.

In October, 1984, complainant's billing stated the following:

> Dear Mr. Frost:
>
> As per our telephone conversation 10/9/84 P.M. You said you would follow up on this account.
>
> Please send your check in the amount of $3,150.80.

Respondent now claims that the potatoes were frozen when delivered and that upon informing complainant of this problem shortly after delivery, complainant agreed to investigate the matter and communicate back. Respondent makes no attempt to explain why it never responded formally to the many bills which complainant sent to it and which reference telephone conversations during which respondent purportedly agreed to pay the entire invoiced amount. Respondent further claims that it only paid the $1,000.00 because it badly needed additional product from complainant.

It is immediately apparent from the record that despite the numerous bills sent by complainant it was not until November 1, 1984, that respondent bothered to document in writing its allegation that the potatoes were frozen and useless. This was done in response to an inquiry from the regional office of the Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (this was the second inquiry sent to respondent, the first one having been unanswered). In fact, respondent's claim at that time—that the potatoes were hauled to a hog farm—is contradicted by the claim in its Answer that the potatoes were hauled to a dairy in Corona, California and dumped for cattle feed. Moreover, respondent's contention in its Answer that the potatoes were hauled to the Venice dairy by Espinoza Trucking is also contradicted by a December, 1984, letter written by Eugene Frost to the Fruit and Vegetable Division in which he claims the potatoes were hauled to a Corona hog farm by Western Pacific Carriers.

Respondent has not only failed to provide adequate explanations concerning the statements and documentation provided by complainant, but has, in fact, provided further support to complainant's claims as a result of its contradictory contentions. The evidence clearly supports a conclusion that respondent accepted the potatoes delivered pursuant to the contract. Having accepted the shipment it is respondent's burden to prove a breach of the contract. *Neal* v. *Kanakry*, 20 Agric. Dec. 771 (1961). There is no credi-

ble evidence in the record to establish that the condition of the potatoes upon delivery was not in accordance with the contract.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $3,150.80 with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

The counterclaim of the respondent is dismissed.

Copies of this order shall be served upon the parties.

FLOYD J. BEYER, *v.* S. B. DAVIS COMPANY. PACA Docket No. 2-7016. Decided October 3, 1986.

Burden of Proof.
Complainant failed to sustain its burden of proving that the respondent broker violated its broker's duties. The complaint was therefore dismissed.

Andrew Stanton, Presiding Officer.
Pro se, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,791.00 in connection with the sale of a quantity of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, it not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and com-

plainant submitted a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Floyd J. Beyer, is an individual whose address is 233 South Knight Road, Munger, Michigan.

2. Respondent, S. B. Davis Company, is a corporation whose address is 2695 Elmridge Drive N.W., Grand Rapids, Michigan. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately May 7, 1984, respondent, through its vice-president Charles Johnson, acting as a broker on behalf of Nash-DeCamp Company, Visalia, California (hereinafter "Nash-DeCamp"), the agent of the shipper, Kundert Bros., Edison, California, negotiated the sale of a carload of Kundert potatoes from Nash-DeCamp to complainant. The carload consisted of 700 sacks of size A potatoes at $10.00 per sack, and 300 sacks of size B potatoes at $5.00 per sack, plus $22.50 for a temperature recorder, for a total contract price of $8,522.50, f.o.b. Mr. Johnson did not inform complainant, at the time the contract was negotiated, that the $10.00 per sack price for the size A potatoes was a "lid" price, and that complainant would be protected in the event of market decline. The potatoes were delivered to complainant on approximately May 16, 1984.

4. Respondent prepared a confirmation of sale reflecting the contract terms agreed to between the parties, as set forth in Finding of Fact 3, and sent it to complainant and Nash-DeCamp. Complainant never objected to the confirmation of sale.

5. On approximately May 16, 1984, complainant, respondent and Nash-DeCamp agreed to a $1.00 per sack reduction in price of the size A potatoes to $9.00 per sack. Respondent prepared an invoice reflecting the adjusted price of $9.00 per sack and sent it to complainant. Complainant never objected to the invoice until it returned it to respondent on June 15, 1984, with the price altered to $8.00 per sack for the size A potatoes, reflecting a $2.00 per sack reduction.

6. An informal complaint was filed on November 30, 1984, which was within nine months when the alleged cause of action herein accrued. A formal complaint was filed on September 27, 1985.

CONCLUSIONS

Complainant claims that respondent, through its vice-president, Charles Johnson, violated its duty as a broker in connection with the sale of carload of potatoes to complainant from Nash-DeCamp

Company, Visalia, California. Complainant alleges that at the time the contract was negotiated, Mr. Johnson told him that Mazzei-Franconi potatoes would be shipped, but without permission substituted Kundert potatoes. Complainant also contends that Mr. Johnson agreed that the price for the 700 sacks of size A white potatoes would have a $10.00 per sack lid, with the final price to be determined at the time of delivery. Complainant contends further that when the potatoes were delivered, on approximately May 16, 1984, Mr. Johnson adjusted the price on the size A potatoes to $8.00 per sack, a $2.00 reduction. However, complainant asserts that Mr. Johnson acted without authorization from Nash-DeCamp, which did not honor the $2.00 per sack adjustment, permitting only a $1.00 per sack reduction. When complainant refused to pay the difference of $700.00, Nash-DeCamp brought a reparation complainant against him and, on April 22, 1985, was awarded $700.00, plus $91.00 interest (*Nash-DeCamp Company* v. *Floyd J. Beyer* 44 Agric. Dec. ____ (1985)). Complainant claims this sum plus $1,000.00 as his damages resulting from complainant's breach of its broker's duties.

The duties of a broker are set forth in section 46.28 of the regulations (7 CFR 46.28) in part, as follows:

> (a) General. The function of a broker is to negotiate, for or on behalf of others, valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the act and is subject to the penalties specified in the act and may be held liable for damages which accrue as a result thereof. It shall be the duty of the broker to fully inform the parties concerning all of the terms and conditions of the proposed contract. . . . The broker should advise his principal promptly of rejection by the buyer or of any other unforseen development of which he is informed.

Complainant, as the moving party, has the burden of proving by a preponderance of the evidence the essential allegations of his complaint (*Vernon C. Justice* v. *Milford Packing Co., Inc. and/or Leibowitz Pickle Products, Inc.*, 34 Agric. Dec. 533 (1975)), including in this case that respondent violated its broker's duties. After carefully examining all the evidence in the record, we can perceive no such violation by respondent. Respondent's Charles Johnson, in a sworn statement submitted as respondent's answering statement, has denied complainant's allegations that at the time the contract was being negotiated, Mr. Johnson informed him that Mazzei-Franconi potatoes would be shipped, and that the size A white potatoes

would have a $10.00 per sack lid price with the final price to be designated at the time of delivery. The most accurate indication of the contract terms negotiated by respondent can be found in respondent's confirmation of sale, to which complainant never objected. That document completely supports respondent, as it shows the shipper as Kundert Bros. and a price of $10.00 per sack for the size A potatoes. The confirmation does not mention Mazzei-Franconi potatoes, nor does it say that the $10.00 per sack price is merely a lid, with the final price to be determined after delivery. Complainant's claim that Mr. Johnson gave him a $2.00 per sack price reduction on the size A potatoes, although the seller, Nash-DeCamp, had only authorized a $1.00 per sack reduction, is also denied by Mr. Johnson in his sworn answering statement. The only other evidence of any price adjustment negotiated by respondent is respondent's May 16, 1984, invoice to complainant, issued on the seller's behalf, which shows a $9.00 per sack price for the size A potatoes. This fully supports respondent's position. Mr. Johnson asserts that complainant received the invoice but never objected to it until this invoice was returned to respondent on June 15, 1984, altered to show a price of $8.00 per sack for the size A potatoes. Complainant has not disputed this assertion. Based on all the evidence in the record, we can not conclude that complainant has sustained his burden of proving that respondent violated any of its duties as a broker regarding the original contract negotiations or the change in price terms for the size A potatoes. Therefore, there is no merit to the complaint and it must be dismissed.

ORDER

The complaint is hereby dismissed.
Copies of this order shall be served upon the parties.

FRUIT MARKETING, INC., *v.* PURITY SUPREME, INC. PACA Docket No. 2-6951. Decided October 6, 1986.

Acceptance by unloading—Rejection ineffective if after acceptance—Burden of proving breach of warranty and damages on respondent buyer—Determination of damages resulting from breach of warranty.

Since respondent accepted the plums by unloading them from the truck, its subsequent attempted rejection was ineffective. Respondent proved that there was a breach of complainant's suitable shipping condition warranty and that transportation conditions were normal. Respondent also proved damages. Complainant awarded the difference between the contract price and respondent's damages.

Andrew Stanton, Presiding Officer.
Pro se, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,802.50 in connection with a quantity of plums sold and shipped to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answering statement, and complainant submitted a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Fruit Marketing, Inc., is a corporation whose address is P.O. Box 399, Del Rey, California.

2. Respondent, Purity Supreme, Inc., is a corporation whose address is 312 Boston Road, North Billerica, Massachusetts. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately June 28, 1984, complainant sold to respondent 240 lugs of Honey Gold plums at prices of $4.00 per lug for 42 lugs of 4×5 plums, $4.00 per lug for 35 lugs of 3×4×5 plums, and $8.00 per lug for 163 lugs of 4×4 plums, plus $22.50 for a Stires recorder and $168.00 for precooling and palletizing, for a total contract price of $1,802.50, f.o.b.

4. The load of plums was shipped in interstate commerce to respondent's place of business, where it arrived on July 3, 1984, and was unloaded.

5. On July 3, 1984, after arrival of the plums, respondent had them federally inspected, which resulted as follows, in relevant part:

WHERE INSPECTED	Appl. Warehouse
. . .	
Condition Of Load:	Stacked on pallets at above location.
. . .	
Temperature of Product:	37 to 42°F.
. . .	
Condition:	Generally hard to firm, ground color light green to greenish-yellow. Average 6% damage by bruising. Range 8 to 22%, average 15% damage by brown surface discoloration affecting ⅛ to ¾ of surface. Decay ranges 2 to 8%, in most samples, some none, average 5% Brown Rot in various stages.
. . .	
Remarks:	Applicant states above shipment unloaded from trailer number Florida 45870.

6. Sometime after the inspection, respondent informed the broker that it was rejecting the load. Complainant refused to authorize respondent to sell the plums for its account. On July 5, 1984, respondent turned the plums over to Peter Condakes Company, Inc., Everett, Massachusetts (hereinafter, "Condakes"), for consignment handling. Condakes provided an account of sales showing that it had received gross proceeds of $967.00 and deducted $145.05 for commission and $36.00 for handling, resulting in net proceeds of $785.95.

8. Respondent has not paid anything to complainant for the load of plums at issue.

9. An informal complaint was filed on March 6, 1985, which was within nine months from when the cause of action herein accrued. A formal complaint was subsequently filed on June 28, 1984.

CONCLUSIONS

Respondent alleges that it rejected the plums because of their poor condition. However, according to the July 3, 1984, inspection report, the plums were inspected while stored in respondent's warehouse, after they had been unloaded from the truck. Respondent's action of unloading the plums was an exercise of dominion that constituted acceptance. *Stonoca Farms Corporation* v. *S & S Produce Inc.*, 42 Agric. Dec. 937 (1983). Respondent does not state when it tried to reject the plums, but we can assume that it did so after the plums were unloaded and inspected. Respondent's attempted rejection of the plums therefore came after acceptance and was ineffective. *Herbert Rich Co.* v. *Blue Bonnet Foods, Inc.*, 38 Agric. Dec. 480 (1979).

Respondent is liable for the contract price of the accepted plums, less damages resulting from any breach of warranty. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Stonoca Farms Corporation* v. *S & S Produce Inc., supra*. Since this was an f.o.b. sale, complainant gave the implied warranty of suitable shipping condition, meaning that the plums, at the time of billing, will be in a condition which, if handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. 7 CFR § 46.46(j). The July 3, 1984, inspection shows abnormal deterioration. Complainant claims that transportation conditions were abnormal, as indicated by the readings of the Stires recorder, which shows the temperature ranging from 45° to 50°F. for most of the trip. Respondent contends that the Stires recorder was not working properly, as it was found on the floor of the truck upon arrival at respondent's warehouse. Further, respondent points out that the pulp temperatures indicated by the inspection were from 37° to 42°F., which is inconsistent with a transit temperature as high as that reported by the Stires recorder. We agree with respondent that these two temperature readings are inconsistent, and conclude that the pulp temperatures found by the federal inspection are a more accurate indication of the normalcy of the transportation conditions than the reading of the Stires recorder. As such pulp temperatures are not excessive for plums, we find that transportation conditions were normal.

Complainant was thus in breach of its suitable shipping condition warranty. As damages resulting from its breach, respondent is entitled to the difference at the time and place of acceptance between the actual value of the plums and their value if they had been as warranted. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest* v. *Garden State Farms, Inc.*, 42 Agric. Dec. 922 (1983). The actual

value is usually determined by the results of a prompt and proper resale. The consignment handling by Peter Condakes Company, Inc., resulting in net proceeds of $785.95, is not disputed by complainant and appears to be prompt and proper. For the value of the plums if they had been as warranted, we will take judicial notice of the price quotations of the Market News Service Reports for Everett, Massachusetts. Although the reports for early July 1984 do not make reference to Honey Gold plums, the price for such plums can be determined by averaging the prices quoted for the many different types of California Plums listed, utilizing the lower price where a range of prices is noted. The average price for 4×4 plums on July 3, 1984, is $11.50 per lug. The average price for 3×4×5 plums on July 3, 1984 is $7.50 per lug. While prices for 4×5 plums are not listed under July 3, 1984, they are found in the reports of July 5, 1984, at $6.00 per lug. Therefore, the price for the plums, if they had been as warranted, would have been $1,874.50 for the 163 lugs of 4×4 plums, $262.50 for the 35 lugs of 3×4×5 plums, and $252.00 for the 42 lugs of 4×5 plums, for a total of $2,389.00. The difference between the actual value of $785.95 and the value if the plums had been as warranted, $2,389.00, is $1,603.05. We should deduct from this figure the amount respondent saved by failing to pay for freight, which was respondent's obligation under the f.o.b. terms of the contract, since complainant presumably paid the freight after respondent's purported rejection. However, there is absolutely no evidence in the record as to what complainant paid for freight for the shipment to respondent, and we are thus forced to find respondent's damages to be $1,603.05.

Respondent's liability is the contract price of $1,802.50 less its damages of $1,603.05, or $199.45. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $199.45, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BONITA PACKING CO., INC., *v.* LOOKOUT MOUNTAIN TOMATO & BANANA CO. INC. PACA Docket No. 2-6934. Decided October 17, 1986.

Broker sale—Failure to prove breach of contract—Complaint dismissed—Open Pricing.

Broker who negotiated sale confirmed respondent's contention that contract price for a truckload of tomatoes was not determined at the time of sale but rather left open to be determined on Tuesday of the week following shipment. Since respondent had paid complainant market price as of that date, complainant failed to prove contract breach, and complaint was dismissed.

Thomas C. Heinz, Presiding Officer.
Billy Don Grant, Bonita Springs, Florida, for complainant.
Dale Schrenck, Chattanooga, Tennessee, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter "the Act". A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of $26,640.00 in connection with the sale and shipment of a truckload of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. After a copy of the formal complaint was served upon respondent, respondent voluntarily paid complainant $14,163.00, thereby reducing the amount in dispute to $12,477.00. Thereafter, respondent filed an answer denying liability except as to $6,877.00 of the $12,477.00 claim. Respondent was accordingly ordered to pay $6,877.00 to complainant, leaving $5,600.00 as the final amount in dispute.

Since the amount claimed does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given opportunities to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement but no brief. Respondent submitted an answering statement which, although not timely filed, was accepted into the record inasmuch as the relevant and material content thereof merely duplicates evidence already in the record. Respondent also did not file a brief.

FINDINGS OF FACT

1. Complainant, Bonita Packing Co., Inc. (hereinafter "Bonita"), is a corporation with a mailing address at Post Office Box 309, Bonita Springs, Florida 33923.

2. Respondent, Lookout Mountain Tomato and Banana Company, Inc. (hereinafter "Lookout"), is a corporation with a mailing address at 1212 Peoples Street, Chattanooga, Tennessee 37403. At the time of the transaction involved herein, Lookout was licensed under the Act.

3. On or about January 23, 1985, Bonita in interstate commerce sold Lookout by oral contract a truckload of fresh tomatoes, consisting of 1600 boxes of 5×6 size tomatoes.

4. The contract was negotiated by Pat Adams of Bonita Springs, Florida, who acted as agent for both complainant and respondent.

5. Lookout accepted the tomatoes at destination and has paid Bonita $21,040.00 of the $26,640.00 demanded by Bonita as the purchase price.

6. A formal complaint was filed on March 25, 1985, which was within nine months from the time the cause of action accrued.

SUBSIDIARY FINDINGS AND CONCLUSIONS

Bonita claims the contract price for the tomatoes was $16.00 per box plus $.50 per box for degreening and $.15 per box for palletizing. In support of that claim, Bonita submitted evidence showing the average Florida price for the week ending January 19, 1985, was $17.09 per box, and for the week ending January 26, 1985, the average price was $14.70 per box. Further, for tomatoes shipped between January 18, 1985, and January 25, 1985, Bonita generally charged customers other than Lookout $16.00 per box, although some prices were as low as $10.00 per box for the same size tomatoes. Lookout, on the other hand, contends that the price was not determined on January 23, the shipment date, but rather left open to be determined by the market price on Tuesday, January 29, 1985, pursuant to the past practice of Lookout and Bonita on tomato contracts where the price was settled on Tuesday of the week following shipment.

As the moving party, Bonita has the burden of proving by a preponderance of the evidence the terms of the contract, respondent's breach thereof, and the resulting damages, if any, sustained by Bonita. *Justice* v. *Milford Packing Co.*, 34 Agric. Dec. 533, and cases cited at 535 (1975). Bonita has not met that burden. Pat Adams, the broker who represented both Bonita and Lookout in this transaction, corroborated without qualification Lookout's contention that "this load should have been priced on Tuesday, January 29, 1985."

As an ostensibly neutral third party, the broker's statements are entitled to great weight. *Homestead Tomato Packing Co.* v. *Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984). Therefore, we cannot credit Bonita's claims regarding the price term of the contract. Similarly, Bonita's claim for a degreening charge finds no support in the record. In fact, Bonita's own evidence shows that it did not charge the vast majority of its customers for degreening during the period in question (33 out of 43 sales or 77%). In sum, Bonita has not proved its allegations by a preponderance of the evidence.

The market price for the tomatoes was $13.00 per box on Tuesday, January 29, having dropped significantly from the previous week's abnormally high prices caused by freezing weather which destroyed part of the crop. Since Lookout has paid Bonita the market price for the tomatoes and for palletizing according to the contract between the parties, Bonita's claim will be dismissed.

ORDER

The complaint is hereby dismissed.

Copies shall be served upon the parties.

A. DUDA & SONS, INC. *v.* PETE PAPPAS & SONS. PACA Docket No. 2-6940. Decided October 17, 1986.

Contracts—Open price term—Contract term, "To be priced on next week's market"—Contracts, Objective theory followed.

Complainant sold and shipped a truck load of tomatoes of varying grades and sizes to respondent "to be priced on next week's market". This open price term was used because the parties expected unsettled market conditions due to a freeze at shipping point at about the time the contract was made. Complainant contended the term should be interpreted to refer to prices at the beginning of the following week, whereas respondent contended that, since the market remained unsettled for over two weeks, it should be allowed to pay complainant on the basis of its actual sales of the tomatoes. It was held that contract prices should be determined on the basis of actual shipping point market prices as reflected by Federal State Market News Service reports during the entire following business week.

George S. Whitten, Presiding Officer.
Craig A. Bromby, Oviedo, Florida, for complainant.
George J. Charles, Washington, D.C., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,752.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complainant was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complaianant filed a brief.

FINDINGS OF FACT

1. Complainant, A. Duda & Sons Inc., is a corporation whose address is P.O. Box 257, Oviedo, Florida.

2. Respondent, Pete Pappas & Sons, is a partnership composed of Peter G. Pappas and Philip G. Pappas, whose address is P.O. Box 1292, Washington, D.C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about January 22, 1985, complainant sold to respondent one truckload of tomatoes as follows: 288 cartons of 5×6 size, U.S. No. 2 grade, Homegrown brand; 504 cartons of 5×6 size, approximately 85% U.S. No. 1 grade, Beefsteak brand; and 792 cartons of 6×6 size, approximately 85% U.S. No. 1, Beefsteak brand; all "to be priced on next week's market".

4. The tomatoes were shipped on January 22, 1985, from Naples, Florida to respondent in Washington, D.C., and were accepted by respondent on arrival. On February 11, 1985, complainant invoiced

respondent at the rate of $14.00 per carton for the 288 cartons of 5×6 U.S. No. 2 tomatoes, $16.00 for the 504 cartons of 5×6 85% U.S. No. 1 tomatoes, and $14.00 for the 792 cartons of 6×6 85% U.S. No. 1 tomatoes, or a total, including a palletizing charge of 15¢ per carton, of $23,421.60. Respondent has paid complainant $18,669.60 for the tomatoes.

5. The contract between complainant and respondent was negotiated on complainant's part by Robert C. Elliott, a salesman for Gargiulo, Inc., a broker located in Naples Florida, who was employed to act on complainant's behalf by complainant's sales agent, Naples Tomatoes Growers, Inc. The contract was negotiated on respondent's behalf by Frank Detrani of Frank Detrani Distributing Co., Inc., of Naples, Florida.

6. The Florida Fruit and Vegetable report published by Federal-State Market News Service, of Winter Park, Florida recorded the following prices, in relevant part, for tomatoes in South and Central Florida: Sales January 28, of 25 pound cartons of loose Mature Green U.S. combination grade or better; 5×6s-$15.00, 6×6s-$14.00; U.S. No. 2; 5×6s-$13.00-$13.50, mostly 13, occasional higher. Sales January 29, showed U.S. combination grade or better; 5×6s-$13.00, 6×6s-$12.00, and U.S. No. 2; 5×6s-$11.00. Federal State Market News reports for Jessup-Maryland reporting f.o.b. shipping point sales for South and Central Florida showed tomatoes on Tuesday, January 29, 1985, selling on an f.o.b. shipping point basis as follows: 25 pound cartons of loose Mature Green 85% or better U.S. No. 1 quality; 5×6s-$13.00, 6×6s-$12.00. The same report showed sales on Wednesday, January 30, 1985, as follows: "Weaker Undertone. Too few sales to establish a market." The same report for Thursday, January 31, 1985, showed sales as follows: 25 pound cartons of loose Mature Green U.S. combination grade or better; 5×6s-$10.00, few $9.00, 6×6s-$9.00, few lower.

7. The formal complaint was filed on March 13, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

In this case we are refreshingly confronted with a situation in which both parties have acted with apparent integrity, but have a good faith dispute over the meaning to be given to a somewhat vague term used in their contract. Complainant and respondent, and the brokers involved in the negotiation of the contract, all agree that due to a freeze in Florida at about the time the contract was made, which was expected to cause unsettled conditions in the tomato market, the tomatoes were sold "to be priced on next week's market". It is clear that by next week the parties intended

to refer to the business week beginning Monday, January 28, 1985. However, complainant maintains that the phrase should be taken to refer to prices at the beginning of the week, whereas respondent maintains that the market remained unsettled for over two weeks following the sale, and since it sold the tomatoes on the best possible terms, it should be allowed to pay complainant in the light of the market it actually experienced.

Both parties characterized the price term used by them as an "open price term", and argue for their respective positions on this basis. It is true that the term employed generically falls into the category of an open price term as those words are used in UCC section 2-305, i.e. "The parties if they so intend can conclude a contract for sale even though the price is not settled". However, the succeeding sentence providing for a reasonable price at time of delivery does not apply since none of the three prescribed conditions is applicable. The first proviso: "if nothing is said as to price", clearly does not apply. Something was said as to price, namely "to be priced at next week's market." The second proviso: "if the price is left to be agreed by the parties and they fail to agree", also does not apply since the price was not left to be agreed to by the parties. The third proviso "if the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded", also does not apply. Although it is true that the price was to be fixed in terms of an agreed market, namely the f.o.b. shipping point tomato market, and that market was recorded by a third person, namely the Federal-State Market News Service, it cannot be said that such market was not set or recorded.

While complainant has argued that the term "next week's market" was not tied to any market reporting service, and that such is not contended by either party, we think that the record herein establishes otherwise. Both parties, throughout this proceeding, have continually made reference to both the shipping point and destination point Federal-State Market News Service reports and have supplied, at various times, copies of such reports as a part of the record herein. Furthermore, such reports, in point of fact, are based upon actual sales of the specified commodities and therefore establish, to the extent relevant sales were recorded, what the actual market for a given commodity was. Although both complainant and respondent submitted copies of the market reports in support of their respective positions, neither party appears willing to rely wholly upon such reports. Respondent seeks to pay complainant on the basis of its actual sales plus a profit, and complainant suggests that if we do not use the market for the first part of the

next week, prices should be based upon its actual sale prices during such period of time. Respondent complains that the market as reflected by the Market News Service reports was unsettled during the applicable period, and complainant complains that the market reports simply do not adequately report on the specific quality of merchandise involved in this tomato transaction. We conclude that both complainant and respondent are wrong. The Market News Service reports are from a neutral source, are based upon objective sales, and should be used if at all possible.

As to the meaning of the term "to be priced on next week's market" we have no hesitation in ascribing to such term its plain and simple meaning. We see no reason to interpret the term to mean the first part of the next week, the last part of the next week, or the middle of the next week. Complainant's sales agent, Robert C. Elliott, stated in a sworn statement submitted as a part of complainant's opening statement, that "it was my intent that the term 'next week's market' meant the market price, f.o.b. Naples, Florida at the beginning of the following week, . . ." While we do not doubt that this is precisely what Mr. Elliott meant by the term, there is absolutely no way that the person with whom he was dealing could know of such intended meaning in the absence of verbal expression of such meaning. See *Anonymous*, 8 Agric. Dec. 374 (1949). Complainant's credit manager, Henry L. Clark, in a letter to this Department adopted what we feel is the only possible interpretation of the term: "We maintain that the intent and interpretation of 'next week's market' means just that, next week's prices. It does not, as the respondent suggests, mean those prices two weeks from now, or when the market is settled, or when the respondent feels the price is right."

Although each of the parties submitted numerous copies of Market News Service reports, most of these reports are irrelevant to the time period with which we are concerned. Complainant submitted f.o.b. shipping point Market News Service reports covering only Monday and Tuesday of the week of January 28, 1985. Respondent submitted destination Market News Service reports for each day of the entire two weeks following the sale of the subject tomatoes. However, in each case the page giving shipping point tomato quotations was omitted. Later, respondent submitted additional destination Market News Service reports which included the page giving shipping point quotations, but the reports covered only Tuesday, January 29, Wednesday, January 30, and Thursday, January 31, 1985. The Monday and Tuesday shipping point reports submitted by complainant do not give quotations for 85% U.S. No. 1 tomatoes, but rather for "U.S. combination grade or better" toma-

toes. However, the Jessup, Maryland Market News Service report in giving f.o.b. shipping prices for South and Central Florida on Tuesday, January 29, quotes 85% or better U.S. No. 1 quality tomatoes size 5×6 and 6×6 at $13.00 and $12.00 respectively, or the same identical price given by the Winter Haven Market News Service report for f.o.b. shipping point prices from South and Central Florida on the same date. We conclude that at the time U.S. combination grade and 85% U.S. No. 1 were selling at or about the same prices. Averaging the available prices for each category of tomatoes over the week of January 28 (the parties did not submit a Market News report covering f.o.b. shipping point prices for Friday, February 1, 1985, and the available reports give no prices in any of the categories of tomatoes for Wednesday, and no prices for the U.S. No. 2s for Tuesday or Thursday) the 85% U.S. No. 1 5×6 tomatoes had an average price for the week of $12.66, the 85% U.S. No. 1 6×6 tomatoes had an average price for the week of $11.66, and the U.S. No. 2 5×6 tomatoes had an average price for the week of $12.00. Multiplying these average prices by the number of cartons in each category, and adding 15¢ per carton for palletizing in accordance with the contractual agreement between the parties, yields a total f.o.b. price for the truckload of $19,308.96. Respondent has already paid complainant $18,669.60, which leaves a balance still due of $639.36. We conclude that respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $639.36, with interest thereon at the rate of 13 percent per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

KENT W. NORTHCROSS, d/b/a NORTHCROSS DISTRIBUTING, *v.* GEORGE VILLALOBOS, d/b/a TEKSUN BRAND INTERNATIONAL. PACA Docket No. 2-6824. Decided September 3, 1986.

Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Deci-

sion and Order was issued on June 12, 1986, requiring that respondent pay complainant, as reparation, $46,767.26 plus interest at the rate of 13% per annum from April 1, 1984, until paid. The Order was served on respondent who, on July 16, 1986, returned it to the Department by a letter dated July 8, 1986. In his letter, respondent claimed that certain exhibits he offered should not have been excluded from the record, and that he had difficulty in "understanding the procedures followed by" the Department. This letter is being treated as a petition for reconsideration filed pursuant to 7 CFR § 47.24.

The documents which were referred to by respondent as allegedly being excluded from the record were documents which were submitted by respondent after the case had been closed for the submission of evidence. Moreover, the documents were cumulative in that copies of them had already been submitted by complainant. Thus, the presiding officer properly refused to accept them into evidence. 7 CFR § 47.24.

Respondent's claim that he had difficulty in understanding our procedures has no merit as a ground for seeking reconsideration. Our procedures are spelled out in the Code of Federal Regulations, and are detailed in all our correspondence with the parties. Moreover, presiding officers are available to discuss these matters with parties to reparation proceedings. Additionally, and in view of the amount in dispute it would have been prudent to do so, respondent could have retained counsel.

Upon review of the record, we are of the opinion that respondent's claims in his petition for reconsideration are without merit, and we conclude that our order of June 12, 1986, is amply supported by the evidence and by the law applicable thereto. Accordingly, respondent's petition for reconsideration is denied without prior service upon complainant.

The order of June 12, 1986, is reinstated except that payment shall be due within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

BECKMAN PRODUCE, INC., *v.* MARVIN G. HOLPERIN, d/b/a UNIQUE FOODS, Co. PACA Docket No. 2-7116. Order issued September 3, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $4,372.41 in connection with a transaction involving shipments of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated July 7, 1986, complainant notified the Department that this matter had been fully settled. Complainant, in its letter of July 7, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

LISA, INC., *v.* THE PRODUCE EXCHANGE. PACA Docket No. 2-7212. Order issued September 3, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $30,042.99 in connection with a transaction involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By mailgram dated July 9, 1986, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

RAINIER FRUIT SALES, INC., *v.* BEN VASQUEZ PRODUCE, INC. PACA Docket No. 2-7225. Order issued September 3, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $8,648.50 in connection with transactions involving the shipment of apples and pears in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated July 18, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of July 18, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MONSON BROS. CO., *v.* SUN TRADING CO., INC. PACA Docket No. 2-6322. Notice issued September 29, 1986.

Donald A. Campbell, Judicial Officer.

NOTICE TO SHOW CAUSE

A formal complaint was filed in this proceeding on November 1, 1982, in which complainant asked for damages of $44,260.00. An answer and counterclaim was filed on July 5, 1983, in which respondent claimed damages of $31,295.00. An oral hearing was originally set for September 25, 1984. At the request of the parties, it was postponed indefinitely.

This tribunal has made several efforts since September 25, 1984, to reset this matter for oral hearing, but the parties have consistently requested such action not be taken. In a telephone conversation on September 9, 1986, Ms. Marlene Monson, an official with complainant, advised this tribunal that respondent had paid all of complainant's original claim. She was advised at that time that this tribunal would issue a Notice to Show Cause why this proceeding should not be dismissed.

ORDER

The complainant is given 20 days from the date of this order to show cause why this proceeding should not be dismissed for failure to prosecute.

The respondent is given 20 days from the date of this order to show cuase why its counterclaim should not be dismissed.

Copies of this order shall be served upon the parties.

PRO-VEG, INC., *v.* M & M PRODUCE FARMS AND SALES a/t/a ZYGMUND ROGOWSKI & SONS. PACA Docket No. 2-6793. Decided October 1, 1986.

Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on July 18, 1986, dismissing the complaint. On August 8, 1986, the Department received a letter from complainant in which it claims that it "does not agree with [our] Conclusions, page 2." As we understand complainant's petition, it claims that we erred in concluding that the respondent's $4,193.00 was accepted by it in full settlement of the parties' dispute. However, before complainant negotiated the respondent's check, it was notified by the Department that the respondent had refused to release the check as an undisputed amount. Under these circumstances, complainant cannot say that it had no notice that its acceptance of the check would result in an accord and satisfaction.

Complainant also claims that it should have been allowed to file a statement in reply. However, as the respondent did not file an answering statement, the Rules of Practice did not permit such a filing and the presiding officer properly rejected complainant's filing. *See* 7 CFR § 47.20(e). Had complainant desired to respond to respondent's answer, it should have filed an opening statement as solicited in the presiding officer's May 10, 1985, letter, but it failed to do. In any event, we have perused the statements in its proposed statement in reply and can see nothing which would have changed our decision.

Upon review of the record, we are of the opinion that complainant's claims are without merit, and we conclude that our order of July 18, 1986, is amply supported by the evidence and by the law

applicable thereto. Accordingly, complainant's petition for reconsideration is dismissed without prior service upon respondent.

The order of July 18, 1986, is reinstated.

Copies of this order shall be served upon the parties.

CALIFORNIA PRODUCE DISTRIBUTORS, INC., *v.* GUS' WHOLESALE MEAT & FOOD CO. PACA Docket No. 2-6927. Order issued October 1, 1986.

George S. Whitten, Presiding Officer.
Thomas I. Rozsa, Los Angeles, California, for complainant.
S. Philip Cabibi, Pueblo, Colorado, for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF CONTINUANCE

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $28,573.15 against respondent in connection with transactions in interstate commerce involving shipments of fruits and vegetables. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, California Produce Distributors, Inc., is a corporation whose address is 751 Merchant Street, Los Angeles, California. Respondent, Gus' Wholesale Meat and Foods Co., is a corporation whose address is P.O. Box 4225, Pueblo, Colorado. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Decision and Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, District of Colorado, a voluntary petition of reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the

debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

TOP QUALITY FRUIT & PRODUCE DIST., INC., *v.* VOLLMER PRODUCE, INC. PACA Docket No. 2-7077. Order issued October 1, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF CONTINUANCE

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $4,793.95 against respondent in connection with transactions in interstate commerce involving shipments of mixed produce. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto. On March 12, 1986, on Order Requiring payment of $2,630.60 as an undisputed amount was issued.

Complainant, Top Quality Fruit & Produce Dist., Inc., is a corporation whose address is P.O. Box 6208, McAllen, Texas 78502. Respondent, Vollmer Produce, Inc., is a corporation whose address is Route 4, Box 1360 Hwy. 6, Navosota, Texas 77868. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a final ruling in this proceeding, the Department was advised that respondent had filed, in the United States Bankruptcy Court for the Southern District of Texas, a voluntary petition of reorganization pursuant to Chapter 11 of the Bankruptcy Act (11 U.S.C. §§ 1101-1174), which has been designated docket no. 86-107-82-H3-11.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

JACK T. BAILLIE CO. INC., *v.* INTERNATIONAL A.G., INC. PACA Docket No. 2-7251. Order issued October 1, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $2,217.30 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated August 15, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of August 15, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GOLD COAST PACKING, INC., *v.* H. SCHNELL & COMPANY, INC., and/or LLOYD MYERS CO., INC. PACA Docket No. 2-6414. Order issued October 16, 1986.

Donald A. Campbell, Judicial Officer.

ORDER DISMISSING SECOND PETITION FOR RECONSIDERATION

A Decision and Order was issued in this matter on December 17, 1984, awarding reparation to complainant against respondent H. Schnell & Company in the amount of $3,404.00 plus interest, and against respondent Lloyd Myers Co., Inc. in the amount of $7,522.00 plus interest. On January 30, 1985, the order of December 17, 1984, was stayed, and respondent Lloyd Myers Co., Inc. was allowed to file a petition to rehear, reargue and reconsider. On May 15, 1985, we granted rehearing of this matter, and the record was reopened to receive new evidence. After receiving evidence from the parties and again closing the record an Order Upon Rehearing was issued on April 9, 1986, reaffirming and reinstating our prior order. On May 8, 1986, respondent Lloyd Myers Co., Inc., filed another petition to reconsider. On May 27, 1986, the order of April 9, 1986, was stayed pending the issuance of a further order in this case.

We have thoroughly reconsidered, for the second time, our order of December 17, 1984, in the light of the record in this proceeding. Aside from the question of whether respondent Lloyd Myers Co., Inc., received the economic benefit of the check issued to it by A & J Produce Corp., we believe that the record supports the conclusion that Lloyd Myers Co., Inc. ordered the load of broccoli for H. Schnell & Company, Inc. without its authorization, and diverted the car, without the authorization of either complainant or H. Schnell & Company, Inc. to A & J Produce Corp. The record further discloses that Lloyd Myers Co., Inc. issued a broker's memorandum of sale to A & J Produce Corp. directing that company to pay Lloyd Myers Co., Inc. for the produce. These actions were a violation of respondent Lloyd Myers Co., Inc.'s duties as a broker, and a violation of the Act, which resulted in complainant not being paid for the produce. We find that our order of December 17, 1984, requiring that Lloyd Myers Co., Inc. pay complainant, as reparation, the sum of $7,522.00, with interest is supported by the evidence of record and the law applicable thereto. That order is hereby reinstated, except that the reparation awarded therein, with interest, shall be paid within 30 days from the date of this order.

In *W. J. Wescott* v. *Yonk Rubin & Son and/or A. L. Schiano,* 10 Agric. Dec. 358 (1951), the opinion was expressed that the Secretary has the discretion whether to allow a party to file more than one petition for reconsideration. As stated therein, the administrative consideration of a proceeding must be brought to a conclusion at some time. No further petition for reconsideration by respondent Lloyd Meyers Co., Inc., will be accepted for filing in this proceeding.

Copies of this order shall be served upon the parties.

GLOBAL TRADING, INC., *v.* LIMPERT BROS., INC. PACA Docket No. 2-6679. Decided October 16, 1986.

George S. Whitten, Presiding Officer.
David B. Ward, Greenville, South Carolina, for complainant.
Mitchell H. Kizner, Vineland, New Jersey, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION AND DENYING PETITION TO REOPEN

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order

was issued December 11, 1985, awarding reparation to complainant against respondent in the amount of $8,227.10. On December 26, 1985, respondent filed a petition for reconsideration and reopening. On February 4, 1986, a stay order was issued giving complainant an opportunity to file an answer to the petition to reconsider and reopen. Such answer was duly filed, and respondent filed a reply to such answer on April 28, 1986.

One of the matters raised in respondent's petition to reconsider concerns an alleged custom and practice in the industry which respondent states contravenes the Department's regulations. Consequently, respondent has requested that "if additional testimony is necessary with respect to custom and practice in the industry or with respect to the Department of Agriculture's own procedures, the record could be reopened for that purpose." It is well settled that where the evidence could have been submitted at the original hearing a proceeding will not be reopened to receive such evidence. See *Monc's Consolidated Produce, Inc.* v. *Black Diamond Fruit & Produce Company, Inc., and/or Kenneth C. White,* 36 Agric. Dec. 97 (1977). The only possible exception to this rule is where evidence comes to light after the close of a hearing which clearly shows a fundamental factual determination to have been in error. Even then, if the failure to offer such evidence was through negligence or oversight of counsel we would not reopen. Clearly, this is not a proceeding which should be reopened.

Respondent states in its petition to reconsider that the decision reached by this Department "unfairly rewards a party which has engaged in reprehensible, deceptive and fraudulent business practices", and is "based upon an incorrect understanding of custom and practice in the industry and of the United States Department of Agriculture's own procedures". Respondent further states that our decision "discounted, and indeed almost overlooked the basic, largely undisputed fact underlying this dispute." Respondent then goes on to detail its basic allegation that the pineapple which it received from complainant did not measure up to the sample which complainant had previously submitted. Respondent further alleges that:

> In rendering a decision for the Complainant the Judicial Officer abandoned any sense of fairness in favor of a wooden adherence to those regulations contained in § CFR 7 which set forth certain rigid time limits for the rejection of fruit. However, in reaching his decision the Officer completely overlooked the unchallenged testimony of the Respondent's President that custom and practice in the in-

dustry is that when dealing with what is believed to be a reputable seller, a buyer does not have to immediately inspect a shipment of hard frozen fruit.

There are two fundamental points which require the result which we reached in our decision and order of December 11, 1985. First, is the evident fact of respondent's acceptance of the frozen pineapple. Our decision of December 11, 1985, thoroughly covers this point and shows why, under the Department's regulations, and under our prior decisions, respondent must be deemed to have accepted the product. Against this respondent urges industry custom and practice. However, it is a fundamental premise of administrative law that an agency is bound by its own regulations. *United States* v. *Nixon*, 418 U.S. 683, 693–696, 94 S.Ct 3090, 41 L.Ed. 2d 1039 (1974); and *Service* v. *Dulles*, 354 U.S. 363, 77 S.Ct 1152, 1 L.Ed. 2d 1403 (1957). Accordingly, respondent must fail in its effort to overthrow the December 11, 1985, decision on this point.

Respondent's acceptance of the product, standing alone, did not preclude respondent from prevailing in this proceeding. As we noted in our conclusions, "the testimonial evidence supports respondent's contention" that the pineapple which respondent accepted did not conform to the sample previously sent by complainant. This brings us to the second major point which, taken with respondent's acceptance, precludes a decision in respondent's favor in this case. As we stated in the December 11, order "respondent totally failed to submit any evidence which would form a basis for computing damages in this proceeding." Respondent did not submit an accounting covering the resale of the 511 cases of pineapple which it accepted, and indeed there was no showing that the pineapple was in fact resold. As we stated, "without such accounting . . . or some other way of determining the value of [the] product at time of delivery we cannot award damages which result from any breach." Respondent has not proposed any remedy for its failure to offer this evidence, nor has respondent seemed to grasp the significance of its failure. Assuming that respondent was now to be allowed to offer additional proof that the contract was breached, and was to succeed in convincing us that we should so decide, respondent still would not prevail due to its failure to prove damages resulting from such breach.

Respondent's failure to prove damages was the underlying reason for our discussion concerning the import to be given to the substandard grade accorded to the product accepted by respondent. Nothing that respondent has submitted or proposed to submit undercuts the conclusion reached in our prior decision that a substandard grade does not render product unmerchantable and with-

out commercial value. Although respondent now professes to be able to prove that the substandard product in fact had a score of 71, respondent even now does not allege that it can show that such a score would be proof that the product had no commercial value. Only a showing that this product had no commercial value would be relevant, in the absence of an accounting covering a resale of the product, to show damages in this case.

Upon reconsideration we find that the order of December 11, 1985, is supported by the evidence and the law applicable thereto. Accordingly, the Petition for Reconsideration and the Petition to Reopen are hereby dismissed.

Copies of this order shall be served upon the parties.

MIC BRUCE, INC., a/t/a SINGER'S *v.* CHIQUITA BRANDS, INC. PACA Docket No. 2-6608. Decided October 17, 1986.

Dennis Becker, Presiding Officer.
Stephen P. McCarron, Silver Spring, Maryland, for complainant.
Richard J. Reisect, New York, N.Y., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on May 1, 1986. A Motion For Reconsideration was filed by complainant on May 13, 1986, as a result of which the Order was stayed on June 10, 1986. Respondent filed a Response To Complainant's Petition For Reconsideration And Cross-Petition For Reconsideration on July 21, 1986.

Full consideration has been given to the arguments made by both parties in their pleadings, as well as relevant portions of the record. Based on our review of the facts and law, we conclude that the Motion For Reconsideration should be denied. Respondent's Cross-Petition For Reconsideration was apparently to be considered by this tribunal only if complainant's motion was granted. As will be discussed more fully below, it would be denied in any event.

Complainant has set forth two bases as to why the Decision should be reconsidered. First it claims that the tribunal misconstrued controlling legal principles in determining the appropriate measure of damages. Complainant believes that the Decision is inconsistent insofar as it states that the complainant did not accept the claim *and* settlement procedures followed by respondent, but later states that "damages are limited to no more than what was

requested in [complainant's] formal written claims submitted to respondent . . . pursuant to Chiquita's claim and settlement procedures". Complainant is incorrect in its reading of the Decision. As was pointed out by respondent in its response the word "and" did not appear between the words "claim" and "settlement" in the discussion of the procedures. As was fully discussed in the Decision, by its course of conduct complainant had accepted the claim procedure, which may also be considered to be claim settlement procedures, set forth in respondent's invoices. That to which complainant had never agreed were the actual settlement terms and conditions unilaterally imposed by respondent extraneous to the procedures for filing claims which might lead to settlement, but which were not included as part of the invoices used by respondent over the years. Indeed, had respondent set forth on its invoices appropriate terminology it could have bound both parties to accept whatever amount of settlement respondent offered if a course of conduct was established over a period of time. We find the other arguments made by complainant with respect to the issue of determining the measure of damages to be saving arguments only, which we need not deal with in this Order on Reconsideration.

The second ground raised by complainant in its Motion For Reconsideration deals with loads 11 through 13 in the complaint. This tribunal denied recovery with respect to these three loads because it found that complainant failed to sustain its burden of proof that the bananas did not make good delivery. The major basis for the conclusion of the tribunal was that complainant did not file a claim of any kind with respect to the three loads until 5 or 6 days after the arrival of the bananas at its place of business, as a result of which it was not possible to determine who was responsible for the deterioration in the bananas. Complainant asked that this determination be overturned by referring to what are known as "after-ripe inspection" reports, which reports are based on inspections carried out by Chiquita for all loads of bananas which are unloaded from ships, usually a week or so after such unloading. While the specific after-ripe inspection report relied upon by complainant shows that with respect to the bananas involved in transactions 11 through 13 there were a high number of defects, we conclude that an inspection at a place other than complainant's business of a sample of bananas taken from ship is not sufficiently probative of the condition of the bananas at complainant's place of business several days after they have arrived. There are many possible distinctions to be made between specific lots of bananas and a sample taken from an entire ship. In essence, the after-ripe inspection is too remote in time, and there are too many possible extraneous factors, for us to

conclude that it may be relied upon to show the condition of the bananas at complainant's place of business several days after arrival, and to attribute any deteriorated condition to respondent. For example, complainant's bananas came from hold number 4. The after-ripe inspection report does not show how the bananas were segregated by hold. Bananas from hold number 4 may have been all right. The high percentage of defects may have occurred with bananas from holds number 1, 2 and 3. Complainant has a higher burden than merely to show by a somewhat remotely related report that respondent may have delivered bananas which were not in accordance with contract specifications. Furthermore, we subscribe to the theory of respondent in its response to complainant's Petition For Reconsideration that the kinds of defects set forth in the after-ripe inspection report were not related to the primary claim of complainant that there was underpeel discoloration.

Although it is not necessary to do so this tribunal wishes to speak to respondent's Cross Petition for Reconsideration. The claim of respondent that there is an industry custom and practice of settling banana claims on an f.o.b. basis needs little elaboration over and above that which was set forth in the Decision and Order previously issued. Respondent failed to address the fact that industry practice needs to be shown not by self serving claims of shippers of bananas, but rather by testimonial and documentary evidence provided by receivers of bananas.

Respondent's claim that it is inequitable and unjust to award complainant all the and expenses fees claimed when it only received 19% of its total claim is without merit. Respondent attached as an exhibit to its cross-petition a prior letter from respondent to complainant offering settlements somewhat near the amount of money which was ultimately awarded by this tribunal. This letter has not been considered because it was not properly filed, and because in any event offers of settlement are not appropriate for consideration. Respondent has also reasoned that it won the case because 81% of the claim of complainant was disallowed. Respondent's reasoning in this regard is erroneous. The Secretary of Agriculture has determined that to award fees and expenses based upon the percentage of a claim allowed would not be in the public interest. It would discourage a complaining party from filing a valid claim merely because it might receive less than all of its claim, and have to pay fees and expenses. It is well established in American judicial practice that claims usually exceed the amount actually awarded. Furthermore, under the PACA respondents have an alternative approach to the defense of large claims under which they may receive the award of attorney's fees and other expenses.

They may admit liability and submit payment for that portion of the total claim for which they believe they may be liable. Then, a respondent may defend the remainder of the claim, and if it is correct and prevails, will be awarded its fees and expenses. The policy of the Secretary of Agriculture in this regard is long standing, has worked well, and is equitable and just. Rather than discourage settlements, it moves the parties forward towards fair resolutions of their dispute short of oral hearing, and assures that the party which prevails receives the fees and expenses to which it is entitled. That is not to say that if the Secretary found in an individual case that a complainant filed a lawsuit asking for an extreme amount of money, or its claim was otherwise unreasonable, the Secretary would not scrutinize closely this policy to determine whether an exception should be made.

ORDER

Complainant's Motion For Reconsideration is denied. Respondent's Cross-Petition For Reconsideration is denied. The Order dated May 1, 1986, is reinstated except for effective dates and the dates for the computation of interest, as set forth below.

Within thirty days from the date of this order respondent shall pay to complainant, as reparation, $6,204.43, with interest thereon at the rate of 13 percent per annum from May 1, 1983, until paid.

Within thirty days from the date of this order respondent shall pay to complainant, as reparation, $4,448.10, with interest thereon at the rate of 13 percent per annum from July 1, 1983, until paid.

Within thirty days from the date of this order respondent shall pay fees and expenses to the complainant, as reparation, in the amount of $6,482.10, with interest thereon at the rate of 13 percent per annum from the date of this order until paid.

Copies of this order shall be served upon the parties.

AGRI-PAK FRUIT CO., *v.* NICHO PRODUCE CO., INC., and/or SO. CENTRAL BROKERAGE, INC. PACA Docket No. 2-6723. Decided October 17, 1986.

Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on June 27, 1986, awarding reparation to complainant in the amount of $2,232.00 with interest at the rate

of 13% per annum from December 1, 1983, until paid, against respondent Nicho Produce Co., Inc. ("Nicho"). After the Department received an undated letter from Nicho requesting the time to file a petition for reconsideration, the Decision and Order was stayed on August 18, 1986, and Nicho was given 15 days from service of the Order to file such a petition. On September 3, 1986, a letter was received from a Mr. B.R. Stockton which was typed on the letterhead of Westlake Distributors, P.O. Box 8245, Fresno, California 93727, in which he expresses some concerns regarding our Decision and Order in this matter and attempts to amplify the record regarding the history of the subject grapes before they were shipped to Nicho. So far as the record reflects, Westlake Distributors has no interest in this matter either financial or otherwise. However, as in its request for a stay Nicho indicated that it needed more time "in order to get an affidavit from Mr. Bob Stockton, who is presently out of the country," the letter from Mr. Stockton is accepted as Nicho's petition for reconsideration.

Mr. Stockton, in his letter, claims that he (although he never explains his relationship, past or present, to any of the parties to this proceeding) never expected that Nicho would be held responsible for this load of grapes. He further goes on to claim that the grapes had been in storage and that "Nicho was justified in their [sic] rejection of" them. On the face of his letter, it appears as if Mr. Stockton may have had something of value to contribute to this proceeding which might have been helpful to Nicho's presentation of its defense. However, the sparse facts contained in his letter must be characterized as "too little, too late." Under the Rules of Practice, 7 CFR § 47.24, petitions to reopen a reparation proceeding for the taking of further evidence, and Mr. Stockton's letter would have to be construed as such, must be filed with the presiding officer prior to the issuance of the final order. As the final order in this case was issued on June 27, 1986, a petition to reopen this matter should not be entertained. In any event, without substantially more facts than are contained in Mr. Stockton's letter, such as his involvement in the transaction, the source of his knowledge as to the condition of the grapes when shipped to Nicho by complainant, etc., we cannot say that his letter, even if filed prior to the issuance of our June 27, 1986, Decision and Order would have swayed us to rule in Nicho's favor.

Upon review of the record, we are of the opinion that Nicho's claims are without merit, and we conclude that our Decision and Order of June 27, 1986, is amply supported by the evidence and the law applicable thereto. Accordingly, Nicho's petition for reconsideration is dismissed without prior service upon complainant.

The Order of June 27, 1986, is reinstated except that the reparation awarded therein shall be paid within 30 days from the date of this Order.

Copies of this Order shall be served upon the parties.

GRASSO FOODS, INC., *v.* THE QUAKER OATS COMPANY. PACA Docket No. 2-6869. Decided October 23, 1986.

Donald A. Campbell, Judicial Officer.

CORRECTED ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on October 3, 1986, awarding reparation to complainant in the amount of $13,200.00 plus interest. In that order, the interest rate was stated as being "13% per month." Such rate was misstated. The correct interest rate should have been stated as being "13% per annum." Accordingly, the October 3, 1986, Order is corrected to read as follows:

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $13,200.00 plus interest at the rate of 13% per annum from December 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

Respondent shall have thirty days from the date of this corrected order in which to make payment to complainant of the amount noted above.

Copies of this corrected order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

J. A. WOOD CO.-VISTA INC. a/t/a J. A. WOOD CO. *v.* ANTHONY MOREALI, JR. d/b/a PACIFIC COAST PRODUCE BROKERAGE. PACA Docket No. RD-86-404. Decided September 2, 1986.

Respondent was ordered to pay complainant, as reparation, $4,199.30 plus 13 percent interest per annum from January 1, 1985, until paid.

D. H. JOHNSON & SONS INC. *v.* NORTHEAST PRODUCE DEALERS INC. PACA Docket No. RD-86-405. Decided September 2, 1986.

Respondent was ordered to pay complainant, as reparation, $1,650.00 plus 13 percent interest per annum from December 1, 1985, until paid.

ROY PIPPIN FARMS INC. *v.* DELEGAL CORPORATION. PACA Docket No. RD-86-406. Decided September 2, 1986.

Respondent was ordered to pay complainant, as reparation, $85,572.75 plus 13 percent interest per annum from December 1, 1985, until paid.

UROZA PRODUCERS, S.A. *v.* UNION PRODUCE DISTRIBUTORS. PACA Docket No. RD-86-407. Decided September 2, 1986.

Respondent was ordered to pay complainant, as reparation, $10,395.41 plus 13 percent interest per annum from November 1, 1984, until paid.

GOLD COAST PACKING INC. *v.* MELON PRODUCE INC. PACA Docket No. RD-86-395. Decided September 10, 1986.

Respondent was ordered to pay complainant, as reparation, $52,082.50 plus 13 percent interest per annum from November 1, 1985, until paid.

MILLS DISTRIBUTING COMPANY *v.* BEST PRODUCE CO. INC. a/t/a NEW AIRLINE PRODUCE CO. PACA Docket No. RD-86-408. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, $2,900.00 plus 13 percent interest per annum from October 1, 1985, until paid.

ARNULFO M. FIGUEROA and JUAN A. FIGUEROA d/b/a A. F. & SON BRKGE. *v.* TRAYMAN INC. PACA Docket No. RD-86-409. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, $27,064.30 plus 13 percent interest per annum from August 1, 1985, until paid.

AJM FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-410. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, $40,159.45 plus 13 percent interest per annum from September 1, 1985, until paid.

JOHN LIVACICH PRODUCE INC. a/t/a ALL FRESH PRODUCE DISTRIBUTORS *v.* GUADALUPE G. FONSECA d/b/a LA-BODEGA. PACA Docket No. Rd-86-411. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, $5,812.00 plus 13 percent interest per annum from May 1, 1985, until paid.

G. CEFALU & BROTHERS INC. *v.* INTERSTATE PRODUCE INC. PACA Docket No. RD-86-412. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, $1,776.00 plus 13 percent interest per annum from April 1, 1985, until paid.

KRACAW PRODUCE INC. *v.* KENNER PRODUCE. PACA Docket No. RD-86-413. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, $638.50 plus 13 percent interest per annum from January 1, 1985, until paid.

BELL'S PRODUCE INC. *v.* ALEX PRODUCE INC. PACA Docket No. RD-86-414. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, $2,293.95 plus 13 percent interest per annum from August 1, 1985, until paid.

FIRMAN-PINKERTON CO. INC. *v.* TOMMY TUCKER PRODUCE. PACA Docket No. RD-86-415. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, $4,467.00 plus 13 percent interest per annum from February 1, 1985, until paid.

PRIME PRODUCE CO. INC. *v.* T & T SALES INC. a/t/a LAS VEGAS POTATOE INC. PACA Docket No. RD-86-416. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, $510.75 plus 13 percent interest per annum from July 1, 1985, until paid.

DON BONANNO CITRUS COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-417. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, $1,434.00 plus 13 percent interest per annum from February 1, 1985, until paid.

4-R FARMS *v.* JAMCO FARMS. PACA Docket No. RD-86-418. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, $7,831.95 plus 13 percent interest per annum from June 1, 1985, until paid.

BURNAND AND CO. INC. *v.* WESTERN BEST PACKING CO. PACA Docket No. RD-86-419. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, $33,488.85 plus 13 percent interest per annum from February 1, 1984, until paid.

SUN GLO OF IDAHO INC. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-420. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation, $13,100.00 plus 13 percent interest per annum from November 1, 1985, until paid.

JACK A. VINCE d/b/a DESERT SUN DISTRIBUTING CO. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-421. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation, $4,705.90 plus 13 percent interest per annum from January 1, 1985, until paid.

C & E ENTERPRISES INC. a/t/a KOYMAM FARMS *v.* VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-86-423. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation, $2,092.80 plus 13 percent interest per annum from November 1, 1985, until paid.

MAUNA KEA AGRONOMICS INC. *v.* GREEN VALLEY CO. INC. PACA Docket No. RD-86-424. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation, $16,609.80 plus 13 percent interest per annum from October 1, 1985, until paid.

ONEONTA TRADING CORPORATION *v.* HOUSTON PRODUCE DISTRIBUTING INC. a/t/a HOUSTON FRUIT & VEGETABLE COMPANY. PACA Docket No. RD-86-425. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation, $39,182.00 plus 13 percent interest per annum from October 1, 1985, until paid.

SAN ANTONIO FOREIGN TRADING COMPANY *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-426. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation, $26,559.96 plus 13 percent interest per annum from October 1, 1985, until paid.

SANTO TOMAS PRODUCE ASSOCIATION *v.* EVERFRESH INC. PACA Docket No. RD-86-427. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation, $3,259.20 plus 13 percent interest per annum from December 1, 1985, until paid.

ACE TOMATO CO. INC. *v.* P. G. FRUITS INC. PACA Docket No. RD-86-429. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation, $15,285.00 plus 13 percent interest per annum from October 1, 1985, until paid.

UNITED DISTRIBUTORS INC. *v.* SAM W. RELAN d/b/a SAM RELAN SALES. PACA Docket No. RD-86-428. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation, $4,895.00 plus 13 percent interest per annum from July 1, 1985, until paid.

W. E. BITTINGER COMPANY INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-430. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation, $13,712.50 plus 13 percent interest per annum from February 1, 1985, until paid.

R. B. TODD COMPANY INC. *v.* VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-86-431. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation, $598.75 plus 13 percent interest per annum from November 1, 1985, until paid.

PEMBERTON PRODUCE INC. *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-433. Decided October 7, 1986.

Respondent was ordered to pay complainant, as reparation, $34,030.60 plus 13 percent interest per annum from March 1, 1986, until paid.

SUPREME BANANA CO. INC. *v.* FRANK GUADAGNO & CO. INC. PACA Docket No. RD-86-435. Decided October 7, 1986.

Respondent was ordered to pay complainant, as reparation, $14,400.46 plus 13 percent interest per annum from September 1, 1985, until paid.

ASSOCIATED CITRUS PACKERS *v.* ROBERT W. CASTO d/b/a PRIMA CITRUS & FRUIT EXCHANGE. PACA Docket No. RD-86-436. Decided October 7, 1986.

Respondent was ordered to pay complainant, as reparation, $43,902.00 plus 13 percent interest per annum from January 1, 1986, until paid.

VEG-PAK INC. *v.* M & M PRODUCE INC. PACA Docket No. RD-86-438. Decided October 7, 1986.

Respondent was ordered to pay complainant, as reparation, $7,055.25 plus 13 percent interest per annum from September 1, 1985, until paid.

BRAVO DISTRIBUTORS INC. *v.* DIXIE PRODUCE SALES. PACA Docket No. RD-86-440. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, $60,083.70 plus 13 percent interest per annum from February 1, 1986, until paid.

SIGMA PRODUCE CO. INC. *v.* DEWEY H. BOYD d/b/a DIXIE PRODUCE SALES. PACA Docket No. RD-86-441. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, $132,787.83 plus 13 percent interest per annum from March 1, 1986, until paid.

SOL SALINS INC. *v.* CAPITAL CITY PRODUCE CO. PACA Docket No. RD-86-442. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, $146,955.13 plus 13 percent interest per annum from October 1, 1985, until paid.

RANCHERO PACKING CO. INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-443. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, $5,272.50 plus 13 percent interest per annum from September 1, 1985, until paid.

MILAS G. RUSSELL, JR. *v.* DON PELUCCA. PACA Docket No. RD-86-444. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, $15,322.50 plus 13 percent interest per annum from December 1, 1985, until paid.

CHASE FARMS INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-445. Decided October 9, 1986.

Respondent was ordered to pay complainant, as reparation, $17,061.12 plus 13 percent interest per annum from January 1, 1985, until paid.

SILVA HARVESTING CO. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-446. Decided October 9, 1986.

Respondent was ordered to pay complainant, as reparation, $83,058.90 plus 13 percent interest per annum from September 1, 1985, until paid.

CHARLES F. ZAMBITO d/b/a ZAMBITO PRODUCE SALES *v.* NORTHEAST PRODUCE DEALERS INC. PACA Docket No. RD-86-448. Decided October 9, 1986.

Respondent was ordered to pay complainant, as reparation, $18,505.50 plus 13 percent interest per annum from January 1, 1986, until paid.

SOURCE PRODUCE DISTRIBUTING CO. *v.* NORTHEAST PRODUCE DEALERS INC. PACA Docket No. RD-86-449. Decided October 9, 1986.

Respondent was ordered to pay complainant, as reparation, $23,992.67 plus 13 percent interest per annum from November 1, 1985, until paid.

BIANCHI & SONS PACKING CO. *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-450. Decided October 10, 1986.

Respondent was ordered to pay complainant, as reparation, $1,548.00 plus 13 percent interest per annum from December 1, 1985, until paid.

BIG BEND TOMATO PACKERS INC. *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-451. Decided October 10, 1986.

Respondent was ordered to pay complainant, as reparation, $1,840.00 plus 13 percent interest per annum from July 1, 1985, until paid.

TOM LANGE COMPANY INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-453. Decided October 10, 1986.

Respondent was ordered to pay complainant, as reparation, $13,519.70 plus 13 percent interest per annum from December 1, 1985, until paid.

MANUEL E. VIEIRA INC. a/t/a A. V. THOMAS PRODUCE *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-454. Decided October 10, 1986.

Respondent was ordered to pay complainant, as reparation, $300.00 plus 13 percent interest per annum from December 1, 1985, until paid.

BUD ANTLE INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-455. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, $4,659.20 plus 13 percent interest per annum from January 1, 1986, until paid.

ERNIE DALIDIO d/b/a ZAPATA SALES *v.* JOE PINTO & SON INC. PACA Docket No. RD-86-461. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, $1,442.94 plus 13 percent interest per annum from December 1, 1985, until paid.

LESTER DISTRIBUTING CO. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-462. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, $8,311.94 plus 13 percent interest per annum from November 1, 1985, until paid.

STEGEMAN MARKETING SERVICES INC. *v.* JOE PINTO & SON. PACA Docket No. RD-86-463. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, $2,738.70 plus 13 percent interest per annum from November 1, 1985, until paid.

HI-VALUE PROCESSORS INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-464. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, $1,576.10 plus 13 percent interest per annum from July 1, 1985, until paid.

PAWEL DISTRIBUTING CO. *v.* UNION PRODUCE DISTRIBUTORS. PACA Docket No. RD-86-465. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, $12,418.08 plus 13 percent interest per annum from January 1, 1986, until paid.

SAM J. MAGLIO, JR. d/b/a MAGLIO & COMPANY *v.* MARVIN G. HOLPERIN d/b/a/ UNIQUE FOODS Co. PACA Docket No. RD-86-466. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, $2,689.00 plus 13 percent interest per annum from October 1, 1985, until paid.

FRESH WESTERN MARKETING INC. *v.* ROBERT W. CASTO d/b/a PRIMA CITRUS & FRUIT EXCHANGE. PACA Docket No. RD-86-467. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, $3,366.85 plus 13 percent interest per annum from October 1, 1985, until paid.

N. P. DEOUDES INC. *v.* MANASSAS PRODUCE Co. INC. PACA Docket No. RD-86-468. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, $11,092.57 plus 13 percent interest per annum from March 1, 1986, until paid.

WATSONVILLE EXCHANGE INC. *v.* TOC PRODUCE DIST. CORP. PACA Docket No. RD-86-469. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, $924.00 plus 13 percent interest per annum from October 1, 1985, until paid.

BLUE STAR GROWERS INC. *v.* HOUSTON PRODUCE DISTRIBUTING INC. a/t/a HOUSTON FRUIT & VEGETABLE COMPANY. PACA Docket No. RD-86-470. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, $300.00 plus 13 percent interest per annum from August 1, 1985, until paid.

C. H. ROBINSON COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-456. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, $9,522.76 plus 13 percent interest per annum from December 1, 1985, until paid.

WESCAL MARKETING INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-457. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, $5,623.90 plus 13 percent interest per annum from October 1, 1985, until paid.

J. A. WOOD CO.-VISTA INC. a/t/a A. WOOD CO. *v.* JOE PINTO & SON INC. PACA Docket No. RD-86-458. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, $3,940.00 plus 13 percent interest per annum from April 1, 1985, until paid.

GOLDEN WEST PACKING CO. *v.* JOE PINTO & SON INC. PACA Docket No. RD-86-459. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, $6,882.00 plus 13 percent interest per annum from March 1, 1986, until paid.

SUN WORLD INTERNATIONAL INC. *v.* JOE PINTO & SON INC. PACA Docket No. RD-86-460. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, $1,454.12 plus 13 percent interest per annum from November 1, 1985, until paid.

RAIO PRODUCE COMPANY INC. *v.* MUNCHY PRODUCE INC. PACA Docket No. RD-86-471. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, $573.75 plus 13 percent interest per annum from October 1, 1985, until paid.

HAYWOOD COUNTY COOPERATIVE FRUIT AND VEGETABLE ASSOCIATION INCORPORATED *v.* KEITH D. ROBERTSON d/b/a K & S PRODUCE. PACA Docket No. RD-86-472. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, $569.50 plus 13 percent interest per annum from September 1, 1985, until paid.

C. H. ROBINSON COMPANY *v.* HOUSTON PRODUCE DISTRIBUTING INC. a/t/a HOUSTON FRUIT & VEGETABLE COMPANY. PACA Docket No. RD-86-473. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, $35,224.65 plus 13 percent interest per annum from September 1, 1985, until paid.

C. H. R. COMPANY *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-474. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, $8,992.58 plus 13 percent interest per annum from October 1, 1985, until paid.

PEREZ RANCHES INC. a/t/a P. R. I. SALES CO. *v.* TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-475. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, $46,163.88 plus 13 percent interest per annum from March 1, 1985, until paid.

H. SMITH PACKING CORP *v.* FARM FOODS INC. PACA Docket No. RD-86-476. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, $972.50 plus 13 percent interest per annum from January 1, 1985, until paid.

BUD ANTLE INC. *v.* FARLEY & CALFEE INC. PACA Docket No. RD-86-477. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, $35,892.00 plus 13 percent interest per annum from February 1, 1986, until paid.

FRANK S. ECKET, III and WILLIAM R. SHERER d/b/a SKIP'S CONSOLIDATION *v.* TOC PRODUCE DISTRIBUTORS CORPORATION. PACA Docket No. RD-86-478. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, $892.90 plus 13 percent interest per annum from October 1, 1985, until paid.

MAGNOLIA FRUIT & PRODUCE CO. INC. *v.* BERRYMAN PRODUCE INC. PACA Docket No. RD-86-479. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, $3,902.00 plus 13 percent interest per annum from April 1, 1985, until paid.

PEMBERTON PRODUCE INC. *v.* WILBUR F. WILLIAMS d/b/a W. F. WILLIAMS COMPANY. PACA Docket No. RD-86-482. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, $7,525.50 plus 13 percent interest per annum from July 1, 1985, until paid.

A. DUDA & SONS INC. *v.* JOHN E. REYNA d/b/a REYNA BROTHERS PRODUCE & TRUCKING. PACA Docket No. RD-86-483. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, $5,151.75 plus 13 percent interest per annum from January 1, 1986, until paid.

SMITH POTATO INC. *v.* M & M PRODUCE INC. PACA Docket No. RD-86-484. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, $3,852.50 plus 13 percent interest per annum from November 1, 1985, until paid.

GERALD LARSON d/b/a SPLIT DIAMOND L RANCH *v.* FARM PRODUCE OF IDAHO INC. PACA Docket No. RD-86-485. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, $30,224.02 plus 13 percent interest per annum from May 1, 1985, until paid.

STEVCO INC. *v.* TOC PRODUCE DIST. CORP. PACA Docket No. RD-86-486. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, $1,016.40 plus 13 percent interest per annum from September 1, 1985, until paid.

GOOD YEAR PRODUCE INC. *v.* GREEN VALLEY CO. INC. PACA Docket No. RD-86-487. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, $1,992.90 plus 13 percent interest per annum from February 1, 1986, until paid.

SUNNYSIDE PACKING COMPANY *v.* VINCENT MAENZA BANANA Co. a/t/a MAENZA & SONS. PACA Docket No. RD-86-488. Decided October 24, 1986.

Respondent was ordered to pay complainant, as reparation, $1,301.10 plus 13 percent interest per annum from October 1, 1985, until paid.

OSHITA MARKETING INC. *v.* INTERNATIONAL A. G. INC. PACA Docket No. RD-86-489. Decided October 24, 1986.

Respondent was ordered to pay complainant, as reparation, $9,338.20 plus 13 percent interest per annum from March 1, 1986, until paid.

MEREX CORP. *v.* FRESHVILLE PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-490. Decided October 24, 1986.

Respondent was ordered to pay complainant, as reparation, $31,965.15 plus 13 percent interest per annum from November 1, 1985, until paid.

HAYWOOD COUNTY COOPERATIVE FRUIT AND VEGETABLE ASSOCIATION INCORPORATED *v.* FLAMINGO PRODUCE SALES INC. PACA Docket No. RD-86-491. Decided October 30, 1986.

Respondent was ordered to pay complainant, as reparation, $6,789.30 plus 13 percent interest per annum from September 1, 1985, until paid.

DULCE A. VITALE d/b/a TRANS WORLD Co. *v.* BEACON PRODUCE Co. PACA Docket No. RD-86-492. Decided October 30, 1986.

Respondent was ordered to pay complainant, as reparation, $7,240.25 plus 13 percent interest per annum from September 1, 1985, until paid.

HALLMARK PRODUCE COMPANY *v.* KALECK DISTRIBUTING COMPANY. PACA Docket No. RD-86-493. Decided October 30, 1986.

Respondent was ordered to pay complainant, as reparation, $1,681.53 plus 13 percent interest per annum from June 1, 1985, until paid.

MERIT PACKING COMPANY *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-495. Decided October 30, 1986.

Respondent was ordered to pay complainant, as reparation, $39,084.80 plus 13 percent interest per annum from March 1, 1986, until paid.

SUNRISE RANCHES a/t/a SUNRISE SALES *v.* A & J FAMILY PRODUCE. PACA Docket No. RD-86-496. Decided October 31, 1986.

Respondent was ordered to pay complainant, as reparation, $18,411.48 plus 13 percent interest per annum from November 1, 1985, until paid.

BROAD ACRES *v.* RONALD L. COLLINS d/b/a KISSIMMEE FARM FRESH PRODUCE. PACA Docket No. RD-86-498. Decided October 31, 1986.

Respondent was ordered to pay complainant, as reparation, $8,800.00 plus 13 percent interest per annum from September 1, 1985, until paid.

COEXPORT INTERNATIONAL INC. *v.* C & C PRODUCE CO. INC., formerly: TRI-STATE PRODUCE CO. INC. PACA Docket No. RD-86-500. Decided October 31, 1986.

Respondent was ordered to pay complainant, as reparation, $22,190.36 plus 13 percent interest per annum from June 1, 1985, until paid.

LEE H. ISAAK and ABE H. ISAAK d/b/a ISAAK BROS. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-501. Decided October 31, 1986.

Respondent was ordered to pay complainant, as reparation, $11,443.00 plus 13 percent interest per annum from September 1, 1985, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS

NIKADEMOS DISTRIBUTING COMPANY, INC., *v.* BOLIVAR G. GAMEZ d/b/a ROBIL INTERNATIONAL. PACA Docket No. RD-86-295. New Docket No. 2-7295. Order issued September 10, 1986

Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on June 18, 1986 awarding reparation to complainant in the amount of $2,327.75. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). A Stay Order was issued on July 30, 1986.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and respondent's answer is hereby ordered filed.

Copies of this order shall be served upon the parties. A copy of respondent's answer shall be served upon complainant, along with this order.

SPRING ACRES SALES COMPANY, INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. RD-86-361. Order issued October 6, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $38,049.00 in connection with a transaction involving the shipment of sweet potatoes in interstate commerce.

A copy of the formal complaint was served on respondent, who failed to file a timely answer thereto and was thus in default. By letter dated July 29, 1986, respondent notified the Department that on April 25, 1986, complainant had filed in the Supreme Court of the State of New York, a complaint against respondent involving the same issues as this reparation proceeding. In a letter dated August 1, 1986, the Department gave complainant 15 days from its receipt of such letter to show that the state action had been dismissed without prejudice, or complainant would be deemed to have made an election of remedies pursuant to 7 U.S.C. § 499e(b), and its complaint would be dismissed. The letter was served on August 6, 1986, and complainant has failed to respond thereto.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

SIX L'S PACKING COMPANY, INC., *v.* BOLER FARMS. PACA Docket No. RD-86-362. Order issued October 6, 1986.

Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on August 4, 1986, awarding reparation to the complainant in the amount of $1,851.25. By letter received August 18, 1986, respondent has moved that this matter be reopened.

Accordingly, the order of August 4, 1986, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

J.R. NORTON COMPANY *v.* M & M PRODUCE, INC. PACA Docket No. RD-86-393. Order issued October 6, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $950.00 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated August 6, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of August 6, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY, INC., *v.* MELON PRODUCE INC. PACA Docket No. RD-86-398. Order issued October 23, 1986.

Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on August 28, 1986, awarding reparation to the complainant in the amount of $95,331.50. By motion received September 23, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of August 28, 1986, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

L.D. GREENE COMPANY *v.* PELICAN TOMATO CO. INC. PACA Docket No. RD-86-367. Order issued October 27, 1986.

Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Respondent has 10 days from its receipt of this order to file an original and two copies of its answer. Respondent's failure to file an answer in a timely fashion will result in the immediate issuance of a Default Order.

Copies of this order shall be served upon the parties.

INTERSTATE PACKING CO., *v.* PACIFIC FARM COMPANY. PACA Docket No. RD-86-386. Order issued October 27, 1986.

Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that

good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Respondent apparently assumed, although wrongly, that its answer to the informal complaint was a sufficient response to the formal complaint. Under these circumstances, respondent's default in the filing of an answer should be set aside. Respondent will have 10 days from its receipt of this order to file an original and two copies of its answer to the formal complaint. Respondent's failure to file a timely answer will result in the immediate issuance of a Default Order.

Copies of this order shall be served upon the parties.

THE TOBI COMPANY, INC., *v.* UNITED PACKING CO. PACA Docket No. RD-86-306. Decided October 28, 1986.

Donald A. Campbell, Judicial Officer.

ORDER TO SHOW CAUSE

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Default Order was issued on July 1, 1986, awarding reparation to complainant in the amount of $3,305.27. Respondent moved that the default be reopened and, on August 15, 1986, a Stay Order was issued, staying the Default Order and providing complainant with an opportunity to respond to the motion to reopen.

Complainant has submitted a letter in which it states that when it "submitted our formal complaint back in January 1986, it appears that it had been entered against the wrong licensee . . . the claim should have been filed against licensee Harkness-Colgate-Bartell d/b/a United Packing Company." Complainant appears to be requesting a dismissal of the complaint against respondent. Therefore, complainant will have 10 days from its receipt of this order to show cause why its complaint should not be dismissed. If a timely response is not made, we will assume complainant acquiesces to dismissal and will issue the appropriate order. Complainant should be aware that the filing of a reparation complaint against Harkness-Colgate-Bartell d/b/a United Packing Company will not be permitted if the filing date is in excess of nine months from when the alleged cause of action accrued. *Bianchi & Sons Packing Co.* v. *Kelvin S. Ng d/b/a Kin Yip Company*, 42 Agric. Dec. 292 (1983).

Copies of this order shall be served upon the parties.

MURAKAMI FARMS, INC., a/t/a MURAKAMI PRODUCE CO., *v.* M & M PRODUCE, INC. PACA Docket No. RD-86-437. Order issued October 28, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $7,133.75 in connection with a transaction involving the shipment of onions in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated August 21, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of August 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FRANK CAPURRO & SON *v.* M & M PRODUCE, INC. PACA Docket No. RD-86-439. Order issued October 28, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $5,507.20 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 5, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of September 5, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

In re: JOSE JAMIE SANCHEZ REYES. P.Q. Docket No. 209. Decided July 11, 1986.

William W. Weber, Administrative Law Judge.
Kris Ikejiri, for complainant.
Pro se, for respondent.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act, as amended, (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Jose Jamie Sanchez Reyes violated the PQA and section 319.27 of the regulations, promulgated thereunder (7 CFR § 319.27).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the respondent.

Jose Jamie Sanchez Reyes was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Mr. Reyes was served with the complaint. Mr. Reyes has not filed an answer or any other document to date. This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by Mr. Reyes's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Jose Jamie Sanchez Reyes, respondent herein, in an individual whose mailing address is 885 Given Street, San Diego, California 92154.

2. On or about March 30, 1985, the respondent imported from Mexico into San Diego, California, Mexican limes, in violation of section 319.27 of the regulations (7 CFR § 319.27), because the importation of Mexican limes is prohibited.

3. On or about March 30, 1985, the respondent imported from Mexico into San Diego, California, lemons, in violation of section 319.27 of the regulations (7 CFR § 319.27), because the respondent did not conform to the restrictions, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent Jose Jamie Sanchez Reyes, is hereby assessed a civil penalty of five hundred dollars ($500.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Esq., Office of the General Counsel, Room 2422 South Building, Washington, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Default Decision and Order upon the respondent, unless there is an appeal within 30 days of service to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145)

[The Default Decision and Order became final on September 3, 1986.—Ed.]

In re: ARDLEY BALLIN CROSS, JR. P.Q. Docket No. 244. Decided September 5, 1986.

Dorothea A. Baker, Administrative Law Judge.
Clement McGovern, for complainant.
Ramino Estrada, Jr., San Antonio, Texas, for respondent.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act, as amended, (Act) (7 U.S.C. §§ 151-165 and 167) by a complaint filed

by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ardley Ballin Cross, Jr., the respondent herein, is an individual whose mailing address is Route 9, Box 278 K, San Antonio, Texas 78227.

2. On or about February 22, 1986, the respondent imported approximately fourteen (14) grapefruits, fourteen (14) tangerines and thirty three (33) oranges from Mexico.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred seventy five dollars ($375.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agricul-

ture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: NORTHWEST ORIENT AIRLINES. P.Q. Docket No. 157. Decided September 9, 1986.

Failure to present two pieces of baggage from Hawaii for inspection—Failure to file timely answer—Penalty.

The Judicial Officer affirmed Chief Judge Campbell's decision assessing a civil penalty of $1,000 against respondent under the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations, because respondent failed to present two pieces of passenger baggage which were in its possession at Honolulu, Hawaii.

Donald A. Campbell, Judicial Officer.
Sherrie Kennedy, for complainant.
Mary McMunn, Northwest Airlines, for respondent.

DECISION AND ORDER

This is a proceeding under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a, 167), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*), in which Chief Administrative Law Judge John A. Campbell (ALJ) filed an initial Decision and Order on January 31, 1986, assessing a civil penalty of $1,000 against respondent after respondent failed to file a timely answer.

On March 5, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] On August 26, 1986, the case was referred to the Judicial Officer for decision.

Based on a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151–164a and 167) and the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*) (Acts) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on November 25, 1985. The complaint alleged that the respondent violated sections 318.13–10 and 318.13–12(a) of the regulations (7 CFR §§ 318.13–10 and 318.13–12(a)).

Copies of the complaint and the Rules of Practice governing proceedings under the Acts were served by the Hearing Clerk, by certified mail, upon respondent on December 3, 1985. On December 27, 1985, respondent was sent, by regular mail, a notice that its answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Northwest Airlines, Inc., respondent, is a business having its principal place of business at Office of the President, Executive Offices, Minneapolis-St. Paul International Airport, St. Paul, Minnesota 55111.

2. On or about June 1, 1985, the respondent violated sections 318.13–10 and 318.13–12(a) of the regulations (7 CFR §§ 318.13–10 and 318.13–12(a)) because respondent failed to present two (2)

pieces of passenger baggage, with Northwest Airline baggage claim tag numbers NW 211-845 and NW 211-846, which were in its possession at Honolulu Hawaii International Airport (Flight No. 22) and which were subject to inspection, for said inspection.

CONCLUSION

By reason of the facts in the finding of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file an answer with the Hearing Clerk within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or
>
> (3) State that the respondent admits the jurisidictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless

the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra*, and advised respondent that complainant was seeking a $1,000 civil penalty. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, as follows (Complaint at 2):

WHEREFORE, it is hereby ordered that for the purpose of determining whether or not respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the applicable Rules of Practice (7 CFR § 380.1 and 7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the

effect of failure to file an answer with the Hearing Clerk within 20 days. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

The return receipt card shows that respondent was served with a copy of the complaint on December 3, 1985. Respondent's answer was, therefore, required to be filed with the Hearing Clerk by December 23, 1985. However, respondent filed nothing until over a month later, when it filed objections to complainant's motion for adoption of the proposed default decision. Since respondent failed to file an answer within the specified time period, the default Decision and Order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,[2] respondent has shown no basis for setting aside the default decision here.[3]

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[2] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3] *See In re Schwartz*, 45 Agric. Dec. ___ (Aug. 12, 1986); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ___ (July 9, 1986); *In re Gutman*, 45 Agric. Dec. ___ (June 17, 1986); *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ___ (Sept. 23, 1985); *In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984); *In*

Continued

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a $10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not file a timely answer and did not contest the allegations of the complaint in its untimely answer.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [4] If respondent were permitted to contest some of the allegations of fact at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

Respondent's principal contention is that the alleged violation was not intentional, and that respondent "has demonstrated over the years a conscientious effort and intent to comply fully with all applicable regulations of the U.S. Department of Agriculture" (Letter of February 27, 1986, at 1). That defense, however, would not result in lessening the civil penalty in this proceeding, which is

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re Buzun, 43 Agric. Dec. ___ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.* 39 Agric. Dec. 395, 396–97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[4] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851–52 (7th Cir. 1962).

in accord with the Department's settled sanction policy. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985); *In re Eastern Airlines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985) ($2,000 civil penalty for two violations); *In re Esposito*, 38 Agric. Dec. 613, 622-65 (1979); *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

The inspection of passenger baggage moving from Hawaii, which is under quarantine, is necessary to ascertain whether baggage contains prohibited articles or plant pests. Such inspection is designed to prevent the spread of dangerous plant diseases and insect infestation. Unintentional violations could cause billions of dollars of damage and eradication expenses of tens of millions of dollars. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent is hereby assessed civil penalty of $1,000, which shall be paid within 30 days after service of this order. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U.S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D.C., 20250-1400.

In re: MERCEDES CAPISTRANO. P.Q. Docket No. 179. Decided September 9, 1986.

Importation of plantains from the Philippines in violation of the Act—Penalty.

The Judicial Officer affirmed Chief Judge Campbell's order assessing a civil penalty of $250 against respondent for importing plantains from the Philippines into the United States in violation of the Act of August 20, 1912, as amended, and the regulations. This case is governed by *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), notwithstanding the fact that respondent's friend placed the prohibited plantains in respondent's luggage without respondent's knowledge.

Donald A. Campbell, Judicial Officer.
Jaru Ruley, for complainant.
Pro se, for respondent.

DECISION AND ORDER

This is a proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), in which Chief Administrative Law Judge John A. Campbell (ALJ) filed an initial Decision and Order on May 27, 1986, assessing a civil penalty of $250 against respondent for

importing plantains from the Philippines into the United States in violation of the Act and regulations.

On July 8, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on August 26, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 CFR §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on February 6, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about April 7, 1985, the respondent imported plantains into the United States at Seattle, Washington, from the Philippines, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the plantains were not imported under permit as required by section 319.56–2(e) of the regulations (7 CFR § 319.56–2(e)).

On February 21, 1986, the respondent filed an answer responding to and admitting the allegations contained in the complaint. This admission of the allegations contained in the complaint constitutes a waiver of hearing (7 CFR § 1.139).

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

FINDINGS OF FACT

1. Respondent, Mercedes Capistrano, is an individual whose address is 115 Fairview Avenue, Apt. 26, Jersey City, New Jersey 07304.

2. On or about April 7, 1985, the respondent imported plantains into the United States at Seattle, Washington, from the Philippines, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the plantains were not imported under permit as required by section 319.56–2(e) of the regulations (7 CFR § 319.56–2(e)).

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 319.56(c) of the regulations (7 CFR § 319.56(c)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

This case is governed by the principles set forth in *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), a copy of which is attached as an appendix.

There is a slight difference between the facts here and the facts in *Lopez*, *viz.*, in *Lopez*, the respondent knew that he had one piece of sugarcane in his possession, but did not know that it was unlawful to bring it into the United States, whereas here, respondent's friend placed the prohibited plantains in respondent's luggage, without respondent's knowledge. However, that distinction is not material. As explained in *Lopez*, in order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws. If that policy were not followed where forbidden items were placed in luggage by relatives or friends of the violator, a loophole would be created that could prove disastrous to American agriculture. Accordingly, the *Lopez* doctrine will be followed here, just as it was in the case of *In re Vallalta*, 45 Agric. Dec. ____ (June 17, 1986), in which respondent's relative placed a prohibited cacao pod in his luggage without his knowledge.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent, Mercedes Capistrano, is hereby assessed a civil penalty of $250, which shall be payable to the "Treasurer of the United States," by certified check or money order, and it shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, U.S. Department of Agriculture, Washington, D.C. 20250-1400, within 30 days from the service of this order.

APPENDIX

In re Lopez, 44 Agric. Dec. ___ (Oct. 7, 1985).
[Excerpt omitted.—Ed.]

In re: NORTHWEST ORIENT AIRLINES. P.Q. Docket No. 131. Decided September 11, 1986.

Victor W. Palmer, Administrative Law Judge.
Joe Pembroke, for complainant.
Mary McMunn, Northwest Airlines, for respondent.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act, as amended, (Act) (7 U.S.C. §§ 151-165 and 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of

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1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Northwest Orient Airlines, respondent is a corporation whose business address is Minneapolis-St. Paul International Airport, St. Paul, Minnesota 55111.

2. On or about July 26, 1986, the respondent transported approximately eight pieces of passenger baggage from Hawaii, to the United States mainland.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred and fifty dollars ($350.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: MAHARLIKA MARKET. P.Q. Docket No. 212. Decided June 29, 1986.

Dorothea A. Baker, Administrative Law Judge.
Kris Ikejiri, for complainant.
Ladd Baumann, Agana, Guam, for respondent.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act, as amended (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Maharlika Market violated the PQA and section 319.56 of the regulations, promulgated thereunder (7 CFR § 319.56).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the Maharlika Market. Maharlika Market was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint. It was informed that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Maharlika Market was served with the complaint. Maharlika Market has not filed an answer, but, through counsel, filed a request for an extension of time to answer.* This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by Maharlika Market's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Maharlika Market, respondent, is a company whose mailing address is P. O. Box 8544, Tamuning, Guam 96911.

2. On or about October 5, 1985, the respondent imported from the Philippines into Guam, approximately 20 pounds of longan fruit, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the importation from the Philippines into Guam of longans is prohibited.

CONCLUSION

The respondent has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By its silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent Maharlika Market, is hereby assessed a civil penalty of seven hundred fifty dollars ($750), which shall be payable to

* This was denied. The time for the filing of a timely answer had expired.

"The Treasurer of the United States", by certified or money order, and which shall be forwarded to Kris H. Ikejiri, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of the Default Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on September 11, 1986.—Ed.]

In re: TRANSOCEANIC MARINE, INC. P.Q. Docket No. 272. Decided September 11, 1986.

William J. Weber, Administrative Law Judge.
Clement McGovern, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912 as amended (21 U.S.C. §§ 111 and 120) and the Federal Plant Pest Act as amended, hereinafter "Act", (7 U.S.C. § 150aa *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Acts and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Transoceanic Marine, Inc., respondent, is a corporation incorporated under the laws of the State of New York and having its principle place of business at 39 East 51st Street, New York, New York 10022.

2. On or about March 10, 1986, the respondent stored garbage aboard the M/V World Negotiator which was docked at the Wilmington Marine Terminal, Wilmington, Delaware.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred and fifty dollars ($750.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: SABENA AIRLINES. P.Q. Docket No. 239. Decided September 25, 1986.

William J. Weber, Administrative Law Judge.
Joe Pembroke, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1903, as amended, (Act) (7 U.S.C. §§ 151-164a) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Sebena Airlines, respondent violated the Act and reg-

ulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Sabena Airlines is a corporation whose business address is P.O. Box 20947, Hartsfield International Airport, Atlanta, GA 30320.

2. On or about July 16, 1985, respondent imported a shipment of corn salad leaves into Atlanta, Georgia from Belgium. (AWB 082/4374 2451)

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred and seventy-five dollars ($375) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of

Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: TRANS WORLD AIRLINES, INC. P.Q. Docket No. 266. Decided September 29, 1986.

Dorothea A. Baker, Administrative Law Judge.
Clement McGovern, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 159 and 162) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Trans World Airlines, Inc., the respondent herein, is a corporation doing business at John F. Kennedy International Airport, New York, New York, and whose attorney for purposes of service is Ms.

Mary McGuire Voog, Trans World Airlines, Inc., 605 Third Avenue, New York, New York 10158.

2. On or about February 20 and 23, of 1986, the respondent imported fresh vegetables and mushrooms into the United States from Italy.

3. On or about February 23, 1986, the respondent imported chicory into the United States from Italy.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars ($1000.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this Order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: JESUS HERNANDEZ, P.Q. Docket No. 173. Decided August 18, 1986.

Edward H. McGrail, Administrative Law Judge.
Clement McGovern, for complainant.
Pro se, for respondent.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act, as amended (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia,* that respondent Jesus Hernandez violated the PQA and section 319.56–2(e) of the regulations, promulgated thereunder (7 CFR § 319.56–2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the respondent.

Jesus Hernandez was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint. Mr. Hernandez has filed an answer, in which he admitted the material allegations of fact contained in the complaint. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

Accordingly, the material facts alleged in the complaint, which were admitted by Mr. Hernandez in his answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Jesus Hernandez, respondent herein, is an individual whose mailing address is 541 Delas Flores, Calexico, California 92231.

2. On or about July 5, 1985, the respondent imported four avocados in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)), because the importation of avocados from Mexico without a permit is prohibited.

CONCLUSION

The respondent has filed an answer in which he has admitted the material allegations contained in the complaint. The consequences of such an action were explained to the respondent in the Rules of Practice, a copy of which accompanied the complaint and letter of service. The admission by the answer of all the material allegations of fact contained in the complaint constitutes a waiver of hearing in accordance with § 1.139 of the regulations (9 CFR § 1.139).

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent, Jesus Hernandez, is hereby assessed a civil penalty of three hundred and seventy-five dollars ($375.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145

of the Rules of Practice applicable to this proceeding (7 CFR# 1.145).

[The Decision and Order became final on October 1, 1986.—Ed.]

In re: JESUS ALBERTO RENTARIA. P.Q. Docket No. 213. Decided June 24, 1986.

John A. Campbell, Administrative Law Judge.
Joe Pembroke, for complainant.
Pro se, for respondent.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), and the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated regulations promulgated thereunder (9 CFR §§ 91.1 *et seq.* and 7 CFR § 319.27 *et seq.*). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 CFR § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Jesus Alberto Renteria, respondent, is an individual whose address is 7631 North Loop #290, El Paso, Texas 79915.

2. On or about April 27, 1984, at Ysleta, Texas, the respondent imported twenty pounds of potatoes into the United States from Mexico in violation of 7 CFR §§ 321.4(a) and 319.56–2(e), because the respondent had neither applied for nor obtained a permit, as required.

3. On or about April 27, 1984, at Ysleta, Texas, the respondent imported three avocados into the United States from Mexico in violation of 7 CFR § 319.56–2(e), because the avocados were not accompanied by a permit, as required.

4. On or about April 27, 1984, at Ysleta, Texas, the respondent imported thirty eggs into the United States from Mexico in violation of 9 CFR §§ 92.2(a), 92.5(b)(1), 94.6(g), and 94.6(h), because the eggs were neither accompanied by a certificate, nor had respondent applied to the Deputy Administrator, Veterinary Services, for permission to import the eggs, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Jesus Alberto Renteria is hereby assessed a civil penalty of five hundred dollars ($500), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 6, 1986 --Ed.]

In re: INVERSIONES REALTICO S.A., & RAM'S CARGO BROKERS, INC.
P.Q. Docket No. 252. Decided August 25, 1986.

Victor W. Palmer, Administrative Law Judge.
Jaru Ruley, for complainant.
Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 CFR §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on May 19, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about August 12, 1986, the respondents imported yams and pumpkins into the United States at Miami, Florida, from Costa Rica, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the yams and pumpkins were not imported under permit as required by section 319.56–2(e) of the regulations (9 CFR § 319.56–2(e)).

The respondents failed to file answers in response to the complaint and, consequently, are deemed to admit the allegations contained in such complaint. (7 CFR § 1.136(c)). Respondent have, however, submitted payment of the civil penalties requested in the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Iversiones Realtico, S.A., is a foreign business located in San Jose, Costa Rica. Eddie Socarras is its agent in the United States with an address of 3055 N.W. 13th Street, Miami, Florida 33125.

2. Respondent, Ram's Cargo Brokers, Inc., is a corporation doing business at 3900 N.W. 79th Avenue, Suite 416, Miami, Florida 33166.

3. On or about August 12, 1985, the respondents imported yams and pumpkins into the United States at Miami, Florida, from Costa Rica, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the yams and pumpkins were not imported under permit as required by section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondents have violated section 319.56(c) of the regulations (7 CFR § 319.56(c)).

Therefore, the following Order is issued.

ORDER

The respondents, Inversiones Realtico, S.A. and Ram's Cargo Broker, Inc., are hereby assessed civil penalties of seven hundred fifty dollars each ($750.00). This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 7, 1986.—Ed.]

In re: INTERNATIONAL AIR SERVICES. P.Q. Docket No. 220. Decided October 10, 1986.

Dorothea A. Baker, Administrative Law Judge.
Kevin Thiemann, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that International Air Services, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 330.100 *et seq.* and 9 CFR § 94.5 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in this complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. International Air Services, Inc., respondent, is a corporation doing business at Luis Munoz International Airport, Isla Verde, Puerto Rico 00913.

2. On or about July 17, 1985, the respondent removed two (2) bags of foreign origin garbage from a Guyana Airways Corporation aircraft, which had arrived at the Luis Munoz International Airport, Isla Verde, Puerto Rico, from Georgetown, Guyana.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred dollars ($400.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: VALLEY VIEW FARM. P.Q. Docket No. 273. Decided October 10, 1986.

John A. Campbell, Administrative Law Judge.
Jaru Ruley, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Valley View Farm, herein referred to as the respondent, is a corporation whose business mailing address is 119 Chrystie Street, New York, New York 10002.

2. On or about March 5, 1986, the respondent imported *moringa oleifera* (drumsticks) from the Dominican Republic into the United States at Jamaica, New York.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of six hundred dollars ($600.00). The respondent shall send a certified check or money order for $600.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, United States Deparment of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: RENA LARIOS. P.Q. Docket No. 218. Decided September 10, 1986.

John Campbell, Administrative Law Judge.
Clement McGovern, for complainant.
Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing restrictions on entry of fruits and vegetables into the United States from certain foreign countries and localities (7 CFR § 319.56-2), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was initiated by a complaint filed on March 17, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about August 5, 1985, the respondent imported mangoes from Mexico that were not under permit.

On April 18, 1986, the respondent filed an Answer responding to and admitting the allegations contained in the Complaint. The ad-

mission of the allegations contained in the Complaint constitutes a waiver of hearing. (7 CFR § 1.139).

Accordingly, the material allegations contained in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Rena Larios, is an individual with a mailing address of 3271 North Cornelia, Fresno, California 93711.

2. On or about August 5, 1985, the respondent imported from Mexico, approximately two (2) mangoes in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)) because the mangoes were not imported under permit, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

Therefore, the following Order is issued.

ORDER

The respondent, Rena Larios, is hereby assessed a civil penalty of two hundred fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422-South Building., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal within 30 days after service to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 20, 1986.—Ed.]

In re: SHIRLEY WILLIAMS DACO, P.Q. Docket No. 182. Decided September 9, 1986.

J. Campbell, Administrative Law Judge.
Kevin Thiemann, for complainant.
Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 CFR §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on February 6, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that on or about September 11, 1985, the respondent imported five (5) longans into the United States at Seattle, Washington from the Philippines, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the longans were not imported under permit as required by section 319.56–2(e) of the regulations (7 CFR § 319.56–2(e)).

On March 4, 1986, the respondent filed an Answer responding to and admitting the allegations contained in the Complaint. This admission of the allegations contained in the Complaint constitutes a waiver of hearing (7 CFR § 1.139).

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Shirley Williams Daco, respondent, is an individual whose address is 145 Fleet Street, Vallejo, California 94591.

2. On or about September 11, 1985, the respondent imported five (5) longans into the United States at Seattle, Washington from the Philippines, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the longans were not imported under permit as required by section 319.56–2(e) of the regulations (7 CFR § 319.56–2(e)).

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 319.56(c) of the regulations (7 CFR § 319.56(c)).

Therefore, the following Order is issued.

ORDER

The respondent, Shirley Williams Daco, is hereby assessed a civil penalty of three hundred seventy-five dollars ($375.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR # 1.145).

[The Decision and Order became final on October 24, 1986.—Ed.]

In re: MITSUI OSKLINE, LTD. P.Q. Docket No. 268. Decided September 12, 1986.

Dorothea A. Baker, Administrative Law Judge.
Cynthia Koch, for complainant.
Pro se, for respondent.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Federal Plant Pest Act, as amended, (FPPA), (7 U.S.C. § 150aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia,* that respondent Mitsui Oskline, Ltd., violated the FPPA and section 330.120 * of the regulations promulgated thereunder (7 CFR § 330.110). Copies of the complaint and the Rules of Practice governing proceedings under the FPPA were

* Corrected from 330.100 by the Administrative Law Judge.

served by the Hearing Clerk, by certified mail, upon Mitsui Oskline, Ltd.

Mitsui Oskline, Ltd., was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Mitsui Oskline, Ltd. was served with the complaint. Mitsui Oskline, Ltd., has not filed an answer or any other document to date. This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

FINDINGS OF FACT

1. Mitsui Oskline, Ltd., respondent, is a company, whose address for purposes of service of process is, 1 World Trade Center, Suite 2211, New York, New York 10048.

2. The respondent is the registered owner of the motor vessel (M/V) *Michalis V.*

3. On or about December 29, 1985, at San Juan, Puerto Rico, the respondent violated section 330.110 of the regulations (7 CFR. § 330.110), because an inspector of the Plant Protection and Quarantine Programs had boarded the M/V *Michalis V* and applied seals to five boxes of foreign origin apples and oranges, and while under the custody of the respondent, the seals were broken without authorization, as required.**

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By its silence, the respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the FPPA and regulations promulgated thereunder. The following Order is, therefore, issued.

** Complaint alleges "prohibited".

ORDER

Respondent Mitsui Oskline, Ltd., is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Thomas E. Bundy, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Default Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer within 30 days, pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Default Decision and Order became final October 24, 1986.—Ed.]

In re: RONALD BROWN. P.Q. Docket No. 67. Decided August 18, 1986.

Edward McGrail, Administrative Law Judge.
Joe Pembroke, for complainant.
Pro se, for respondent.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122), Federal Plant and Pest Act, as amended, (7 U.S.C. §§ 150aa *et seq.*), and the Act of August 20, 1912, as amended, (7 U.S.C. §§ 161 and 162) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and sections 330.400(b)(1) and 94.5(b)(1) of the regulations promulgated thereunder (7 CFR § 330.400(b)(1) and (9 CFR § 94.5(b)(1)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on March 19, 1985, by regular mail in conformity with section 1.147(b)(3) of the Rules of Practice (7 CFR § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the com-

plaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and waiver of such hearing. More than twenty (20) days have elapsed since Respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Ronald Brown, is an individual whose mailing address is 720 Rosedale Avenue, Bronx, New York 10473.

2. On or about October 28, 1984, respondent, a Northwest Airlines employee removed from Northwest Airlines flight 18, garbage consisting of two pounds of grapes, three oranges and a persimmon, in violation of section 330.400(b)(1), (7 CFR § 330.400(b)(1)), and section 94.5(b)(1), (9 CFR § 94.5(b)(1)) because respondent failed to unload the foreign-origin garbage in tight, leak-proof covered receptacles, to an approved facility for incineration, sterilization or grinding, as required.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent is hereby assessed civil penalty of one hundred and fifty dollars ($150) which shall be payable to the "Treasurer of the United States" by certified check and money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422 S. Bldg., United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days (7 CFR § 1.142(c)) after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on October 27, 1986.—Ed.]

In re: EUGENIA GOMEZ DE LOPEZ. P.Q. Docket No. 175. Decided August 20, 1986.

Edward McGrail, Administrative Law Judge.
Clement McGovern, for complainant.
Pro se, for respondent.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act, as amended, (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia,* that respondent Eugenia Gomez de Lopez violated the PQA and section 319.56-2(e) of the regulations, promulgated thereunder (7 CFR § 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the respondent.

Eugenia Gomez de Lopez was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Mrs. Gomez was served with the complaint. Mrs. Gomez has not filed an answer or any other document to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by Mrs. Gomez's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Eugenia Gomez de Lopez, respondent herein, is an individual whose mailing address is Eduardo Conde 20-14 Santurle, Puerto Rico.

2. On or about November 8, 1985, the respondent imported for the Dominican Republic into San Juan, Puerto Rico, one pound of

okra, in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)), because the importation of okra from the Dominican Republic without a permit is prohibited.

CONCLUSION

The respondent has failed to file an answer in response to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By her silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent, Eugenia Gomez de Lopez, is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, Washington, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 27, 1986.—Ed.]

In re: MOTORSHIPS, INC. P.Q. Docket No. 251. Decided September 10, 1986.

William J. Weber, Administrative Law Judge.
Jaru Ruley, for complainant.
Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the storage and disposal of garbage coming into the United States from certain foreign countries and localities (7 CFR § 330.400), hereinafter referred

to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on May 19, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about October 21, 1985, the respondent unloaded regulated garbage in violation of the governing regulations.

On June 2, 1986, the respondent filed an Answer responding to and admitting the allegations contained in the Complaint. This admission of the allegations contained in the Complaint constitutes a waiver of hearing. (7 CFR § 1.139).

Accordingly, the material allegations contained in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Motorships, Inc., is a business with a mailing address of P.O. Box 1157, Englewood Cliffs, New Jersey 07632.

2. On or about October 21, 1985, the respondent unloaded regulated garbage from aboard the vessel SW Atlantic Concert, which was docked at Elizabeth, New Jersey. This unloading was in violation of section 330.400(b)(1) of the regulations (7 CFR § 330.400(b)(1)) in that the regulated garbage was not unloaded under the direction of an Animal and Plant Health Inspection Service inspector and was not being moved to an approved facility for incineration, grinding, or sterilization, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 330.400 of the regulations (7 CFR § 330.400).

Therefore, the following Order is issued.

ORDER

The respondent, Motorships, Inc., is hereby assessed a civil penalty of two hundred fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hear-

ing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer within 30 days of service pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR # 1.145).

[The Decision and Order became final on October 28, 1986.—Ed.]

In re: HENRY ORRANTE. P.Q. Docket No. 174. Decided August 4, 1986.

Victor W. Palmer, Administrative Law Judge.
Clement McGovern, for complainant.
Pro se, for respondent.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act, as amended, (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia,* that respondent Henry Orrante violated the PQA and section 319.56-2(e) of the regulations, promulgated thereunder (7 CFR § 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the respondent.

Henry Orrante was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Mr. Orrante was served with the complaint. Mr. Orrante has not filed an answer or any other document to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by Mr. Orrante's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Henry Orrante, respondent herein, is an individual whose mailing address is 1611 Tachivach Street, Palm Springs, California 92262.

2. On or about July 5, 1985, the respondent imported from Mexico into Calexico, California, several mangoes in violation of section 319.56–2(e) of the regulations (7 CFR § 319.56–2(e)), because the importation of mangoes from Mexico without a permit is prohibited.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure was explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent, Henry Orrante, is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, Washington, United States Department of Agriculture, Washington, D. C. 20250–1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 30, 1986.—Ed.]

In re: PESTKA ELEVATOR COMPANY. USWA Docket No. 86-1. Decided August 27, 1986.

Failure to increase warehouseman's bond—Failure to deliver corn and soybeans to CCC—Permanent revocation of license.

John Lom, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a proceeding under the United States Warehouse Act, as amended (the Act) (7 U.S.C. 241 *et seq.*), instituted by a complaint filed by the Acting Administrator, Agricultural Stabilization and Conservation Service (ASCS), United States Department of Agriculture, charging that the respondent willfully violated the Act and regulations promulgated thereunder (7 CFR 735-743).

Copies of the complaint and Rules of Practice (7 CFR 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

1. Pestka Elevator Company is, and at all times material herein was, a Minnesota corporation which operates the Pestka Elevator, a grain warehouse located at Rural Route 3, (Box 81), Mapleton, Minnesota 56065.

2. The respondent has been licensed under the Act.

3. The regulations at 7 CFR 736.6(d) provide that no person may be licensed as a warehouseman unless he has allowable net assets to the extent of at least $25,000 or 20 cents per bushel for the maximum number of bushels of grain storage capacity. The regulations also provide that in case of a deficiency in net assets above the minimum required by 7 CFR 736.6(d), the bond requirement shall be increased (7 CFR 736.14(c)).

4. The Act (7 U.S.C. 247) requires that the warehouseman post a bond in the amount required by the Secretary within the time required by the Secretary and provides for revocation of the warehouseman's license under the Act for failure to do so.

5. On or about April 22, 1985, respondent was requested by mail to increase the sum of the warehouseman's bond by no later than May 21, 1985, from $52,000 to $78,000 to cover a deficiency in allowable net worth. Respondent was again advised on or about June 10, 1985, by certified mail, that he had failed to respond satisfactorily to the letter of April 22, 1985, and did not provide the bond increase by the May 21, 1985 deadline.

6. On or about August 26, 1985, by leased wire, the license was temporarily suspended pending correction of financial conditions and correction of exceptions noted during an examination of the warehouse which occurred on July 29–30, 1985. The warehouseman was also advised that if corrective action was not completed and the licensing authority notified within 30 days of the date of the wire, action would be initiated to revoke the license. The warehouseman has failed to comply within the time allowed.

7. The Act (7 U.S.C. 262) requires the warehouseman to deliver agricultural products upon demand if such demand includes an offer to satisfy the warehouseman's lien and an offer to surrender the receipt.

8. On or about June 24, 1985, CCC issued a Loading Order to the respondent demanding shipment of 32,615.59 bushels of U.S. No. 2 yellow corn. The warehouse receipts were surrendered with the Loading Order along with an offer to pay storage through July 3, 1985, and also included an offer to pay loadout charges.

9. As of July 2, 1986, the warehouse was empty and the respondent had failed to deliver 13,704 bushels of U.S. No. 2 yellow corn and 8,417 bushels of soybeans to CCC.*

CONCLUSIONS

1. On February 6, 1986, the respondent was served a complaint filed by the Acting Administrator, ASCS, to permanently revoke respondent's license which was issued under the Act.

2. Respondent has failed to answer the complaint.

3. The regulations at 7 CFR 736.9 provide that a license issued to a warehouseman may be revoked, after an opportunity for a hearing, if the warehouseman has in any manner violated or failed to comply with any provisions of the Act or the regulations thereunder.

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* This allegation of Fact was not set forth in the Complaint.

4. Pursuant to 7 U.S.C. 246, the violations alleged in paragraphs 1-9 of the Findings of Fact are grounds for the revocation of the U.S. Warehouse Act license issued to the respondent.

ORDER

1. The license issued under the Act to the respondent is hereby permanently revoked and any other license issued under the Act in which the respondent has any authority or financial interest is also revoked because of the violations as stated in paragraphs 1-9 of the Findings of Fact and paragraphs 1-4 of the Conclusions, above.

2. The provisions of this order shall become effective on the first day after this decision becomes final. Copies hereof shall be served upon the parties.

3. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR 1.130 *et seq.*).

[The Decision and Order Upon Admission of Facts by Reason of Default became final on October 9, 1986.—Ed.]

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DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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In re: WHITE PACKING COMPANY, INC. I&G Docket No. 83. Decided December 2, 1986.

Suspension—Removal of "USDA Product Control" device—Consent.
Respondent consented to the issuance of this decision in which they were suspended from receiving federal meat grading and acceptance services for a period of one (1) year.

Kevin B. Thiemann, for complainant.
John J. Sullivan, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. § 1621 *et seq.*) (Act), and regulations issued thereunder (7 CFR Part 54) to withdraw and deny the benefits of federal meat grading and acceptance services from White Packing Company, Inc., respondent. This proceeding was commenced by a complaint filed on September 8, 1986, by the Agricultural Marketing Service, United States Department of Agriculture, which is responsible for the administration of federal meat grading and acceptance services. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purpose of this Stipulation and the provisions of this Consent Decision only, respondent admits all of the jurisdictional allegations of the complaint, admits the Findings of Fact contained herein; and waives;

a) Any further proceedings;

b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

c) All the rights to seek judicial review and otherwise challenge or contest the validity of this Decision.

2. This Stipulation and Consent Decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. White Packing Company, Inc., respondent, is, and at all times material herein was, a corporation which operates a meat processing establishment, and whose address is P.O. Box 95, King George, Virginia 22485.

2. Respondent is now, and at all times material herein was, receiving federal meat grading and acceptance services provided by the Agricultural Marketing Services (AMS) of the United States Department of Agriculture at its establishment at King George, Virginia.

3. On or about March 5, 1986, respondent offered for acceptance to an AMS grader sliced bacon which was identified as Lot 63 and which was prepared for the United States Department of Defense under contract number DLA 13H-86-C-E 422.

4. Lot 63 was rejected by the AMS grader for being off-conditioned and thus could not be reworked and reoffered for AMS acceptance service.

5. The USDA alleges that on or about March 5, 1986, the respondent reboxed portions of Lot 63 into boxes marked "Lot 64" with the contract number DLA 13H-86-C-E 422.

6. The USDA alleges that on or about March 11, 1986, the respondent removed a "USDA Product Control" device from a box identified as "Lot 64" without the express permission of an authorized representative of the U.S. Department of Agriculture.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision and Order in disposition of this proceeding, such Decision and Order will be issued.

ORDER

1. Federal meat grading and acceptance services provided under the Act and regulations issued thereunder are withdrawn from and denied to the respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate or other device, for a period of one (1) year beginning on December 1, 1986, and ending on November 30, 1987. Four (4) consecutive months of actual suspension will begin on December 1, 1986, and end on March 31, 1987. The remaining eight (8) months of the one (1) year withdrawal period will be held in abeyance and will not become effective:

a. For so long as, within one (1) year from the effective date of this Consent Decision and Order, respondent, or any of its officers, employees, or agents do(es) not violate any section of the Act (7

U.S.C. § 1621 *et seq.*) or the regulations issued thereunder (7 CFR Part 54); and

b. For so long as, within one (1) year from the effective date of this Consent Decision and Order, respondent:

1. Does not knowingly hire, in any capacity, any individual who has been convicted of any felony; and

2. To the extent permitted by Virginia law, dismisses from its employment any such individual, hired after the effective date of this Consent Decision and Order, when that individual's conviction becomes known.

2. The violation of any provision in paragraph 1 of this Order will result in the immediate withdrawal of federal meat grading and acceptance services under the Act. The Secretary of Agriculture shall have the right to summarily withdraw such services upon finding of a violation by appropriate national headquarters staff. Any summary withdrawal of grading and acceptance services shall be subject to respondent's right to request an expedited hearing on the alleged violation. Moreover, nothing in this Consent Decision shall preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

3. If any provision of this Order is declared to be invalid, such declaration shall not affect the validity of any other provision herein.

4. This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: JOE L. HENSON, D.M.V. AQ Docket No. 264. Decided November 4, 1986.

Civil Penalty—Consent.
The Judicial Officer affirmed the default order issued by Judge Weber assessing a civil penalty of $500 against respondent for moving 1 cow that was not individually identified on an owner's or shipper's statement or other document, as required by the regulations governing the interstate movement of cattle to prevent the spread of brucellosis. Respondent's answer fails to request a hearing and does not deny the allegations of the complaint. Accordingly, a default decision was properly issued.

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, 122), for a violation of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR § 78.18). An initial Decision and Order was issued on August 18, 1986, by Administrative Law Judge William J. Weber (ALJ) assessing a civil penalty of $500.

On June 16, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on October 22, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with trivial changes. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR § 78.18 *et seq.*),

[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR § 70.1 *et seq.* and 7 CFR § 1.130 *et seq.*

This proceeding was instituted by a complaint filed on May 8, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about May 24, 1985, the respondent caused the interstate movement of one cow from Chatom, Alabama, to Mize, Mississippi, in violation of sections 71.18(a)(1) and 71.18(a)(3) of the regulations (9 CFR §§ 71.18(a)(1) and 71.18(a)(3)) in that the cow was not individually identified on an owner's or shipper's statement or other document. In his answer, the respondent admitted the material allegations contained in the complaint, thereby waiving a hearing. (See 7 CFR § 1.139).

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Joe L. Henson, D.V.M., is an individual whose address is P.O. Box 326, Chatom, Alabama 36518.

2. On or about May 24, 1985, the respondent caused the interstate movement of one cow, twenty-four months of age or older, from Chatom, Alabama, to Mize, Mississippi, in violation of sections 71.18(a)(1) and 71.18(a)(3) of the regulations (9 CFR §§ 71.18(a)(1) and 71.18(a)(3)) in that the cow was not individually identified on an owner's or shipper's statement or other document, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 71.18(a)(1) and 71.18(a)(3) of the regulations (9 CFR §§ 71.18(a)(1) and 71.18(a)(3)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)–(c), .139, .141(a)):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objec-

tions are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra*, and advised respondent that complainant was seeking a $500 civil penalty. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, and that failure to deny or otherwise respond to any allegation shall constitute an admission of such allegation, as follows (Complaint at 2):

WHEREFORE, it is hereby ordered that for the purpose of determining whether or not the respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250–1400, in accordance with the applicable Rules of Practice (9 CFR § 70.1 and 7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to plead specifically to any allegation of the complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies

> of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent's answer fails to request a hearing and does not deny the allegations of the complaint. Specifically, respondent's answer states:

> The cow that you were referring to belonged to Charles Busby Rt 1, Tippie, Al. 36583. There was one truck load of heifers or about 80 head permitted from his farm to Mise, Mississippi on or about the 24th day of May, 1985. They were all Calfhood Vaccinated against bangs and properly identified as such to the best of my ability. The Mississippi State Veterinarian's Office in Jackson was called and these cattle were issued a permit number. At this time I asked if these cattle were to be individually identified and was instructed to only list the number of vaccinated heifers to be shipped. A certificate of Veterinary Inspection was then issued to Mr. Busby.
>
> I cannot explain how a 2 year old cow got into this load of heifers, but I can explain what I did to determine the age of these cattle prior to shipment.
>
> * * * * * * *
>
> There was a lot of time and effort spent trying to determine the correct age and proper procedure for shipping these heifers and if there was a mistake made in shipping one too old it was surely not done intentionally.
>
> I regret this happened and if I can be of any further assistance on this please let me know.

Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued. Although on rare occasions default decisions have been set aside for good cause shown or

where complainant did not object,[2] respondent has shown no basis for setting aside the default decision here.[3]

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[2] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3] *See In re Guffy*, 45 Agric. Dec. ___ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. ___ (Sept. 9, 1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. ___ (Sept. 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ___ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ___ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec. ___ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ___ (Sept. 23, 1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ___ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order; *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondent's contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not contest the allegations of the complaint in his answer.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [4] If respondent were permitted to contest some of the allegations of fact at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

The civil penalty assessed here is modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. ____, slip op. at 67 (Jan. 31, 1986):

> The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of $1 billion. It costs about $150 million a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. ____, slip op. at 4-5 (Oct. 31, 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

> 4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.[4] (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).
>
> [4] Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal

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[4] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).

For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32-33, 1059-63). For example, in 1980, the Federal Government spent $73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent, Joe L. Henson, D.V.M., is hereby assessed a civil penalty of $500, which shall be paid within 30 days after service of this order. This civil penalty shall be payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Jaru Ruley, U.S. Department of Agriculture, Officer of the General Counsel, Room 2422, South Building, Washington, D.C. 20250-1400.

In re: J. MELVIN FARRAR, JOE H. PEOPLES, and RONALD B. PITCHFORD. AQ Docket No. 259. Decided November 6, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision and was assessed a civil penalty of $100.

Robert L. Broussard, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR §§ 71.1 *et seq.*, 78.1 *et seq.*). The complainant and the respondent, Ronald B. Pitchford, have agreed that this proceeding should be terminated with respect to Ronald B. Pitchford by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Mr. Ronald B. Pitchford, respondent, is an individual whose address is P.O. Box 683, Hartford, Arkansas 72938.

2. On or about March 29, 1985, the respondent moved interstate approximately twenty-four (24) cattle from Greenwood, Arkansas to Rock Island, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred dollars ($100.00) in four (4) monthly installments of twenty-five dollars ($25.00) each which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be sent to USDA, APHIS, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403. The first installment is due within thirty (30) days from the effective date of this order and the remaining three installments are due within sixty (60), ninety (90) and one hundred and twenty (120) days of the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: EDWARD GEORGE DIAMOS and RANDY L. BAKER. AQ Docket No. 287. Decided November 17, 1986.

Dismissal.

Clement McGovern, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

MOTION TO DISMISS WITH RESPECT TO RANDY L. BAKER

For good cause shown, complainant's motion to dismiss the complaint against respondent Randy L. Baker, is granted.

In re: LEONARD MCDANIEL, JACK STEWART, and LOUISE STEWART, d/b/a L&W CATTLE COMPANY. AQ Docket No. 257. Decided December 8, 1986.

Civil Penalty

The Judicial Officer affirmed Judge Baker's order assessing civil penalties totaling $4,000 ($1,000 per violation) for violations of the Act and regulations governing the interstate movement of cattle to prevent the spread of brucellosis. Respondent's failure to file an answer constitutes an admission of the allegations in the complaint and a waiver of hearing. Accordingly, a default decision and order was properly issued. Although respondent's appeal was filed 2 days late, it is the practice of this Department to accept late appeals filed before the initial decision becomes final. Even if respondent had filed a timely answer, it would not have changed the result

in this case. Respondent's understanding that the case had been settled (when he incurred financial hardship by having to take his cattle to the sale barn for branding) is not supported by the record and would not signify a "settlement" to an adult person of reasonable understanding. Assessing a civil penalty because respondent failed to have the required certificate and assessing a separate civil penalty because respondent failed to have the required permit for entry, in the same transaction, does not violate the Double Jeopardy Clause. The Clause applies to criminal proceedings. It protects against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense. But a single transaction may contain distinct offenses without violating the Clause. Two offenses are not the same for double jeopardy purposes if one requires proof of a fact that the other does not. Respondent's unsupported claim that a $4,000 civil penalty will impose a financial hardship on him is not a circumstance that mitigates the sanction in view of the importance of the Brucellosis Eradication Program.

William Jensen, for complainant.
Carl LeForce, Idabel, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER WITH RESPECT TO LEONARD McDANIEL

This is an administrative proceeding for the assessment of civil penalties under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, and 122) for violations of the Act and the regulations promulgated thereunder (9 CFR § 78.1 *et seq.*), governing the interstate movement of cattle without required documents. An initial Default Decision and Order was filed September 12, 1986, by Administrative Law Judge Dorothea A. Baker (ALJ) assessing civil penalties totaling $4,000 ($1,000 per violation).

On October 24, 1986, respondent [1] appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[2] The case was referred to the Judicial Officer for decision on November 25, 1986.

Based upon a careful consideration of the record, the initial Default Decision and Order is adopted as the final Decision and Order in this case (with minor trivial changes), except that the effective

[1] By order of July 7, 1986, the ALJ dismissed the complaint as to respondents Jack Stewart and Louise Stewart, d/b/a L&W Cattle Co., without prejudice. The complainant had so moved on July 1, 1986, based upon newly discovered evidence.

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

date of the order is changed in view of respondent's appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that Leonard McDaniel violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and section 78.9 of the regulations promulgated thereunder (9 CFR § 78.9). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon Leonard McDaniel.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) Leonard McDaniel was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegations in the complaint would constitute an admission of such allegations pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Mr. McDaniel was also informed that the failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Leonard McDaniel filed no answer or any other document during the twenty-day period provided. His failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). His failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since Mr. McDaniel is deemed to have admitted the material allegations of the facts in the complaint as they applied to him, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Leonard McDaniel, respondent herein, is an individual whose address is Route 3, Box 496, Idabel, Oklahoma 74745.

2. On or about January 8, 1985, respondent Leonard McDaniel moved interstate from Nashville, Arkansas, to Antlers, Oklahoma, approximately seven (7) cattle, in violation of section 78.9(d) of the regulations (9 CFR § 78.9(d)), because the cattle were not accompanied by a certificate, as required.

3. On or about January 8, 1985, respondent Leonard McDaniel moved interstate from Nashville, Arkansas, to Antlers, Oklahoma, approximately seven (7) cattle, in violation of section 78.9(d) of the regulations (9 CFR § 78.9(d)), because the cattle were not accompanied by a "Permit for Entry," as required.

4. On or about April 1, 1985, respondent Leonard McDaniel moved interstate from Nashville, Arkansas, to Idabel, Oklahoma, approximately 10 cattle, in violation of section 78.9(d) (9 CFR § 78.9(d)) of the regulations, because the animals were not accompanied by a certificate, as required.

5. On or about April 1, 1985, respondent Leonard McDaniel moved interstate from Nashville, Arkansas, to Idabel, Oklahoma, approximately 10 cattle, in violation of section 78.9(d) (9 CFR § 78.9(d)) of the regulations, because the animals were not accompanied by a "Permit for Entry," as required.

CONCLUSION

The respondent has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence, respondent has admitted all of the material allegations of fact in the complaint as they applied to him and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following Order is therefore issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)–(c), .139, .141(a)):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and

shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with

> the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical to the findings of fact, *supra*, and advised respondent that an answer must be filed with the Hearing Clerk, and that failure to file an answer "shall constitute an admission of the allegation[s] in this complaint and a waiver of hearing" (Complaint at 3).

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer or plead specifically to any allegation of the complaint. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent failed to answer the complaint. Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did

not object,[3] respondent has shown no basis for setting aside the default decision here.[4]

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[3] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[4] *See In re Mayes*, 45 Agric. Dec. ___ (Nov. 24, 1986) (default order proper where answer not filed); *In re Pieszko*, 45 Agric. Dec. ___ (Nov. 12, 1986) (default order proper where answer not filed); *In re Henson*, 45 Agric. Dec. ___ (Nov. 4, 1986) (default order proper where answer admits or does not deny material allegations); *In re Guffy*, 45 Agric. Dec. ___ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. ___ (Sept. 9, 1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airline*, 45 Agric. Dec. ___ (Sept. 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ___ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ___ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec. ___ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ___ (Sept. 23, 1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984) (default order proper where timely answer was not filed; respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ___ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for someone named Buzun); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39

Continued

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [5] If respondent were permitted to contest some of the allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

In fact, Complainant's Response to Respondent's Appeal argues that the appeal was filed late, on October 24, 1986, and thus should not be considered. The appeal *was due* to be filed 2 days earlier, October 22, 1986, but, in accordance with the practice of this Department, it is accepted late since it was filed before 35 days after service of the initial decision, when it would have become final. *In re Machado*, 42 Agric. Dec. 1454, 1455 n.3 (1983) (decision as to respondent Cozzi), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished); *In re Shatkin*, 34 Agric. Dec. 296, 315 (1975); and *see In re Burton*, 40 Agric. Dec. 1534 (order vacating notice of effective date and permitting late appeal), *final decision*, 40 Agric. Dec. 1738 (1981) (decision as to LeRoy Franks), *rev'd on other grounds*, 638 F.2d 280 (8th Cir. 1982).

Respondent's appeal sets forth three contentions:

(A) That it was respondent's understanding that the case was settled because respondent was required to take his cattle to the sale barn for "B" branding, resulting in financial hardship;

Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondent's contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[5] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

(B) That the complaint, as reflected in the ALJ's findings numbered 2 and 3, and 4 and 5, respectively, asserts separate violations from facts and circumstances arising on the same days—January 8, 1985, for Findings 2 and 3; and April 1, 1985, for Findings 4 and 5—which constitutes "double jeopardy"; and

(C) That respondent is financially "hard pressed" to pay a $4,000 civil penalty.

As has been painstakingly detailed in the preceding pages, the Department's rules of practice deem it an admission of all material allegations if no answer is filed to the complaint. Therefore, these three contentions would have no effect on the decision below. However, even if these contentions are considered in their best possible circumstances, apart from the respondent's failure to file an answer, they would not change the outcome.

A. Respondent's Understanding that Case Had Been Settled Not Supported by the Record or Any Other Reasonable Interpretation of the Proceeding.

The record as a whole shows no basis for a misunderstanding as to the Department's intent in this case. There is no deception, or attempt to mislead respondent, by the Department anywhere in the record. To the contrary, this has been a straightforward proceeding against an experienced cattleman.

In complainant's reply, complainant's attorney correctly points out that respondent does not allege that there is factual error in the ALJ's Default Decision and Order. Moreover, complainant aruges that there is no connection of relevancy shown between the surrounding facts in the case and respondent's understanding of settlement. I agree with complainant's attorney.

Such a claim of misunderstanding possibly could have been raised in a timely-filed answer, but it is a near certainty that the ALJ would not have accorded it any weight, because the prosecution itself was and is the best notice of the Department's understanding of its position. Loss of cattle and financial hardship to the owner, and nothing more, would not signify a "settlement" to an adult person of reasonable understanding.

B. Separate Violations from the Same Set of Circumstances and Facts Arising on the Same Day Do Not Place Respondent in Double Jeopardy.

First of all, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution (the Clause) only applies essen-

tially to criminal proceedings.[6] This is an administrative proceeding to assess a civil penalty, is civil in nature, and not subject to the Clause. Nevertheless, even if the Clause were determined to apply here, it would not help respondent, because the facts here do not fit within the protection of the Clause, as construed by the Federal Courts.

The Clause protects against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense.[7] Respondent was found to have moved seven cattle interstate on January 8, 1985, both without the required *certificate* (Finding 2) and without the required *permit for entry* (Finding 3). Additionally, respondent was found to have moved approximately 10 cattle interstate on April 1, 1985, both without the required *certificate* (Finding 4) and without the required *permit for entry* (Finding 5). Respondent asserts incorrectly that Findings 2 and 3 are the same offense, and that Findings 4 and 5 are the same offense, respectively. This follows because a single transaction may contain distinct offenses without violating the Clause.[8] The Supreme Court has long held the view [9] that two offenses are not the same for double jeopardy purposes if one requires proof of a fact that the other does not. Findings 2 and 3, and 4 and 5, respectively, each require proof of an additional fact which the other does not. Thus, the Double Jeopardy Clause does not apply in these factual circumstances.

C. Respondent's Financial Situation Has No Bearing on the Civil Penalty Assessed.

The Secretary of Agriculture is authorized to assess a civil penalty of not more than $1,000 per violation of the regulations under the Act (21 U.S.C. § 122). Respondent's failure to answer the complaint deems all material allegations admitted by respondent, and

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[6] See, *United States* v. *Dinitz*, 424 U.S. 600, 606 (1976); *Breed* v. *Jones*, 421 U.S. 519, 528 (1975); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235–36 (1972).

[7] See, *Ohio* v. *Johnson*, 467 U.S. 493, 499–500 (1984); *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 306–07 (1984); *Illinois* v. *Vitale*, 447 U.S. 410, 415–16 (1980); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969).

[8] See, *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981); *United States* v. *Ramos*, 666 F.2d 469, 476 (11th Cir. 1982); *United States* v. *Barton*, 647 F.2d 224, 234 (2d Cir. 1981).

[9] *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932); *Flittie* v. *Solem*, 751 F.2d 967, 970 (8th Cir. 1985); *United States* v. *Colmenares-Hernandez*, 659 F.2d 39, 43 (5th Cir.), *cert. denied*, 454 U.S. 1127 (1981); *United States* v. *Garner*, 529 F.2d 962, 971 (6th Cir. 1975).

neither the record nor the respondent's appeal shows any reason whatsoever to question the decision below.

Moreover, it has consistently and routinely been held that an unsubstantiated, alleged inability to pay a civil penalty, which is otherwise statutorily proper for the Secretary to assess, is not relevant. *In re Crowder*, 40 Agric. Dec. 704, 704 (1981) (order denying petition to modify order); *In re Wall*, 38 Agric. Dec. 1437, 1450–51 (1979), *aff'd in part and rev'd in part*, No. 79–3714 (6th cir. July 10, 1981) (unpublished order), *printed in* 40 Agric. Dec. 927 (1981); *In re Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974).

The civil penalty assessed here is modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. ____, slip op. at 67 (Jan. 31, 1986):

> The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of $1 billion. It costs about $150 million a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. ____, slip op. at 4–5 (Oct. 31, 1984); *aff'd*, No. 3–84–2200–R (N.D. Tex. June 5, 1986), as follows:

> 4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.[4] (Tr. 32, 95–96, 1056–59, 1160–64, 1177–80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).
>
> [4] Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of mik, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).
>
> For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32–33, 1059–63). For example, in 1980, the Federal Government spent $73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239–41). Because of the large economic impact of the cattle industry on the nation, the success

of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent Leonard McDaniel is assessed a civil penalty of $4,000 ($1,000 per violation), which shall be payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Thomas E. Bundy, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within 90 days after service of this order.

In re: JAMES BLACKWELL, CORNHUSKER PACKING COMPANY, DUBLIN AUCTION SALES, INC., GEORGETOWN COMMISSION COMPANY, HAMILTON LIVESTOCK COMMISSION, INC., and WALDRUP LIVESTOCK AUCTION, INC. AQ Docket No. 280. Decided December 8, 1986.

Civil Penalty—Consent
Respondent consented to the issuance of this decision and was assessed a civil penalty of $250.

Andrea R. Bateman, for complainant.
Daniel W. Olsen, Kansas City, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Hamilton Livestock Commission, Inc., *et al.* violated the Act and regulations promulgated thereunder (9 CFR § 71.1, *et seq.*). Respondent Hamilton Livestock Commission and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision, only respondent Hamilton Livestock Commission Company admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the Complaint, admits to the Findings of Fact set forth below and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Hamilton Livestock Commission Company also waives any action against the United States Department of Agriculture under Equal Access to Justice Act of 1980 (5 U.S.C. 504, *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

3. Complainant agrees that this Consent Decision and Order fully and finally precludes complainant from proceeding in any manner against respondent in connection with alleged violations of 9 CFR § 71.18 with respect to all transactions occurring prior to the date this Consent Decision and Order become effective.

FINDINGS OF FACT

1. Hamilton Livestock Commission, Inc., respondent, is a corporation whose business address is Hamilton, Texas 76531.

2. On or about July 6, 1985 the respondent moved interstate from Hamilton, Texas to Omaha, Nebraska approximately fourteen (14) cattle.

CONCLUSIONS

Respondent, Hamilton Livestock Commission Company, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding such Order and Decision will be issued.

ORDER

Respondent Hamilton Livestock Commission Company is assessed a civil penalty of Two Hundred Fifty Dollars ($250.00) which shall be payable to the "Treasurer of the United States," by certified check or money order and which shall be forwarded to Andrea R. Bateman, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C.

20250–1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day of the service upon the respondent.

In re: WILLIAM J. HANKINS, D.V.M. VA Docket No. 39. Decided December 8, 1986.

Issuing certificates without accurately completing—Veterinary accreditation revoked.

Respondent signed certificates or reports without ascertaining that they were accurately completed; respondent failed to carry out the duties and responsibilities in accordance with regulations and instructions issued to him by the Veterinarian in Charge or the State Animal Health Official, because in connection with signing and issuing health certificates, respondent failed to record the brucellosis tests of the cattle listed thereon. Such violations can cause the spread of disease. Respondent's veterinary accreditation is revoked.

Thomas Bundy, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This proceeding was instituted under the Regulations for Accredited Veterinarians (9 CFR 160.1 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated the Standards for Accredited Veterinarians (9 CFR 161.2).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on May 13, 1986.

Pursuant to section 1.136 of the Rules of Practice applicable to this proceeding (7 CFR § 1.136), respondent was informed in the complaint and the letter of service that his answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 nd 1.139 of

the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Dr. William J. Hankins, herein referred to as the respondent, is an individual whose address is Box 506, Middleburg, Indiana 46450.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Indiana under the provisions of the regulations of Title 9, Code of Federal Regulations, Parts 160–162.

3. Respondent signed certificates or reports without ascertaining that they were accurately completed because (1) on or about July 16, 1984, respondent signed Brucellosis Calfhood Vaccination Record Nos. 05173 thru 05175, certifying that the cattle listed thereon of Cleo Lambright of Shipshewana, Indiana, were 5 and 6 months of age; (2) on or about August 16, 1984, respondent signed Brucellosis Calfhood Vaccination Record No. 426599 certifying that the cattle listed thereon of Cleo Lambright of Shipshewana, Indiana, were 4 to 10 months of age; and (3)on or about September 5, 1984, respondent issued Indiana Health Certificate Nos.32–778795 thru 32–778799 for the interstate movement of cattle from Cleo Lambright, Shipshewana, Indiana, to Mike Thor, Lockwood, Missouri, indicating that the cattle listed thereon were 16 to 17 months of age when, in truth and in fact, many of such cattle were the same cattle for which respondent signed and issued the aforementioned Brucellosis Calfhood Vaccination Records.

4. Respondent, on or about September 5, 1984, did not carry out all of his responsibilities under the applicable Federal programs and cooperative programs in accordance with regulations and instructions issued to him by the Veterinarian in Charge or the State Animal Health Official, or both, because respondent, in connection with his signing and issuance of Indiana Health Certificates Nos. 32–778795 thru 32–778799 failed to record the brucellosis vaccination status or the date and results for the brucellosis tests of the cattle listed thereon, as required.

CONCLUSION

By reason of the facts in the findings of fact set forth above, respondent has violated the Standards for Accredited Veterinarians. Violations such as respondent's go to the heart of the accredited

veterinarian program and undermine credibility in the program. Such violations can also cause the spread of animal disease. Therefore, the following order is issued.

ORDER

Respondent's veterinary accreditation is hereby revoked. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final December 8, 1986.—Ed.]

In re: HERBERT H. STERNER. AQ Docket No. 261. Decided December 11, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision in which they were assessed a civil penalty of $450.

Kevin B. Thiemann, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Herbert H. Sterner, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Herbert H. Sterner, respondent, is an individual whose address is 111 Kindig Road, Littlestown, Pennsylvania 17340.

2. On or about March 9, 1985, the respondent moved one (1) equine infectious anemia reactor horse from Littlestown, Pennylvania to Emmitsburg, Maryland.

3. On or about March 9, 1985, the respondent moved one (1) equine infectious anemia reactor horse from Emmitsburg, Maryland to Bealton, Virginia.

4. On or about March 9, 1985, the respondent moved one (1) equine infectious anemia reactor horse from Bealton, Virginia to Littlestown, Pennsylvania.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred fifty dollars ($450.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Ave., S.W., Washington, D.C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: JAMES WALLIS. AQ Docket No. 237. Decided December 23, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of $500 and ordered to cease and desist from violating the Act and the regulations and standards thereunder.

Clement McGovern, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*).

The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. James Wallis, herein referred to as the respondent, is an individual whose address is P.O. Box 1444, Oak Grove, Louisiana 71263.

2. On or about March of 1985, the respondent moved interstate an equine infectious anemia reactor horse from Oak Grove, Louisiana, to Wilmont, Arkansas.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decison will be issued.

ORDER

Respondent is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable in monthly installments of fifty dollars ($50.00). Payments will be made payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403. The first payment shall be due within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: K KENNELS INTERNATIONAL and THOMAS KRUEGER. AWA Docket No. 378. Decided November 10, 1986.

Civil Penalty—Consent
Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of $1500 and ordered to cease and desist violating the Act and regulations and standards thereunder.

M. Bradley Flynn, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(a) K-Kennels International is a business with its principal place of business located at U.S. Route 50, Chantilly, Virginia 22021. Its mailing address is Post Office Box 213, Chantilly, Virginia 22021.

(b) Respondent K-Kennels International was a registered intermediate handler under the Act at all times material herein.

(c) Respondent Thomas Krueger is an individual with his principal place of business located at U.S. Route 50, Chantilly, Virginia 22021. His mailing address is Post Office Box 213, Chantilly, Virginia 22021.

(d) Respondent Thomas Krueger, at all times material herein, was the president and owner of K-Kennels International, and managed, directed, and controlled the activities of K-Kennels International.

(e) Respondent Thomas Krueger is and at all times material herein was an intermediate handler under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Respondents K-Kennels International, its officers, directors, agents, and employees, and Thomas Krueger, his agents and employees, directly or indirectly through any corporation, trust, or any device whatsoever, shall cease and desist from violating the Animal Welfare Act and the regulations and standards issued thereunder. In particular, respondents shall not:

a. Transport dogs in primary enclosures which are not large enough to insure that each animal has sufficient space to stand and sit erect and to lie in a natural position;

b. Transport dogs in primary enclosures which contain an insufficient quantity of absorbent litter;

c. Otherwise violate section 3.12 of the standards (9 CFR § 3.12);

d. Transport dogs in a truck whose cargo space lacks sufficient air conditioning to protect the health and ensure the comfort and safety of the dogs therein;

e. Maintain the cargo space of a truck used to transport dogs in a manner to allow the ingress of exhaust fumes and gasses;

f. Transport dogs in a truck whose cargo space and the positioning of the primary enclosures therein denies the dogs sufficient air for normal breathing;

g. Otherwise violate section 3.13 of the standards (9 CFR § 3.13);

h. Fail to provide dogs with water during transport;

i. Otherwise violate section 3.14 of the standards (9 CFR § 3.14);

j. Fail, while transporting dogs, to assure that the dogs receive adequate air ventilation, to maintain ambient air temperatures within prescribed limits to determine whether any of the dogs are in obvious physical distress, and to provide needed veterinary care;

k. Transport in commerce dogs in obvious physical distress; and

l. Otherwise violate section 3.15 of the standards (9 CFR § 3.15).

2. Respondents are hereby assessed jointly and severally a civil penalty of $1,500 to be paid by certified checks and/or money orders made to the order of the Treasurer of the United States. Payment is due on the following schedule:

a. The sum of $500 is due on or before October 31, 1986;

b. An additional sum of $500 is due on or before November 30, 1986; and

c. A further payment of $500 is due on or before December 31, 1986.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: VADEN WISE. AWA Docket No. 413. Decided November 10, 1986.

Civil Penalty—Consent

Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of $1000 and ordered to cease and desist from violating this Act and the regulations and standards thereunder.

M. Bradley Flynn, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(a) Mr. Vaden Wise, hereinafter referred to as respondent, is an individual doing business as "The Farm."

(b) The respondent, at all times material herein, was located at Route 2, Box 65, Gonzales, Louisiana 70737.

(c) The respondent, at all times material herein, was a licensed dealer (License No. LA-B-13) under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Respondent, his agents, employees, and assigns acting directly or indirectly through any corporation, trust, or device whatsoever, shall cease and desist from violating any and all provisions of the Animal Welfare Act and the regulations and standards issued thereunder. In particular, respondent shall cease and desist from:

(a) Failing to make, keep, and maintain a system of records which fully and correctly discloses the name and address of the person from whom each dog or cat under respondent's control was acquired or purchased; and

(b) Otherwise failing to comply with section 2.75 of the regulations (9 CFR § 2.75).

2. Respondent is hereby assessed a civil penalty of $1,000 payable by certified check or money order payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: WILLIAM FRYE d/b/a B & H RABBITRY. AWA Docket No. 409. Decided December 11, 1986.

Civil Penalty—Consent

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of $2000. Respondent's license was suspended for a period of six (6) months.

Robert M. Frisby, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Adminstrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United

States Department of Agriculture, alleging that respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1–3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. William Frye, hereinafter referred to as the respondent, is an individual doing business as B & H Rabbitry and his mailing address is Post Office Box 3035, Gaithersburg, Maryland 20878.

B. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (No. 51–AR) issued under the Act.

CONCLUSION

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent William Frye shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131–2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1–3.142, and shall cease and desist from any violation thereof. In particular, respondent, his agents and employees, directly or through any corporate device, shall cease and desist from failing to:

1) Keep his facilities in structurally sound condition and protect rabbits from predators as required by 9 CFR § 3.50(a);

2) Store properly rabbit feed as required by 9 CFR § 3.50(c);

3) Remove animal waste as required by 9 CFR § 3.50(d);

4) Provide adequate shelter from wind and cold for rabbits as required by 9 CFR § 3.52(c);

5) Repair or replace rusty rabbit cages, racks, and metal clips as required by 9 CFR § 3.53(a);

6) Provide adequate food and water for rabbits as required by 9 CFR §§ 3.54(a) and 3.55;

7) Remove debris and excreta from the premises and from containers under rabbit cages with mesh floors as required by 9 CFR §§ 3.56(a) and (c);

8) Hire a sufficient number of employees as required by 9 CFR § 3.57; and

9) Establish and maintain a program of veterinary care supervised by a doctor of veterinary medicine and provide veterinary care for sick rabbits as required by 9 CFR § 3.59.

Respondent is hereby assessed a civil penalty of $2,000, suspended provided the respondent complies with the Act and the regulations and standards issued thereunder. If, after notice and hearing, the respondent is found to have violated the Act or the regulations and standards issued thereunder, this $2,000 shall become due and payable by certified check or money order made payable to the Treasurer of the United States.

Respondent's license is suspended for six (6) months and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: STANLEY and LINDA WAGNER d/b/a WAGNER'S REGISTERED DOGS. AWA Docket No. 400. Decided October 31, 1986.

Licensed dealers—Protection of food supplies—Interior surfaces impervious to moisture—Cleaning of enclosures—Insect control—Civil penalty—Suspension of license.

John D. Griffith, for complainant.
Marvin W. Quinlan, Jr., Bozeman, Montana, for respondents.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Animal Welfare Act, as amended, 7 U.S.C §§ 2131-2156, herein referred to as the Act, in-

stituted by a complaint filed April 24, 1986, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that the respondents willfully violated the Act and regulations and standards promulgated thereunder, 9 CFR §§ 1.13–3.142. The case was assigned to this Administrative Law Judge on October 28, 1986.

Copies of the complaint and Rules of practice, 7 CFR §§ 1.130–1.151, governing proceedings under the Act were served May 8, 1986, upon respondents by the Hearing Clerk by certified mail. Respondents were informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

On May 23, 1986, an Order Granting Extension of Time to Respond to Complaint was filed in the case granting the respondents 20 days after service of the Order to respond. The respondents were served the Order by certified mail on June 10, 1986.

Respondents have failed to file an answer within the time prescribed in the Order Granting Extension of Time to Respond to Complaint and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 CFR § 1.139.

FINDINGS OF FACT

1. Stanley and Linda Wagner are partners whose address is P. O. Box 420, Baker, Montana.

2. The respondents, at all times material herein, were operating a dog kennel and were dealers within the meaning of the Act. The respondents, at all times material herein, were licensed as required by the Act.

3. APHIS inspected the respondents' facility on September 17, 1985, and found the following willful violations of section 2.100 of the regulations, 9 CFR § 2.100, and the standards specified below:

(a) Supplies of food were stored in facilities which did not provide adequate protection from infestation and contamination by vermin in violation of 9 CFR § 3.1;

(b) Interior surfaces needed resurfacing and repainting and were not substantially impervious to moisture in violation of 9 CFR § 3.2;

(c) Primary enclosures were not being sanitized often enough, allowing debris and other hazardous material to accumulate in violation of 9 CFR § 3.7;

(d) The premises were not being properly cleaned in violation of 9 CFR § 3.7; and

(e) No effective program for the control of insects had been established and maintained in violation of 9 CFR § 3.7.

CONCLUSIONS

By reason of the facts set forth in the Findings of Fact above, the respondents have willfully violated section 2.100 of the regulations, 9 CFR § 2.100, and the specified standards.

ORDER

Respondents Stanley and Linda Wagner, their agents and employees, directly or through any corporate or other device, shall cease and desist from failing to:

1. Provide adequate protection for supplies of food from infestation and contamination by vermin as required by 9 CFR § 3.1;

2. Maintain interior surfaces so that they are substantially impervious to moisture as required by 9 CFR § 3.2;

3. Clean and sanitize primary enclosures often enough to prevent debris and other dangerous materials from accumulating as required by 9 CFR § 3.7; and

4. Establish and maintain an effective program for the control of insects as required by 9 CFR § 3.7.

The respondents Stanley and Linda Wagner are assessed a civil penalty of $200.00 which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

Respondents' license is suspended for thirty (30) days and thereafter until respondents demonstrate to the Animal and Plant Health Inspection Service (APHIS) that they are in compliance with the Act and the regulations and standards thereunder. When respondents demonstrate that they are in compliance with the Act and the regulations and standards, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension after the expiration of the thirty-day period.

Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 CFR §§ 1.130–1.151, unless appealed within 30 days after service.

Copies hereof shall be served upon the parties.

[This default decision and order became final December 26, 1986.—Ed.]

In re: JIMMY MARTIN. HPA Docket No. 189. Decided November 5, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of $700 and were disqualified from showing or exhibiting or permitting as owner the showing or exhibiting of any horse for a period of six (6) months.

Robert M. Frisby, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Horse Protection Act ("Act"), as amended, 15 U.S.C. §§ 1821–1831, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

Jimmy Martin admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Jimmy Martin, hereinafter referred to as the respondent, is an individual whose mailing address is P. O. Box 54, Cornersville, Tennessee 37047.

B. At all times material herein, the respondent was the owner and trainer of "Evil Streaker" and entered for the purpose of offering for sale that horse as Exhibit No. 45 on January 11, 1986, at the 14th Annual Colts of the Future Sale at Murfreesboro, Tennessee.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jimmy Martin is assessed a civil penalty of $700 payable by certified check or money order made to the order of the Treasurer of the United States.

Respondent Jimmy Martin is disqualified from showing or exhibiting or permitting as owner the showing or exhibiting of any horse for six (6) months.

The provisions of this order shall be effective from November 1, 1986, to April 30, 1987.

Copies of this decision shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: JEFF V. PALMER. P&S Docket No. 6640. Decided June 23, 1986.

Dealer—Insufficient funds checks—Failure to pay when due—Suspension of registration.

Andrew Y. Stanton, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Jeff B. Palmer, doing business as Palmer Cattle Company, hereinafter referred to as respondent, is an individual whose mailing address is P. O. Box 10041, Fresno, California 93745.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and the accounts of others; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

2. The respondent, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock, and in purported payment for such livestock, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account to pay such checks when presented.

3. (a) The respondent, on or about the dates and in the transactions set forth in paragraph II of the complaint, and in the transaction set forth in paragraph III(a) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of October 31, 1985, there remained unpaid a total of $103,962.37 for such livestock purchases.

CONCLUSIONS

By reason of the facts found in Findings of Fact 2 and 3 herein, respondent wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Jeff V. Palmer, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, the full purchase price for livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of ten years, provided, however, that a supplemental order will be issued terminating this suspension at any time after the expiration of 120 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided further that this suspension may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the 120 day period of suspension.

This decision and order shall become final and without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Default decision and order became final November 3, 1986.—Ed.]

In re: VALLEY MEATS, INC. P&S Docket No. 6753. Decided November 3, 1986.

Packer—Insufficient Funds—Consent.
Respondents consented to the issuance of this decision and order in which they were ordered to cease and desist from purchasing livestock while its current liabilities exceeded its current assets.

Sharlene Lassiter, for complainant.
Michael Offner, Red Cloud, Nebraska, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Valley Meats, Inc., also doing business as Meats & More, hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Nebraska. Its business mailing address is P. O. Box 249, Red Cloud, Nebraska 68970.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter, and manufacturing and preparing meats and meat food products for sale and shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, its officers, directors, agents and employees, successors and assigns, directly or indirectly through any corporate or other device shall cease and desist from purchasing livestock while its current liabilities exceed its current assets unless respondent pays for such livestock purchases in U.S. currency, cashier's check or wire transfer.

The provisions of this order shall become effective on the first day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: BRUCE CARTWRIGHT. P&S Docket No. 6742. Decided November 6, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of $500 and ordered to cease and desist from engaging in business without filing and maintaining adequate bond as required by the Act and regulations thereunder.

Edward M. Silverstein, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary

has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Bruce Cartwright, hereinafter referred to as the respondent, is an individual whose business mailing address is 2205 Beckett Street, Bossier City, Louisiana 71111.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Bruce Cartwright, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: RONNYE RICHARDS. P&S Docket No. 6750. Decided November 6, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision in which they were assessed a civil penalty of $500 and ordered to cease and desist from engaging in business without filing and maintaining adequate bond as required by the Act and regulations thereunder.

Thomas C. Heinz, for complainant.
Jim Camp, Sparta, Tennessee, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ronnye Richards, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 606, Sparta, Tennessee 38583.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Ronnye Richards, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: TOWN AND COUNTRY MEATS, INC., LARRY MEYER and BARBARA MEYER. P&S Docket No. 6741. Decided November 7, 1986.

Packer—Issuing checks without sufficient funds—Failure to pay when due.
Respondents consented to the issuance of this decision in which they were ordered to cease and desist from issuing checks for payment without maintaining sufficient funds and failing to pay for purchases when due.

Peter Train, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and con-

sent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Town and Country Meats, Inc., hereinafter referred to as the corporate respondent, is a corporation whose mailing address is 220 N.W. 2nd Street, Pipestone, Minnesota 56164.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Larry Meyer and Barbara Meyer, hereinafter referred to as the individual respondents, are individuals whose business address is 220 N.W. 2nd Street, Pipestone, Minnesota 56164.

4. The individual respondents at all times material herein were:

(a) Owners of the corporate respondent;

(b) Jointly responsible for the management, direction and control of the corporate respondent; and

(c) Packers within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Town and Country Meats, Inc., its successors, officers, directors, agents and employees, and the individual respondents Larry Meyer and Barbara Meyer, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented for payment;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock.

This order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondents.

Copies of this decision shall be served upon the parties.

In re: JOHN CLAY & COMPANY OF OGDEN, UTAH, RAYMOND C. WILLIAMS, and LEWIS E. HARPER. P&S Docket No. 6216. Decided October 1, 1986.

Dealer—Insufficient funds drafts—Issuing drafts in payment for livestock—Failing to pay when due—Suspended as a registrant.
Respondents John Clay & Company of Ogden, Utah and Raymond C. Williams issued unauthorized drafts in payment for livestock, failed to honor such drafts when presented for payment, and failed to pay, when due, for livestock purchased. Respondents were suspended as registrants under the Act.

Eric Paul, for complainant.
Michael V. Mulchay, Phoenix, Arizona, for respondents.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

The proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed on November 16, 1983, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent, John Clay & Company of Ogden, Utah, failed to meet the financial requirements of the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*, "the Act") and that the corporate respondent and the individual respondents who are its principal officers, each willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). The complaint was served on each of the respondents, and service on the corporate respondent was accepted on its behalf by respondent Lewis E. Harper, its President, and by respondent Raymond C. Williams, its Vice President and Treasurer. An answer was filed by respondent Williams on January 3, 1984, and separate answer was filed by respondent Harper on December 30, 1983. Neither of these individual respondents filed an answer on behalf of respondent Clay, which had ceased operations after seeking relief under the provisions of the United States Bankruptcy Code in May 1983. These proceedings were then deferred at complainant's request, to allow claims being litigated in other forums to be settled. On February 5, 1986, a consent decision was entered against respondent Harper which suspended him as a registrant under the Act for one year, which became effective, *nunc pro tunc,* on January 1, 1985.

An oral hearing was held before me on June 3 and 4, 1986, in Phoenix, Arizona. Respondent Williams was represented by attorneys Joseph K. Brinig and Michael V. Mulchay. Complainant was represented by Eric Paul, Office of the General Counsel, United States Department of Agriculture. No appearance was entered on behalf of respondent Clay and the allegations of the complaint stand admitted by this respondent by reason of its failure to answer and appear [TR 10; 13].

Respondent Williams admitted, in whole and in part, by his answer, certain of the jurisdictional and substantive allegations, including the insolvency of respondent Clay and the failure of respondent Clay to meet the financial requirements of the Act (7 U.S.C. § 204) by reason of such insolvency. Briefing was completed on September 15, 1986.

An order is being entered against respondents requiring respondent Clay to cease and desist from various practices pertaining to its failure to pay, in full, livestock sellers; suspending respondent Clay as a registrant under the Act for one year and thereafter until it demonstrates it is no longer insolvent; and suspending respondent Williams as a registrant under the Act for sixty (60) days.

FINDINGS OF FACT

1. John Clay & Company of Ogden, Utah, ("John Clay") is a corporation whose principal place of business was located in Ogden, Utah. John Clay's mailing address was P. O. Box 507, 3636 Rear Washington Boulevard, Ogden, Utah 84402.

2. John Clay, at all times material herein, was:

(A) Engaged in the business of buying and selling livestock in commerce on its own account and buying livestock in commerce on a commission basis; and

(B) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. On May 11, 1983, John Clay filed on Chapter 11 petition in bankruptcy in the United States Bankruptcy Court for the District of Utah, Central Division. On or about May 27, 1983, John Clay converted its Chapter 11 case to a Chapter 7 case in bankruptcy.

4. As a result of John Clay's liquidation in bankruptcy, John Clay's current liabilities presently exceed its current assets and, as of December 31, 1982, current liabilities exceeded current assets in the amount of $49,959.38.

5. By reason of the above facts, the financial condition of John Clay does not meet the requirements of the Act.

6. For approximately 20 years, John Clay purchased and sold livestock, primarily sheep, in commerce. John Clay would buy live-

stock from producers and resell it either to feeders or packers, assuming in the interim the risks of loss if damage to the animals occurred. Often these transactions were handled on an order buying basis, and therefore involved little speculation on John Clay's part. These transactions always involved a mark-up, usually 50 cents per hundredweight.

7. Raymond C. Williams ("Williams") is an individual whose mailing address is 7840 N. Seventh Street, Phoenix, Arizona 85020.

8. Respondent Williams is, and at all times material herein was:

(A) Vice President, Treasurer and owner of 29% of the stock of John Clay;

(B) A dealer within the meaning of and subject to the Act; and

(C) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

9. John Clay officials were responsible for certain specific segments of the corporation's business. Williams and Lewis E. Harper ("Harper") were "field men." Basically, Williams and Harper were out in the country negotiating to buy and sell livestock. Mr. Frank Rynders ("Rynders") was in charge of the office. Rynders coordinated the daily financial business of the corporation, including accounting and various banking transactions.

John Clay had the following officers and shareholders:

Lewis E. Harper—President and a 29% shareholder.

Raymond C. Williams—Vice President/Treasurer and a 29% shareholder.

Roy Shurtz—Vice President/Secretary and a 29% shareholder.

Frank Rynders—A 13% shareholder.

10. Williams and Harper had worked together in one form or another for approximately 25 years. Williams found Harper to be a highly competent livestock dealer who, in 25 years, never gave Williams any reason to distrust him. Williams and Rynders had a business relationship for approximately 20 years. Williams' relationship with Rynders was extremely good. Williams found Rynders' services to be very good; he believed Rynders to be the best in the business and never had reason to doubt business information given him by Rynders.

11. John Clay had dealt with The Commercial Security Bank ("bank") for nearly 20 years. John Clay personnel had individually dealt with the bank (i.e., personal loans, home loans, automobile loans) for nearly 20 years. John Clay was the bank's second largest account. From 1960 through 1983, John Clay sent $600–800 million

through the bank. Also, John Clay officials had a close personal relationship with various bank officials.

12. Williams' normal business practice was to contact Rynders every day respecting upcoming purchases and/or sales and the company's financial status regarding these transactions. During the period of time covered by the complainant, Williams continued this practice. Williams was repeatedly assured by Rynders that, based on discussions with the bank officials, the drafts being issued were sufficiently covered.

13. John Clay lost a lawsuit and was adjudged liable for about $300,000 in damages. When it appealed the decision, John Clay entered into a supersedeas bond with Aetna Insurance Company that was secured by the company's funds, and also a personal indemnification executed by various John Clay personnel (including Williams). In April 1983, John Clay lost its appeal.

14. Between May 7, 1983 and May 19, 1983, Williams personally handled the buying of sheep from producers in Arizona for resale to packers and dealers located in Colorado. He accepted delivery from 6 Arizona sheep growers of animals having a combined purchase amount of $581,876.25 and in payment drew drafts on John Clay that were returned "refused" by Commercial Security Bank. In each instance, Williams had agreed to a specific purchase price per pound, with the live weight to be determined on delivery and weighing only after he had obtained a resale commitment. These transactions are set forth in the following table:

Sale Date 1983	Name of Seller	No. of Sheep	Amt. of Purchase
5/7	Wilaha Sheep Co.	42	$2,198.67
5/9-10	Wilaha Sheep Co.	2,150	151,473.06
5/11	Wilaha Sheep Co.	76	
		2,268	$162,997.53
5/11	Auza Bros., Inc.	836	$62,582.80
5/16	Auza Bros., Inc.	1,366	93,631.16
5/19	Auza Bros., Inc.	83	5,978.78
		2,285	$162,192.74
5/11	Manterola Sheep Co., Inc.	578	$39,228.64
5/13	Manterola Sheep	1,196	85,037.96
			-246.96
			$124,019.64
5/12	Long Tom Sheep	548	$15,850.00
5/16	Antonio Echandi	390	25,707.68

Sale Date 1983	Name of Seller	No. of Sheep	Amt. of Purchase
		125	1,949.25
		515	$27,656.93
5/16	Jean Arriaga	903	$62,643.56
5/19	Jean Arriaga	561	24,334.30
			2,181.55
		1,464	$89,159.41

15. Williams arranged for trucks to pick up the sheep set forth in the table above and to take them to scales for weighing. The procedure followed involved the prior weighing of the empty trucks; the sorting and loading of animals at the sellers' ranches; and the weighing of the loaded trucks. Upon such weighing, the sheep producers had completed their delivery and the risk of loss passed to John Clay until accepted by John Clay's customer who had agreed to buy the sheep F.O.B. Colorado. Except in one instance involving the purchase of Manterola sheep on May 11, 1983, where Williams was not present at the time the lambs were loaded and weighed, he drew a draft on the spot in the purchase amount that was computed upon completion of the weighing and handed it to the seller.

16. The drafts drawn on the bank account of John Clay were credit instruments in that they contained the following language:

> Payable Through
> Commercial Security Bank
> Ogden, Utah

They were coded with bank code numbers that enabled them to be processed through banking channels in the same manner as checks, but such instruments do not constitute payment until the date they are honored upon presentation to the drawee's bank. The sheep producers set forth in the table contained in Finding 14 above, had not been asked to sign any agreements authorizing the use of drafts. However, it is the usual course of business in Arizona to use drafts for purchases of sheep.

17. John Clay filed a petition seeking relief pursuant to Chapter 11 of the United States Bankruptcy Code on May 11, 1983. This filing occurred at 12:56 p.m. Mountain Standard Time (Arizona Time), while Williams was accepting delivery of sheep from Arizona producers. Williams had no knowledge of the actual filing until

later that day, although he was aware an attorney had been hired for advice.

18. Williams thereafter was aware of the Chapter 11 bankruptcy filing on behalf of John Clay. Williams' understanding of the Chapter 11 Bankruptcy filing was that it was a vehicle which allowed the company to continue its operations and thus meet its obligations. Williams relied on assurances from Rynder that, even after the Chapter 11 filing, his purchases and the drawing of drafts posed no problem.

19. Ultimately, the producers, as a result of the bankruptcy proceedings, recovered all but approximately ten percent of the money due them.

20. The return of drafts drawn on John Clay by the Commercial Security Bank on or about May 20, 1983, was the direct cause of the conversion of the Chapter 11 proceeding to the Chapter 7 proceeding on May 27, 1983.

21. Williams had no actual advance knowledge that Commercial Security Bank, in spite of the Chapter 11 filing with its attendant automatic stay, would refuse to honor the drafts he issued to producers.

22. Respondent Williams is currently employed on a salaried basis by Jack Taylor, a former employee of respondent Clay who handled the firm's California purchases. Except for a lack of ownership by respondent Williams, the Jack Taylor operation is an admitted successor to the sheep business of respondent Clay. Respondent Williams testified that it did an annual volume of $12 million to $13 million in purchases, that 60% to 70% of this volume was in Arizona just as had been the case with respondent Clay and that, for the most part, Jack Taylor serves the same customers as respondent Clay.

RULINGS ON PROPOSED FINDINGS AND CONCLUSIONS

All proposed findings and conclusions by either party not incorporated and adopted as part of the findings and conclusions, have been rejected as contrary to the relevant, material and substantial evidence of record.

CONCLUSIONS

1. Respondent John Clay violated the Act, and its financial condition requires the indefinite suspension of its registration until such time, after the expiration of a one year period of time, when it can demonstrate it is no longer insolvent.

2. Under controlling policies of the Department of Agriculture, sanctions may be imposed against respondent Williams, Vice Presi-

dent and 29% shareholder of John Clay, for John Clay's violations of the Packers and Stockyards Act.

3. The Arizona sheep transactions handled by respondent Williams for John Clay, were dealer transactions in which John Clay assumed all risk of loss until the sheep were accepted by the ultimate purchaser.

4. The issuance of unauthorized drafts to pay for livestock instead of sufficient fund checks, and the failure to pay for livestock in full, constitutes wilful violations of the Act by John Clay, that were participated in by respondent Williams for which, in accordance with the Department's sanction policy, his personal registration as a dealer should be suspended for sixty (60) days.

DISCUSSION

Complainant has requested the issuance of a cease and desist order, and the suspension of John Clay as a registrant under the Act for a minimum of one year and thereafter until it demonstrates it is no longer insolvent. This Order is fully warranted, is not a matter of controversy and is being entered.

The real controversy concerns what sanctions, if any, should be imposed on respondent Raymond C. Williams. Mr. Williams has impressed me as being a completely credible and truthful witness. His attorneys' brief has likewise impressed me as being comprehensive and most persuasive.

I agree with Mr. Williams' counsel that a one year suspension of Williams' dealer registration, as requested by complainant, would be most inappropriate and contrary to the ends of justice. Complainant's arguments that a sanction of this length is needed because the transactions were those of a market agency having special fiduciary duties to sellers, is contrary to the facts. Williams issued John Clay's drafts on the spot and John Clay thereupon assumed all responsibility for loss or rejection of the sheep until their actual acceptance by ultimate purchasers. Those facts show the transactions to be dealer transactions. *See Daugherty* v. *White*, 335 F.2d 94, 95-96 (10th Cir. 1964); and *Hines*, 35 Agric. Dec. 113, 121 (1976).

On the other hand, under well-established policies of the Department set forth in the various cases advanced by complainant and discussed by respondent, sanctions do lie against a corporate officer's personal registration when the corporation has violated the Act. *See MCM Livestock Inc.*, 39 Agric. Dec. 893, 901 (1980); and *Farmers & Ranchers Livestock Auction, Inc.*, P. & S. Docket No. 6483, 45 Agric. Dec. ____, (2/27/86 slip opinion at pp. 24-25).

Respondent Williams has argued that he cannot be said to have wilfully participated in any violation of the Act since he relied on assurances by Frank Rynders when he issued drafts for livestock after John Clay had filed in bankrupcty. However, as a registrant under the Act, Williams was required to do more. *See e.g., Garver*, P. & S. Docket No. 6449, 45 Agric. Dec. ____, (6/19/86 slip opinion). He should have consulted Packers and Stockyards officials for an official position or have directly consulted his own attorney for reliable advice. A registrant under the Act is not absolved by his reliance upon erroneous advice. *See George Steinberg and Son* v. *Butz*, 491 F.2d 988, 994 (2nd Cir.), *cert. denied*, 419 U.S. 830 (1974); and *Shatkin*, 34 Agric. Dec. 296, 298-300 (1975).

Upon reviewing past decisions by the Department, a sixty (60) day suspension of Williams' personal license appears warranted and appropriate in the circumstances.

Accordingly, the following Order is hereby entered.

ORDER

Respondent John Clay & Company of Ogden, Utah, its directors, officers, employees, agents, successors and assigns, and respondent Raymond C. Williams, directly or through any corporate or other device, shall cease and desist from:

1. Issuing drafts in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such drafts when presented;

2. Failing to honor drafts, drawn and issued in payment for livestock, when presented for payment;

3. Issuing drafts which are not checks in payment for livestock purchased on a cash basis;

4. Failing to pay, when due, the full purchase price of livestock purchased.

Respondent John Clay & Company of Ogden, Utah, is suspended as a registrant under the Act for a period of one year and thereafter until it demonstrates that it is no longer insolvent. When respondent Clay demonstrates it is no longer insolvent, a supplemental order shall be issued in this proceeding terminating the suspension, after the expiration of the one-year period.

Respondent Raymond C. Williams is suspended as a registrant under the Act for a period of sixty (60) days.

The provisions of this Order shall become effective 35 days after service of this Order on the respondents, unless appealed within 30 days after service (9 CFR §§ 1.145(a) and 1.142(c)).

Copies of this decision shall be served upon the parties. Service on respondent Clay shall be effected by service on its Vice President and Treasurer, respondent Williams.

[This decision and order became final November 12, 1986.—Ed.]

In re: LEFFLER BROS., INC., FRED G. STERNAU and ALAIN FOSTER.
P&S Docket No. 6650. Decided November 14, 1986.

Civil Penalty—Consent.

Respondents consented to the issuance of this decision in which they were assessed a civil penalty of $1000 and ordered to cease and desist from failing to pay for purchases when due, and issuing checks for payment without maintaing sufficient funds.

Allan Kahan, for complainant.
Respondents, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO LEFFLER BROS., INC. AND FRED G. STERNAU

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Leffler Bros., Inc. and Fred G. Sternau admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they apply to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Leffler Bros. Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of New York. Its business mailing address is 147-12 95th Avenue, Jamaica, New York 11435.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of marketing meat, meat food products and poultry products acting as a wholesale broker, dealer or distributor in commerce; and

(b) A packer within the meaning of the Act and subject to the provisions of the Act.

3. Fred G. Sternau, hereinafter referred to as respondent Sternau, is an individual whose mailing address is Box 216 Schoolhouse Road, Cross River, New York 10518.

4. Respondent Sternau is, and at all times material herein was owner, through F.G.S. Marketing Corporation, of 86% of the stock of the corporate respondent.

5. Respondent Sternau was, at all times material herein, a packer within the meaning of the Act and subject to the provisions of the Act.

6. Respondents Leffler Bros., Inc. and Fred G. Sternau have made restitution to the various meat suppliers set forth in paragraph II of the Complaint and Notice of Hearing.

CONCLUSIONS

Respondents Leffler Bros., Inc. and Fred G. Sternau, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Leffler Bros. Inc., its officers, directors, agents and employees, and respondent Fred G. Sternau, directly or through any corporate or other device, shall cease and desist from:

(1) Failing to pay, and from failing to pay when due, for meat and meat food products and poultry products purchased; and

(2) Issuing checks in payment for meat, meat food products or poultry products without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks or drafts when presented for payment.

Respondents Leffler Bros., Inc. is hereby assessed a civil penalty of One Thousand Dollars ($1,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: LYNN ROSE. P&S Docket No. 6616. Decided November 17, 1986.

Dealer and Market Agency—Engaging in business while insolvent—Failure to pay when due—Consent.

Respondent consented to the issuance of this decision in which they were ordered to cease and desist from engaging in business without filing and maintaining adequate bond; issuing checks for payment without maintaining sufficient funds; and failing to pay for purchases when due. Respondent was further suspended as a registrant for a period of two (2) years.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lynn Rose, hereinafter referred to as the respondent, is an individual whose mailing address is Route 2, Box 5497, Twin Falls, Idaho 83301.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis and buying and selling livestock in commerce for his own account; and

(b) Registered as a market agency and dealer under the Act, with such registration having been suspended in 1982 and remaining suspended to the present time for failure of respondent to demonstrate solvency.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Lynn Rose, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the bank account[s] upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent Rose is presently suspended as a registrant under the Act for failure to demonstrate solvency. Respondent Rose is further suspended as a registrant under the Act in this proceeding for a period of two years and his present suspension continues until he demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements under the Act and the regulations, a supplemental order will be issued in this proceeding after the expiration of the two year suspension.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: ROSS CATTLE CO., INC., WILLIAM W. ROSS, ROBERT L. KLEINPETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676. Decided November 17, 1986.

Dealer—Failure to pay when due—Consent.
Respondents consented to the issuance of this decision in which they were ordered to cease and desist from failing to pay full purchase price when due and delaying payments for purchases. Respondents were further suspended as registrants and prohibited from engaging in business as a dealer or market agency for a period of 45 days.

Jory M. Hochberg, for complainant.
William W. Ross, Jackson, Mississippi, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO ROSS CATTLE CO., INC. AND WILLIAM W. ROSS

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C., Section 181 et seq.) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR Section 1.138).

Respondents Ross Cattle Co., Inc. and William W. Ross admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations as they pertain to them, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ross Cattle Co., Inc. is a corporation whose business mailing address is Route 1, Box 121, Terry, Mississippi 39170.

2. Respondent Ross Cattle Co., Inc. was at all times material herein:

(a) Engaged in the business of buying and selling livestock in commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

3. William W. Ross is an individual whose mailing address is 1431 Chestnut Lane, Jackson, Mississippi 39212.

4. Respondent William W. Ross at all times material herein was:

(a) President of and owner of 100 percent of the outstanding stock issued by respondent Ross Cattle Co., Inc.;

(b) Responsible for the direction, management and control of respondent Ross Cattle Co., Inc.; and

(c) A dealer buying and selling livestock in commerce for his own account.

CONCLUSIONS

Respondents Ross Cattle Co., Inc. and William W. Ross having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Ross Cattle Co., Inc. and William W. Ross, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and

3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Ross Cattle Co., Inc. is suspended as a registrant under the Act for a period of 45 days.

William W. Ross is prohibited from engaging in business as a dealer or market agency for a period of 45 days.

The provisions of this order shall become effective on the sixth day after service of this decision on the parties.

Copies of this decision shall be served upon the parties.

In re: DELMA M. ROGERS and JOYCE ROGERS d/b/a APACHE LIVESTOCK SALES Co. P&S Docket No. 6687. Decided November 17, 1986.

Market Agency—Failure to pay when due—Issuing payments without maintaining sufficient funds—Consent.

Respondents consented to the issuance of this decision in which they were ordered to cease and desist from failing to deposit proceeds in a Custodial Account for Shippers Proceeds; using funds received for purposes other than payment to owners, consignors, or shippers; issuing checks for payments without maintaining sufficient funds; and failing to pay proceeds to consignors when due. Respondents were further suspended as registrants for a period of five (5) years.

Ben Bruner, for complainant.
Respondents, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Delma M. Rogers and Joyce Rogers, hereinafter referred to as respondents, are individuals doing business as Apache Livestock Sales Co. Their business address is P. O. Box 390, Apache, Oklahoma.

2. Respondents, at all times material herein, were:

(a) Engaged in the business of selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Delma M. Rogers and Joyce Rogers, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regu-

lations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of livestock or the payment of amounts due the respondent for lawful marketing charges;

3. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the requirements of section 201.42 of the regulations.

4. Issuing checks to any person in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented;

5. Failing to remit, when due, the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors; and

6. Failing to remit the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors.

Respondents Delma M. Rogers and Joyce Rogers are suspended as registrants under the Act for a period of five years and thereafter until such time as they demonstrate that the deficiency in their Custodial Account for Shippers' Proceeds has been eliminated, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of eighteen (18) months upon demonstration by the respondents that all unpaid livestock consignors have been paid in full and that the deficiency in their Custodial Account for Shippers' Proceeds has been eliminated, and provided further, that this order may be modified upon application to the Packers and Stockyards Administration to permit the respondents' salaried employment by another registrant after the expiration of the eighteen (18) month period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: GEORGE WATTS. P&S Docket No. 6662. Decided October 6, 1986.

Dealer—Market agency—Bonding requirement—Suspended as a registrant—Civil penalty.

Jory M. Hochberg, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) George Watts, hereinafter referred to as the respondent, is an individual doing business in Roswell, New Mexico 88201.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified on various occasions by the Packers and Stockyards Administration of the need to file and maintain a surety bond to secure the performance of his livestock obligations

under the Act. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverge or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notices, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent George Watts, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Thousand Dollars ($5,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This default decision and order became final November 18, 1986.—Ed.]

In re: CIRCLE B MEAT CO., INC. d/b/a FLORIDA BONELESS BEEF and CIRCLE B PORTION MEAT CO., GEORGE E. MUELLER, SR. and JAY A. MUELLER. P&S Docket No. 6614. Decided October 7, 1986.

Packer—Question: Should one respondent be held accountable for the actions of the other respondent while divorced from day to day operations—Complaint dismissed as to respondent Jay Mueller.

Respondent Jay Mueller was divorced from the day to day operations of the corporate respondent during the period of the alleged violations and therefore should not be held accountable for actions taken by respondent George E. Mueller, Sr. Therefore the complaint, as it pertains to respondent Jay Mueller, was dismissed.

Allan R. Kahan, for complainant.
Robert L. Williams, Venice, Florida, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under Title II of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a Complaint filed on October 21, 1985, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The Complaint alleges that respondent Circle B Meat Company, Inc., doing business as Florida Boneless Beef and Circle B Portion Meat Co., under the management, direction and control of respondents George E. Mueller, Sr., and Jay A. Mueller, in connection with the operations of Circle B Meat Company, Inc., as a packer subject to the Act, purchased livestock for slaughter and failed to pay, when due, for said livestock; purchased livestock and in purported payment issued checks which were returned unpaid by the bank because the corporate respondent did not have sufficient funds on deposit and available in the account; failed to hold in trust inventories of livestock required to be held in trust for the benefit of all unpaid cash sellers of livestock; and willfully dissipated inventories of meat and meat food products which were required to be held in trust for the benefit of all unpaid cash sellers of livestock. Said practices are alleged to be in wilful violation of sections 202(a), 206(b) and 409 of the Act (7 U.S.C. §§ 192(a), 196(b), 228).

On November 18, 1985, Respondent Jay A. Mueller filed a response to the Complaint and Notice of Hearing which admitted the jurisdictional allegations of the Complaint, but denied that he was responsible, with George E. Mueller, Sr., for the management, direction and control of the practices and activities of the corporate

respondent, during the period of the alleged violations, and denied the remaining allegations as they related to him.

A default decision was issued against respondents Circle B Meat Co., Inc., and George E. Mueller, Sr., on April 23, 1986, and became final and effective on June 2, 1986. As a result of this final Decision, George E. Mueller, Sr., was assessed a civil penalty in the amount of $25,000.

An oral hearing was held on July 1, 1986, in Tampa, Florida, before Administrative Law Judge Edward H. McGrail, United States Department of Agriculture. Respondent was represented by Robert L. Williams, Esq., Venice, Florida. Complainant was represented by Allan R. Kahan, Esq., Office of the General Counsel, United States Department of Agriculture. Complainant called six witnesses, including Respondent Jay A. Mueller, and offered twenty-one (21) exhibits. Respondent called no witnesses since complainant made Respondent Jay A. Mueller his own witness, and offered no exhibits.

FINDINGS OF FACT

1. Circle B Meat Co., Inc., hereinafter referred to as the corporate respondent, is a family owned corporation organized and existing in the State of Florida, doing business as Florida Boneless Beef and Circle B Portion Meat Company. It had as its officers Jay A. Mueller, President; George A. Mueller, Sr., Vice-President, and Arthaleen Mueller, Secretary/Treasurer. Its business mailing address is P. O. Drawer 1417, Dade City, Florida 34297. (CX-1, 21, p. 2) [1]

2. The corporate respondent was, at all times material herein:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter;

(b) Engaged in the business of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(c) A packer within the meaning of the Act and subject to the provisions of the Act. (CX-1)

3. Jay A. Mueller, hereinafter referred to as Respondent Jay Mueller, is an individual whose business mailing address is 216 Carey Place, Lakeland, Florida 33803. (Respondent's Answer)

4. Respondent Jay Mueller is, and at all times material herein was:

(a) Listed as President and a director of the corporate respondent and was active in the management of the corporate respondent

[1] Reference to exhibits are designated "CX". References to the hearing transcript are designated "Tr."

until approximately August 22, 1983, at which time he, following a serious argument with his father, George E. Mueller, Sr., left the management and control of the business, received no salary from that point forward, turned in the company automobile and found other employment; and

(b) Respondent Jay Mueller did not return to the corporate business until on or about January 24, 1984, at which time the corporate respondent had filed for bankruptcy in the Bankruptcy Court, Tampa, Florida, said filing having been accomplished by his father, George E. Mueller, Sr., on January 3, 1984. (CX-21, p. 2; Tr. 123, 130-131, 134-135)

5. During Respondent Jay Mueller's absence from the day to day operation of the corporate respondent it was understood that his father, George E. Mueller, Sr. was running the corporate business. By date of January 4, 1984, the Regional Office of the Packers and Stockyards Administration (P&S), Atlanta, Georgia, sent a letter, addressed to the corporate respondent, advising that P&S had received information that the corporate respondent had failed to pay for livestock and that the corporate respondent should take immediate steps to comply with the requirements of the Act. The letter explained the requirements of the Act, as well as provided information regarding the packers obligation to establish and maintain the trust account. This letter was signed as being received at the corporate respondent's place of business on January 11, 1984, by Linda Ledford, bookkeeper for the firm. A copy of the letter was also sent to Don Stichter, Esq., who was identified as the attorney representing the corporate respondent in the bankruptcy proceeding filed in the Bankruptcy Court, Tampa, Florida, on January 3, 1984. (CXs-1, 2, pp. 3-4; CXs-11, 12, 21; Tr. 64, 68, 70-71, 114-115, 121, 127, 130-131, 135)

6. On January 5, 1984, after futile attempts by P&S to contact Respondent George E. Mueller, Sr. by telephone, Respondent Jay Mueller was contacted at his home in Lakeland, Florida, by a representative of P&S in Atlanta, Georgia. Although Respondent Jay Mueller acknowledged he was still listed as President of respondent's company, he advised he had not been active in the daily operations since the fall of 1983. The bankruptcy filing was also discussed, as well as money owed to sellers of livestock and the responsibility for protecting trust assets. The bankruptcy petition filed in the Bankruptcy Court, Tampa, Florida on January 3, 1984, was signed by George E. Mueller, Sr., as Vice-President of the corporate respondent. (CXs-5, 12, 21; Tr. 127)

7. On several occasions during the period when Respondent Jay Mueller was absent from the corporate respondent, he was request-

ed to make purchases of cattle at the Interstate Livestock Auction Market, Seffner, Florida (Interstate) by his father, George E. Mueller, Sr. Prior to such purchases, personnel of Interstate would clear authority to purchase cattle for the corporate respondent from Respondent George E. Mueller, Sr., who acknowledged he would be responsible for payment of the purchased cattle. On these occasions, Respondent Jay Mueller was not working at corporate respondent, nor receiving any pay for his limited service. Rather, he was employed by a real estate company. (CX-15-20; Tr. pp. 65-70, 98, 100-105, 131-132, 139-143)

8. (a) The corporate respondent, in connection with their operations as a packer, on or about the dates and in the transactions set forth below and at diverse other times, purchased livestock for slaughter and failed to pay, when due, the full purchase price of such livestock:

1983 Date of Purchase	From Whom Purchased	Amount
May 4	Little Everglade	$176.88
Aug. 10	J. L. Overstreet	737.10
Sept. 27	Little Everglade	237.90
Oct. 20	Buck Island Ranch	7,647.81
Oct. 25	Robert Manning	2,319.26
Nov. 22	Interstate Livestock Auction	10,371.00
Nov. 30	North Florida Farmers L/S Mkt.	37,988.55
Dec. 1	Buddy Johnson	2,165.96
Dec. 6	Interstate Livestock Auction	13,508.35
Dec. 12	Jacksonville Livestock Auction	16,963.92
Dec. 13	Interstate Livestock Auction	6,799.74

(CX-2)

(b) As of August 1, 1985, there remained unpaid by the corporate respondent approximately $130,399.30 for such livestock purchases. (CX-2)

9. Respondent George E. Mueller, Sr., and/or corporate respondent in connection with operations as a packer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefore issued checks on the corporate respondent's account which were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented. (CX-3, pp. 6, 22, 30, 34, 44, 49, 58, 63):

1983 Date of Purchase	No. Head	From Whom Purchased	Check No.	Amount
Sept. 28	4	J. D. Skinner	5355	$997.44
Oct. 5	30	North Florida Farmers L/S Mkt.	5120	9,701.36
Oct. 12	35	North Florida Farmers L/S Mkt.	5168	10,264.72
Oct. 14	20	Cordele Livestock Co., Inc.	5219	6,845.37
Oct. 19	49	North Florida Farmers L/S Mkt.	5231	8,737.96
			5232	8,737.96
Nov. 3	4	Barthle Brothers	5342	1,058.14
Nov. 9	41	North Florida Farmers L/S Mkt.	5326	8,286.79
			5327	8,286.81

10. The corporate respondent and/or George E. Mueller, Sr. failed to hold in trust and willfully dissipated inventories of meat and meat food products which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that:

(a) On January 6, 1984, corporate respondent and/or George E. Mueller, Sr. shipped 4,860 pounds of 50/50 beef trim to Swift Independent Packing Company, Orlando, Florida, for $1,980.00. Such beef trim had been stored in the Tampa Cold Storage Company, Tampa, Florida. The proceeds from said sale were deposited in The Bank of Pasco County by George E. Mueller, Sr. on January 24, 1984, and were distributed by corporate respondent and/or George E. Mueller, Sr. to Sam Cohen, United Telephone and M&M Cattle. The M&M Cattle Company is wholly owned by George E. Mueller, Sr. The payments constitute dissipations of trust assets. (CX-9, pp. 17, 37; Tr. pp. 92, 133)

(b) On January 19 & 25, 1984, corporate respondent and/or George E. Mueller, Sr. shipped a total of 9,000 pounds of 50/50 beef trim to Swift Independent Packing Company, Orlando, Florida, for $3,960.00. Such beef trim had been stored in the Tampa Cold Storage Company, Tampa, Florida. The proceeds from said sale were deposited in The Bank of Pasco County by George E. Mueller, Sr. on February 28, 1984. Such proceeds from said sale were used to make payments to U.S. Leasing, United Telephone, Sumter Electric, and Grafton and Sons, Inc., to make two loan payments totalling $417.75, and obtain $1,290.66 in currency, the disposition of which is unaccounted for. The loan payments were made on loans the Bank had made to M&M Cattle, a company wholly owned by

George E. Mueller, Sr. The payments constitute dissipations of trust assets. (CX-9, pp. 29–32, 37; Tr. pp. 89, 133)

11. The corporate respondent and/or George E. Mueller, Sr. failed to hold in trust inventories of livestock which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that, during the period October 24, 1983, through December 12, 1983, corporate respondent and/or George E. Mueller, Sr. purchased a total of 67 head of livestock from Jacksonville Livestock Auction Company, Inc., Whitehouse, Florida, and North Florida Farmers Livestock Market, Inc., Lake City, Florida for $7,847.56. The corporate respondent's records contain no indication of the slaughter or other disposal or disposition of this livestock. Linda Ledford, bookkeeper for corporate respondent, advised that George E. Mueller, Sr. gave her the invoices for these purchases and told her to pay them from corporate respondent's funds. She paid all except those that are still in accounts payable. (CX-10, pp. 1, 5)

DISCUSSION AND CONCLUSIONS

The basic question here is whether Respondent Jay Mueller, listed as President of corporate respondent during the period of the alleged violations should be held accountable for actions taken by his father, Respondent George E. Mueller, Sr., while Respondent Jay Mueller was divorced from the day to day operations of the corporate respondent. I find that he should not, and dismiss the Complaint.

The corporate respondent was a small family owned business with Respondent Jay Mueller as its President, his father George E. Mueller, Sr. as its Vice-President, and Arthaleen Mueller, mother/wife, as its Secretary/Treasurer. The record here shows that in April, 1983, while Respondent Jay Mueller was actually in charge of the day to day operations of the corporate respondent, an audit conducted by P&S personnel showed that the corporate respondent was experiencing a high percentage of slow payment to sellers of livestock. The corporate respondent had also issued several NSF checks. At that time Respondent Jay Mueller was having difficulty controlling the actions of his father, George E. Mueller, Sr., with regard to the day to day operations of the corporate respondent. P&S personnel explained the provisions and requirements of the Act regarding slow payment to Respondent Jay Mueller, but found the trust assets to be more than enough to cover obligations of the corporate respondent. Respondent Jay Mueller made good the NSF checks and obtained extension credit agreements with its sellers of

livestock. As a result of this compliance, no action was deemed necessary by P&S. (Tr. pp. 119–125)

Complainant does not dispute the facts showing that during the period on or about August 22, 1983, through on or about January 24, 1984, Respondent Jay Mueller completely divorced himself from the day to day management of the corporate respondent. This was due to a serious irreversible business altercation between father and son which prevented Respondent Jay Mueller from again participating in the actual day to day operations of the company, except on a few occasions during this period on which he did purchase cattle at one market on behalf of his father. However, even on these occasions he was a mere conduit since the purchases had to have the authorization of George E. Mueller, Sr., as well as his personal commitment to be responsible for payment of such livestock purchases. Without this authorization and commitment by George E. Mueller, Sr., the cattle could not have been purchased. I find the testimony of Respondent Jay Mueller to be sincere, creditable and worthy of great weight in this matter.

Complainant also admits that during the period Respondent Jay Mueller relinquished the management of the corporate respondent to his father, and that almost all of the alleged violations committed during this period were perpetrated by Respondent George E. Mueller, Sr. Indeed, complainant concedes the evidence shows that Respondent George E. Mueller, Sr. ". . . was the active culprit in the alleged violations, not Respondent Jay Mueller." (Complainant's Brief, pp. 6–7) Such admission is not difficult to concede since, as noted earlier, during the period of Jay Mueller's absence his father was responsible for issuing NSF checks (Finding No. 9), was responsible for ordering payment of non-valid invoices from corporate funds (Finding No. 11), expended funds, properly assignable to the trust fund, to pay utility bills and notes owed to The Pasco County Bank by his wholly owned M&M Company and the improper withdrawal of beef from the trust assets. (Finding No. 10) It is noted here also that Respondent George E. Mueller, Sr., exerting his authority over the company, placed the company in bankruptcy by filing a "Debtors Petition" with the Bankruptcy Court, Tampa, Florida on January 3, 1984.

Further buttressing the facts that Respondent George E. Mueller, Sr. was in complete charge of the day to day operations of corporate respondent is the fact that P&S personnel acknowledged this when they attempted to contact him as a result of learning of unpaid bills to sellers and the corporate respondent's filing bankruptcy. Only when they were unable to contact Respondent George E. Mueller, Sr. did they contact Respondent Jay Mueller at his

home in Lakeland, Florida. There is dispute as to whether knowledge of the provisions of, and responsibilities under the Act, were relayed by Respondent Jay Mueller to his father as a result of the P&S telephone call to him on January 5, 1984. Whether he did or not, I infer from the fact that the P&S letter of January 4, 1984, received at the respondent company on January 11, 1984, that Respondent George E. Mueller, Sr. had knowledge of the provisions of the Act as well as his responsibilities as a packer.

Finally, there is witness testimony that there had been no problems with corporate respondent until Respondent Jay Mueller left. (CX-2, p. 4; Tr. 69-70) When Respondent Jay Mueller did return, he did so in an attempt to make the corporate respondent a viable business with a saleable value. To this end, he injected his own borrowed money into the business in order to keep the plant open. (Tr. pp. 141-142) Additionally, a trust account was opened at The Bank of Pasco County in January 1984. Although the exact date is not discernable from the "New Account Deposit" slip, it appears that this account was opened with checks from payments made to corporate respondent by Baker Hides ($160.84) and Sun Market ($384.00) (CX-8, p. 1, lines 3 & 4) which were deposited in the trust account on January 19, 1984. (CX-8, p. 1, line 1) Thus, in correlating the two items the trust account was opened on January 19, 1984, after Respondent George E. Mueller, Sr. had placed the company in bankruptcy and after Respondent Jay Mueller was reminded by P&S personnel of his obligations and responsibilities under the Act.

Deposits made after Respondent Jay Mueller returned were placed in the trust fund account and reflected no impropriety on the part of Respondent Jay Mueller. (CX-8; Tr. 54 & 79) An amount that was not placed in the trust account fund was a check received by the corporate respondent in the amount of $1,991.39. (CX-5, pp. 1, 4) However, this money was used by Respondent Jay Mueller to pay an electrical bill so that trust fund asset meats in the plant freezer would be protected. As stated by a P&S witness, Respondent Jay Mueller had a duty to protect trust fund assets, and money assignable to the trust fund account could be used to protect such assets. There was no impropriety on the part of Respondent Jay Mueller. (Tr. pp. 73-75)

Thus, during the periods before and after the alleged violations, when Respondent Jay Mueller managed the day to day operations of the corporate respondent, he acknowledged his responsibilities and obligations as a packer under the Act, and performed them in accordance with the regulations. As noted previously, complainant conceded that Respondent George E. Mueller, Sr. ". . . was the active culprit in the alleged violations, not Respondent Jay

Mueller." As also noted previously, George E. Mueller, Sr., ". . . the active culprit in the alleged violations . . ." has already been assessed a civil penalty in the amount of $25,000. This conforms to the Secretary's policy of deterrence and sends an unmistakable signal to the industry that such practices will not be tolerated. On the other hand, seeking a cease and desist order and imposing a civil penalty of $15,000 on Respondent Jay Mueller would have the opposite effect and defeat the policy of the Secretary. Such order and civil penalty would be imposed on a packer who witnesses concede performed no wilful acts in violation of the Act or the regulations while he was the active manager of the day to day operations of corporate respondent. Rather, he quickly and sincerely complied with them, and upon his return attempted to salvage trust assets and bring the corporate respondent back to the status of a viable business.

Nor is this inopposite to *In re MCM Livestock, et al,* 39 A.D. 893, 901 (1980) cited by complainant. There, Respondent McAninch, although a non-participating president of a company in which two-thirds of the stock was owned by his wife, had designated another party to be responsible for the management of MCM. Since this designation had been made, it was within his power at anytime to rectify the violations alleged. There is no indication in this record of ownership of the stock of the corporate respondent. However, it is unlikely that Respondent Jay Mueller would walk away from a business in which he held a financial interest, stock. Therefore, I infer that the majority, if not all, of the stock of the corporate respondent was held by Respondent George E. Mueller, Sr. and/or his wife Arthaleen Mueller. Additionally, because of the serious and deep seated nature of the disagreement between father and son over the day to day operations of corporate respondent it was impossible for him to return to its management until after the father had relinquished control of the company and had placed it in bankruptcy. No such set of circumstances existed in *MCM, supra.* Finally, it is noted in *MCM, supra,* that only a cease and desist order was sought against McAninch. Since the corporate respondent is in bankruptcy, and Respondent Jay Mueller is engaged in other gainful employment, real estate, imposing a cease and desist order here would be an exercise in futility.

ORDER

IT IS ORDERED, that the Complaint in this matter as pertains to Respondent Jay Mueller be, and hereby is, dismissed with prejudice.

[This decision and order became final November 19, 1986.—Ed.]

In re: BOBBY WILLIAMSON. P&S Docket No. 6761. Decided November 20, 1986.

Civil Penalty—Consent.
Respondents consented to the issuance of this decision in which they were assessed a civil penalty of $350 and were ordered to cease and desist from engaging in business without maintaining adequate bond as required by the Act and the regulations thereunder. Respondents are further suspended as registrants until fully compliant with the bonding requirements.

Peter Train, for complainant.
Respondents, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Bobby Williamson, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 6, Box 243, Opelousas, Louisiana 70570.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Bobby Williamson, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Hundred Fifty and no/100 ($350.00) Dollars.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: ELMO MAYES. P&S Docket No. 6591. Decided November 24, 1986.

Civil Penalty.

The Judicial Officer affirmed Chief Judge Campbell's default order assessing an $8,000 civil penalty and ordering respondent to cease and desist from failing to pay, when due, the full purchase price of livestock. Since respondent failed to file an answer to the complaint, the default decision was properly issued.

Roberta Swartzendruber, for complainant.
Edward M. Dooley, Middlesboro, Kentucky, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et*

seq.).[1] An initial default Decision and Order was filed on May 7, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) assessing an $8,000 civil penalty and ordering respondent to cease and desist from failing to pay, when due, the full purchase price of livestock.

On October 28, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[2] The case was referred to the Judicial Officer for decision on November 21, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of respondent's appeal, and specific provisions are added as to the manner in which the civil penalty shall be paid. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

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[1] *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1986 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Elmo Mayes, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Highway 63, Cumberland Gap, Tennessee 37724.

(b) Respondent is and at all times material herein was:

(1) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(2) A dealer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

2. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)–(c), .139, .141(a)):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical to the findings of fact, *supra*, and advised respondent that an answer must be filed with the Hearing Clerk, and that failure to file an answer "shall constitute an admission of all the material allegations of this complaint" (Complaint at 3).

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer or plead specifically to any allegation of the complaint. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *four* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation. Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent failed to answer the complaint. Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,[3] respondent has shown no basis for setting aside the default decision here.[4]

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[3] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24, (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[4] *See In re Pieszko*, 45 Agric. Dec. ___ (Nov. 12, 1986) (default order proper where answer not filed); *In re Henson*, 45 Agric. Dec. ___ (Nov. 4, 1986) (default order proper where answer admits or does not deny material allegations; *In re Guffy*, 45 Agric. Dec. ___ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. ___ (Sept. 9, 1986) (de-

Continued

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their

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fault order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. ___ (Sept. 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ___ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ___ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec. ___ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ___ (Sept. 23, 1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *appeal docketed*, No. 91 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ___ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

multitudinous duties.' " [5] If respondent were permitted to contest some of the allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

Respondent's appeal is frivolous. As stated by complainant's attorney in the Answer to Respondent's Petition for Appeal of Decision and Order at 1-3:

> The appeal cites 12 issues as basis of appeal which, on closer reading, are in fact only three in number.
>
> A. Respondent Elmo Mayes (hereinafter respondent) did not receive service of the complaint or the proposed default decision and thus has been denied due process of law;
>
> B. The complainant Packers and Stockyards Administration (hereinafter complainant) has offered no evidence in support of the alleged violations cited against the respondent in its complaint; and
>
> C. The respondent is not guilty of the alleged violations.
>
> Complainant has not only served the respondent with all pertinent papers in this proceeding but did so over respondent's consistent and vigorous efforts to avoid such service as evidenced in the following record review:
>
> The complaint was filed September 4, 1985, and sent to respondent by certified mail. Respondent refused service of the complaint and it was returned to the Hearing Clerk's Office, United States Department of Agriculture on September 12, 1985. (See Exhibit No. 1) Request was made by the Hearing Clerk on September 24, 1985, for personal service of the complaint. (See Exhibit No. 1A). On October 30, 1985, Mr. Kenneth M. Gordon, a supervisory auditor for the complainant personally served a copy of the complaint and the Rules of Practice on respondent at his residence. (See Exhibit No. 1B).
>
> Respondent Mayes failed to reply to the complaint.

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[5] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

On December 9, 1985, complainant's "Motion for Adoption of Proposed Decision" and "Proposed Decision" was filed and sent to respondent on December 12, 1985 by certified mail. (See Exhibit No. 2) Respondent refused to accept the certified mailed documents and they were returned to the Hearing Clerk's Office on December 23, 1985. (See Exhibit No. 2A) Pursuant to Rule of Practice 1.147(b) the "Motion for Adoption of Proposed Decision" and "Proposed Decision" were then sent by regular mail to respondent. (See Exhibit No. 2B) These documents were not returned and no objections to the "Proposed Decision" pursuant to Rule of Practice 1.139 were ever entered by the respondent.

On May 7, 1986, the "Decision and Order Upon Admission of Facts By Reason of Default" was entered against the respondent. The Default Decision was sent to respondent by certified mail on May 9, 1986. (See Exhibit No. 3) It was returned "unclaimed". (See Exhibit No. 3A) Request was made by the Hearing Clerk's Office for personal service of the "Decision and Order Upon Admission of Facts By Reason of Default" against respondent Mayes on June 2, 1986. (See Exhibit No. 3B)

After attempting for several months to locate respondent Mayes, Robert Grainger, Supervisory Scales and Weighing Specialist of the Packers and Stockyards Administration's Bedford, Virginia, regional office and Hal Crocker of the same office located respondent Mayes in his livestock barn on September 9, 1986, at 8:15 a.m. and made personal service on him of a certified copy of the "Decision and Order Upon Admission of Facts By Reason of Default", as well as a copy of the Packers and Stockyards Act and a copy of the regulations promulgated thereunder. (See Exhibits No. 4 and 4A) Thus, respondent's appeal on the basis of due process is false to the point of being frivolously advanced.

By failing to file an answer to the complaint within the time prescribed in section 1.139 of the Rules of Practice, the respondent has admitted all alleged material facts set forth in the complaint. Such admission on the respondent's part negates any requirement that complainant present evidence to prove the violations. Further, denials on the merits offered by the respondent are also negated by re-

spondent's own admissions in failing to answer the complaint within the allocated time.

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent Elmo Mayes, his agents and employees, directly or through any corporate or other device, in connection with his business operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Elmo Mayes is assessed a civil penalty in the amount of $8,000, which shall be paid within 90 days after service of this order. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Roberta Swartzendruber, Office of the General Counsel, U.S. Department of Agriculture, Room 2438, South Building, Washington, D.C. 20250-1400.

In re: RICHARD BALDWIN. P&S Docket No. 6635. Decided October 7, 1986.

Dealer—Market agency—Bonding requirement—Suspended as a registrant—Civil penalty.

Andrew Y. Stanton, for complainant.
Respondent, *pro se*.

Decision by Edward H. McGrail, Administative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the

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Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Richard Baldwin, hereinafter referred to as the respondent, is an individual whose mailing address is 2209 Caldwell Boulevard, Nampa, Idaho 83651.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of a dealer buying and selling livestock in commerce for his own account and for the accounts of others; and

(2) Registered, along with Myrtle A. Baldwin doing business under the trade name of Y-L Cattle Company, with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account and as a market agency to buy livestock in commerce on a commission basis. This registration has been inactive since September 6, 1984.

2. The Packers and Stockyards Administration notified respondent on May 25, 1983, that the $35,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was being terminated effective June 16, 1983, and that it was necessary to file a bond or bond equivalent in the amount of $35,000.00 before continuing his operations. Respondent was further notified that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.19 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account and for the accounts of others, without maintaining bond coverage or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has violated section 312(a) of the Act (7 U.S.C. § 213(a), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Richard Baldwin, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Seven Hundred and Fifty Dollars ($1,750.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This default decision and order became final November 24, 1986.—Ed.]

In re: STOCKYARDS DAIRY SALE, INC., STOCKYARDS BEEF SALE, INC., STOCKYARDS, INC., SAMUEL E. HUBBERT, CURTIS HENRY HUBBERT, and TOMMY SMITH d/b/a MAGNOLIA CATTLE CO. P&S Docket No. 6682. Decided November 24, 1986.

Civil Penalty—Consent.

Respondents, Stockyards Dairy Sale, Inc., Stockyards Beef Sale, Inc., Stockyards, Inc., Samuel E. Hubbert, and Curtis Henry Hubbert, consented to the issuance of this decision in which they were assessed a civil penalty of $12,000.

Ben E. Bruner, for complainant.
H.R. Goodman, Tupelo, Mississippi, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO STOCKYARDS DAIRY SALE, INC., STOCKYARDS BEEF SALE, INC., STOCKYARDS, INC., SAMUEL E. HUBBERT, AND CURTIS HENRY HUBBERT

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Depart-

ment of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Stockyards Dairy Sale, Inc., hereinafter referred to as respondent Stockyards Dairy, is a corporation organized and existing under the laws of the State of Mississippi, with its principal place of business located at Tupelo, Mississippi. Its mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Stockyards Dairy is, and at all times material herein was:

(1) Engaged in the business of conducting and operating the Tupelo Stockyard, Inc., hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

2. (a) Respondent Stockyards Beef Sale, Inc., hereinafter referred to as respondent Stockyards Beef, is a corporation organized and existing under the laws of the State of Mississippi, with its principal place of business located at Tupelo, Mississippi. Its mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Stockyards Beef is, and at all times material herein was:

(1) Engaged in the business of conducting and operating the Tupelo Stockyard Inc.;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. (a) Stockyards, Inc., is a corporation organized under the laws of the State of Mississippi, with its principal place of business located at Tupelo, Mississippi. Its mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Stockyards, Inc., is, and at all times material herein was the owner of the Tupelo Stockyard, Inc.

4. (a) Samuel E. Hubbert, hereinafter referred to as respondent Sam Hubbert, is an individual whose business mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Sam Hubbert is, and at all times material herein was:

(1) A stockholder in and president of respondent Stockyards Dairy;

(2) The owner of 50% of the outstanding stock issued by respondent Stockyards, Inc.; and

(c) A director of respondent Stockyards, Inc.

5. (a) Curtis Henry Hubbert hereinafter referred to as respondent Henry Hubbert, is an individual whose business mailing address is P.O. Box 1666, Tupelo, Mississippi 38801.

(b) Respondent Henry Hubbert is, and at all times material herein was:

(1) A stockholder in and president of respondent Stockyards Beef;

(2) The owner of 50% of the outstanding stock issued by respondent Stockyards, Inc.;

(3) A director of respondent Stockyards, Inc.; and

(4) Registered with the Secretary as dealer, buying and selling livestock in commerce for his own account, and as a market agency buying livestock in commerce on a commission basis.

6. (a) Respondents Sam Hubbert and Henry Hubbert, acting in combination with each other, and through respondent Stockyards, Inc., are:

(1) Responsible for the direction, management and control of respondents Stockyards Beef and Stockyards Dairy; and

(2) Engaged in the business of selling livestock in commerce on a commission basis.

(b) Respondents Sam Hubbert, Henry Hubbert and Stockyards, Inc., are a market agency within the meaning of that term as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Stockyards Dairy Sale, Inc., Stockyards Beef Sale, Inc., Stockyards, Inc., Samuel E. Hubbert, and Curtis Henry Hub-

bert, their agents and employees, directly or indirectly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds", within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Withdrawing funds from their "Custodial Account for Shippers' Proceeds" as consideration for sales on a dealer basis and allowing the buyers to reimburse the market at a later date;

4. Issuing checks drawn on their "Custodial Account for Shippers' Proceeds" for the purpose of extending loans and not for the purpose of paying the net proceeds to the owners, consignors or shippers of livestock or the payment of the amounts due the respondents for lawful marketing charges;

5. Purchasing livestock consigned to any market agency in which they have an ownership interest, or are officers or employees, for resale for their own speculative account;

6. Permitting owners, officers, agents or employees to buy out of consignment for resale for their own speculative account;

7. Issuing accounts of sale which fail to show the correct name of the buyer, when the purchaser is the market agency, an owner, officer, agent or employee of the market agency, or a firm in which one of the respondents has an ownership or financial interest; and

8. Failing to charge each consignor the pass-out and no sale charge as part of the tariff as filed with the Secretary of Agriculture.

Respondent Henry Hubbert, his agents and employees, directly or indirectly or through any corporate or other device, shall cease and desist from:

1. Misrepresenting to his principals or to other purchasers of livestock from respondent the actual purchase weights of livestock;

2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, or any other documents showing false, inaccurate or misleading weight entries for such livestock; and

3. Collecting payment from the purchasers of livestock on the basis of false, inaccurate or misleading accounts of purchase, invoices or billings.

Respondent Henry Hubbert shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true

nature of all transactions involved in their business subject to the Packers and Stockyards Act, including:

1. Accounts of sale issued to consignors of livestock which show, among other necessary information, the correct name of the consignors and, when the buyer is the market agency, an owner, officer, agent or employee of the market agency, or a person or firm in which one of the respondents has a financial or ownership interest, the correct name of the buyer and relationship with the market agency;

2. Invoices issued to buyers which show the correct name of the buyer and, if the seller or consignor is shown, the correct name of the seller or consignor;

3. Receiving tickets which show the correct names of the consignors and identification of the livestock consigned;

4. Invoices on livestock purchased by the respondent which show the correct name of the buyer;

5. A general ledger containing accounts showing assets, liabilities, income, expenses and net worth or capital;

6. An accurate record of livestock purchased and sold on a dealer basis showing source of purchase and to whom sold; and

7. Copies of all health inspection certificates or releases issued in connection with the sale or shipment of livestock.

Respondents Stockyards Dairy, Stockyards Beef and Curtis Henry Hubbert are each suspended as registrants under the Act for a period of 30 days.

Respondents Samuel E. Hubbert and Stockyards, Inc., are each prohibited from operating subject to the Act for a period of 30 days.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents Stockyards Dairy, Stockyards Beef, Curtis Henry Hubbert, Samuel E. Hubbert, and Stockyards, Inc., are jointly and severally assessed a civil penalty of twelve thousand dollars ($12,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: ARTHUR A. DARINGER. P&S Docket No. 6767. Decided November 26, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of $2000 and ordered to cease and desist from engaging in business

without maintaining adequate bond; issuing checks in payment without maintaining sufficient funds; and failing to pay for purchases when due.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Arthur A. Daringer, hereinafter referred to as the respondent, is an individual whose principal place of business is located in Gordon, Nebraska, and whose business mailing address is Box 246, Gordon, Nebraska 69343.

2. Respondent, at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account trading as Gordon Feeder Cattle.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Daringer, his agents and employees, directly or through any corporate or other device, in connection with his busi-

ness operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Act and regulations without having and maintaining an adequate bond or its equivalent, as required by the Act and regulations;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock;

4. Failing to pay the full purchase price of livestock; and

5. Failing to properly provide all information required on scale tickets issued to livestock purchasers and sellers as specified in 201.49 of the regulations.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Act, including (1) a general ledger; (2) a complete record of cash receipts and cash disbursements; and (3) complete monthly reconciliations of his dealer bank account.

Respondent Daringer is suspended as a registrant under the Act for a period of 28 days and thereafter until he demonstrates that he is in full compliance with the bonding requirements of the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 28 day period.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand Dollars ($2,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: Coy Von Womack. P&S Docket No. 6726. Decided November 28, 1986.

Market Agency—Engaging in business while insolvent—Failure to maintain adequate bond—Failure to pay when due—Consent.

Respondent consented to the issuance of this decision in which they were ordered to cease and desist from engaging in business without maintaining adequate bond; is-

suing payments without having sufficient funds; and failing to pay for purchases when due. Respondent was further suspended as a registrant for a period of five (5) years.

Roberta Swartzendruber, for complainant.
Gary Vinson, Batesville, Arizona, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondent does not meet the requirements of the Act that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Coy Von Womack, hereinafter referred to as the respondent, is an individual whose principal place of business was located in Heber Springs, Arkansas. Respondent's mailing address is Route 2, Box 143, Grand Saline, Texas 75140.

2. Respondent, at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Coy Von Womack, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of one year upon demonstration by respondent that all unpaid livestock sellers have been paid in full, that he is no longer insolvent, and that he is in full compliance with the bonding requirements under the Act and the regulations, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the one year period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: POPLARVILLE STOCKYARDS, INC., THURMAN GUILOTT, JOE MACK SMITH, and TOMMY BOND. P&S Docket No. 6585. Decided December 4, 1986.

Civil Penalty—Consent.

Respondent, Tommy Bond, consented to the issuance of this decision in which he was assessed a civil penalty of $2000.

Thomas Heinz, for complainant.
James K. Dukes, Hattiesburg, Mississippi, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO TOMMY BOND

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Tommy Bond admits the jurisdictional allegations in paragraph I of the complaint as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations of the complaint, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

Tommy Bond, hereinafter "respondent Bond," is an individual with a mailing address at Rt. 2, Box 455B, Purvis, Mississippi 39475 and who is, and at all times material herein was, engaged in the business of buying and selling livestock in commerce for his own account.

CONCLUSIONS

Respondent Bond having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Bond, while employed as a livestock auctioneer or while performing duties of comparable responsibility in connection with the actual conduct of livestock action sales, shall cease and desist from purchasing livestock out of consignment for his own account directly, or indirectly, for speculative resale or to fill orders on an agency basis.

Respondent Bond is prohibited from engaging in business subject to the Act for a period of 14 days.

In accordance with section 312(b) of the Act (7 U.S.C. § 203(b)), respondent Bond is assessed a civil penalty of $2,000.00.

The provisions of this Order shall become effective on the sixth day after service of this Order on respondent.

Copies of this decision shall be served on the parties.

In re: POPLARVILLE STOCKYARDS, INC., THURMAN GUILOTT, JOE MACK SMITH, and TOMMY BOND. P&S Docket No. 6585. Decided December 4, 1986.

Market Agency—Failure to deposit in and maintain a Custodial Account for Shippers' Proceeds—Suspended as Registrants—Civil Penalty—Consent.

Respondents, Thurman Guilott and Joe Mack Smith, consented to the issuance of this decision in which they were suspended as registrants under the Act and ordered to cease and desist from failing to deposit in and maintain a Custodial Account for Shippers' Proceeds; permitting auction employees to purchase consigned livestock for their own accounts; selling consigned livestock to persons with whom the respondents have an ownership or financial interest; and issuing scale tickets for livestock without completing the necessary information. Respondent Smith is further assessed a civil penalty of $3000.

Thomas Heinz, for complainant.
James K. Dukes, Hattiesburg, Mississippi, for respondents.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO THURMAN GUILOTT AND JOE MACK SMITH

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Thurman Guilott and Joe Mack Smith admit the jurisdictional allegations in paragraph I of the complaint as they pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Poplarville Stockyards, Inc., hereinafter "respondent Poplarville," is a corporation with a mailing address at P.O. Box 306, Poplarville, Mississippi 39470.

(b) Respondent Poplarville is, and at all times material herein was:

(1) Engaged in the business of selling livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

2. Thurman Guilott, hereinafter "respondent Guilott," is an individual who at all times material herein was:

(1) President and an owner of respondent Poplarville; and

(2) A manager, director and controller of the activities of respondent Poplarville.

3. Joe Mack Smith, hereinafter "respondent Smith," is an individual who all times material herein was:

(1) Vice president of respondent Poplarville; and

(2) A manager, director and controller of the activities of respondent Poplarville.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the complainant having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Guilott and respondent Smith, their agents or employees, directly or indirectly through any corporate or other device, in connection with any livestock auction market which they own, manage, direct, or control, shall cease and desist from:

1. Failing to deposit in any "Custodial Account for Shippers' Proceeds" within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42) an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to maintain any "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Permitting auctioneers, weighmasters and other employees engaged in the actual conduct of auction sales to purchase consigned livestock for their own accounts for speculative resale or for the accounts of others;

4. Selling consigned livestock to any owner, officer, agent, employee, or any person in whose business respondent Guilott or re-

spondent Smith has an ownership or financial interest without disclosing the name of the buyer and the nature of the business relationship existing between respondent Guilott or respondent Smith and the buyer; and

5. Issuing scale tickets for livestock sold on a weight basis which do not contain all the information prescribed by section 201.49 of the regulations. (9 CFR § 201.49).

Respondent Guilott is suspended as a registrant under the Act for a period of one year.

Respondent Smith is suspended as a registrant under the Act for a period of 28 days.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Smith is assessed a civil penalty of $3,000.00.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

In re: GEORGE COUNTY STOCKYARD, INC., and M.H. PITTS. P&S Docket No. 6659. Decided December 4, 1986.

Civil Penalty.

The Judicial Officer affirmed Judge McGrail's order suspending respondent George County Stockyard, Inc., as a registrant for 28 days, prohibiting respondent M. H. Pitts from engaging in business subject to the Act for 28 days, and ordering respondents to cease and desist from various practices, including not properly maintaining a "Custodial Account for Shippers' Proceeds"; failing to pay, when due, the full purchase price of livestock; and engaging in business without maintaining a reasonable bond or its equivalent, as required. Respondents are jointly and severally assessed a $4,000 civil penalty, and are required to keep complete and accurate records. Custodial account violations, failing to maintain the proper bond or bond equivalent, failing to pay, when due, the full purchase price of livestock, and failing to maintain accurate records have long been recognized as serious violations of the Act.

Edward Silverstein, for complainant.
Gerald A. Dickerson, Lucedale, Mississippi, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on September 30,

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* *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1986 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980).

1986, by Administrative Law Judge Edward H. McGrail (ALJ) suspending respondent George County Stockyard, Inc., as a registrant for 28 days, prohibiting respondent M. H. Pitts from engaging in business subject to the Act for 28 days, and ordering respondents to cease and desist from various practices, including not properly maintaining a "Custodial Account for Shippers' Proceeds"; failing to pay, when due, the full purchase price of livestock; and engaging in business without maintaining a reasonable bond or its equivalent, as required. Respondents are jointly and severally assessed a $4,000 civil penalty, and are required to keep complete and accurate records.

On November 5, 1986, respondents appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On November 28, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with a few changes too minor to itemize. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented ("Act"), 7 U.S.C. § 181 *et seq.*, the regulations issued pursuant to the Act, 9 CFR § 201.1 *et seq.*, and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary, 7 CFR § 1.130 *et seq.* ("Rules of Practice").

The proceeding was instituted by a complaint filed on January 8, 1986, by the Administrator, Packers and Stockyards Administration. It was alleged in the complaint that the George County Stockyard, Inc., and M. H. Pitts violated the Act and the regulations in the following ways: (1) the corporate respondent, under Pitts' direction, management and control, engaged in the business of a dealer buying and selling livestock in commerce for its own account and

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

as a market agency selling livestock in commerce for the accounts of others without maintaining adequate bond coverage (7 U.S.C. §§ 204, 213(a); 9 CFR §§ 201.29, 201.30); (2) the respondent corporation, under the direction, management and control of respondent Pitts, failed to properly maintain and use its "Custodial Account for Shippers' Proceeds," thereby endangering the faithful and prompt accounting thereof, and payment of the portions thereof, due the owners and consignors of livestock (7 U.S.C. §§ 208, 213(a); 9 CFR §201.42); (3) George County Stockyards, Inc., under Mr. Pitts' direction, management and control, purchased livestock and failed to pay, when due, the full purchase prices of such livestock (7 U.S.C. §§ 213(a), 228b); and (4) respondents failed to keep accounts, records, and memoranda which fully and correctly disclose all transactions involved in their business as a market agency and dealer under the Act and, in particular, failed to keep and maintain a separate ledger showing their purchases and sales in support of the market (7 U.S.C. § 221, 9 CFR § 201.49).

On February 18, 1986, respondents filed an Answer in which they alleged that they satisfied all the Act's bonding requirements, that the complainant failed to consider the existence of $59,637.48 in certificates of deposit in concluding that they failed to properly maintain the corporate respondent's custodial account, and generally denied all of the allegations in the Complaint, except with regard to paragraph I of the Complaint, in which the complainant identified respondents and alleged all of the jurisdictional prerequisite to the bringing of an action against them under the Act, which they admitted.

At the oral hearing, held on June 18, 1986, in Mobile, Alabama, and without objection, complainant's motion to correct arithmetical errors in paragraph III of the Complaint was granted. (Tr. 8–10, 40) [1] Complainant was represented by Edward M. Silverstein, Esq., Packers and Stockyards Division, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250–1400. Respondent was represented by Gerald A. Dickerson, Esq., 202 Cox-Courthouse Square, Lucedale, Mississippi 39452. Leave was granted to the parties to file briefs, complainant on or before August 1, 1986, respondents by September 1, 1986, and complainant's reply by September 19, 1986. Such briefs have been filed and duly considered. For convenience, the pertinent statutory and regulatory provisions are set forth in Appendices A and B.

[1] Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

FINDINGS OF FACT

1. George County Stockyard, Inc., ("George County") is a Mississippi corporation with its principal place of business at Lucedale, Mississippi, whose business mailing address is P.O. Box 105, Lucedale, Mississippi 39452. (Complaint Para. I(a); Answer Para. I; CX-1; Tr. 15-18)

2. At all material times, George County was:

(a) Engaged in the business of conducting and operating the George County Stockyard, Inc., a stockyard posted under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard;

(c) Engaged in the business of buying and selling livestock in commerce for its own account; and

(d) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce. (Complaint Para. I(b); Answer Para. I; CX-1, Tr. 15-18)

3. M. H. Pitts ("Pitts") is an individual whose mailing address is P.O. Box 105, Lucedale, Mississippi 39452. (Complaint Para. I(c); Answer Para. I; CX-1, Tr. 15-18)

4. At all material times, Pitts was:

(a) President of George County;

(b) Owner of George County;

(c) Responsible for the direction, management and control of George County; and

(d) A market agency and dealer within the meaning of those terms as defined in the Act and subject to the provisions of the Act. (Complaint Para. I(d); Answer Para. I; CX-1, Tr. 15-18, 139)

5. By letter, dated July 9, 1985, the Packers and Stockyards Administration (P&S) notified George County that the $10,000.00 surety bond it maintained to secure the performance of its livestock dealer obligations under the Act was inadequate, and that it was necessary to increase such bond to $20,000.00. By letter, dated August 20, 1985, P&S notified George County it had failed to file a new bond increasing bond coverage to $20,000.00 and that punitive action would be taken if the new bond was not filed.

On November 12, 1985, P&S notified George County that the $10,000.00 surety bond it maintained to secure the performance of its livestock dealer obligations under the Act and the $60,000.00 surety bond it maintained to secure the performance of its obligations under the Act as a market agency selling livestock for the accounts of others would terminate on December 12, 1985. George County was further notified that, if it continued its livestock oper-

ations without adequate bond coverage or its equivalent, it would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, George County, under Pitts' direction, management and control, continued to engage in the business of a dealer buying and selling livestock in commerce for its own account and as a market agency selling livestock in commerce for the accounts of others, without maintaining adequate bond coverage or its equivalent as required by the Act and the regulations. This unlawful operation continued until January 10, 1986, when an acceptable bond was posted. (CX-2, 3; Tr. 18-25)

6. George County, under Pitts' direction, management and control, during the period April 30, 1985, through at least May 17, 1985, failed to properly maintain and use its "Custodial Accounts for Shippers' Proceeds," hereinafter referred to as the custodial account, thereby endangering the faithful and prompt accounting thereof, and payment of the portions thereof, due the owners and consignors of livestock in that:

(a) As of April 30, 1985, George County had outstanding checks drawn on its custodial account in the amount of $104,983.92 and had, to offset such checks, an overdraft in its custodial account in the amount of $85.06, no deposits in transit, and proceeds receivable in the amount of $89,700.59, resulting in a deficiency of $15,368.39 in funds available to pay shippers' proceeds;

(b) As of May 17, 1985, George County had outstanding checks drawn on its custodial account in the amount of $197,200.06 and had, to offset such checks, cash in its custodial account in the amount of $5,261.38, no deposits in transit and proceeds receivable in the amount of $148,021.14, resulting in a deficiency of $43,917.54 in funds available to pay shippers' proceeds;

(c) The shortages described above were caused, in part, by: (1) the deposit of funds to George County's expense account received from the sale of consigned livestock; and (2) the respondents' failure to deposit to the custodial account, within the time prescribed by the regulations, amounts equal to the proceeds receivable due from the owners, officers and employees of the market agency. (CX-7, 8, 10; Tr. 36-52, 55-61)

7. All persons who have custodial accounts under the Act, and the banks handling such accounts, within the Memphis, Tennessee, Region of the Packers and Stockyards Administration (the States of Tennessee, Mississippi, Louisiana and Arkansas) were made aware of the requirements of the Department with regard to the handling of the funds in such accounts. The custodial account is a trust account for the consignors of livestock. The auction markets are

trustees of these accounts and their obligation is to promptly reimburse the account to provide funds for payment of livestock. All monies collected from the buyers of livestock should be placed directly into this account. It is a conduit through which the buyer of livestock pays the seller. To be considered part of the custodial account, securities must be dedicated to, and in the name of, the custodial account. In such status, funds are protected for each consignor and each is insured by the Federal Deposit Insurance Corporation. Whereas assignment of securities to the custodial account does not protect the consignor since such are subject to attachment. (CX-13; Tr. 42-43, 106, 114-117, 127)

8. George County, under Pitts' direction, management and control, in connection with their operations as a dealer, on or about the dates and in the transactions specified below and in various other transactions, purchased livestock and failed to pay, when due, the full purchase price of such livestock: (CX-6, 11; Tr. 34-36, 61-64)

DATE OF PURCHASE	NAME OF SELLER	AMOUNT	HEAD
3/06/85	Poplarville Stockyards, Inc.	$1,482.75	7
3/03/85	Poplarville Stockyards, Inc.	4,095.69	65
3/18/85	Robertsdale Livestock Auction, Inc.	6,201.90	32
3/20/85	Poplarville Stockyards, Inc.	2,092.35	9
3/25/85	Robertsdale Livestock Auction, Inc.	24,075.65	92
4/08/85	Robertsdale Livestock Auction, Inc.	35,044.23	129
4/16/85	Poplarville Stockyards, Inc.	7,654.53	27
4/27/85	Poplarville Stockyards, Inc.	$22,565.14	100

9. Respondent failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions involved in their business as a market agency and dealer under the Act in that respondents failed to keep and maintain a separate ledger showing their purchases and sales in support of the market. Additionally, respondent failed to keep and maintain complete scale tickets in that (1) scale tickets were not used in numerical sequence; (2) voided scale tickets and those used to balance the scale were discarded; and (3) scale tickets did not show the name or initial of the weighmaster or show the date of the weighing. (CX-12; Tr. 38, 64-68, 76)

10. The improper handling of, and misuse of, funds in a custodial account, shortages in custodial accounts, and failure to pay for pur-

chases of livestock when due, are considered serious violations of the Act. (Tr. 119–120)

11. The payment of a civil penalty in the amount of $4,000 by respondents would not cause them to cease operating. (Tr. 120–121)

12. There are several other markets within the geographical area served by respondents available to farmers and ranchers for sale of livestock. (Tr. 121, 129–132)

DISCUSSION AND CONCLUSIONS

Failure to Maintain Proper Bond

The Act and the regulations issued pursuant to it require market agencies, packers and dealers to maintain a reasonable bond to secure the performance of their livestock obligations (7 U.S.C. § 204; 9 CFR §§ 201.19, 201.30). The bonding provisions were added as a special protection against future losses to the livestock producer (see H. Rep. No. 94-1043, 94th Cong., 2d Sess., p. 5; Sen. Rep. No. 94-932, 94th Cong., 2d Sess., pp. 5–6). Thus, such bonding provisions are considered vital to the effective enforcement of the Packers and Stockyards Act and for the protection of livestock producers.

The record is clear that respondents were notified by P&S letters commencing on July 9, 1985, and again on August 20, 1985, that it would be necessary to increase bond requirements. The latter letter also noted a warning of suspension of registration under the Act if the increased bond requirement was not filed. Additionally, respondents were notified by P&S letter of November 12, 1985, that its surety bond with the Aetna Casualty and Surety Company would terminate on December 12, 1985, and that operation without filing an adequate bond would be in violation of the Act and the regulations. Such notices were admitted to have been received by respondents. However, an acceptable bond was not filed until January 10, 1986. Thus, from the date of receipt of the July 9, 1985, P&S letter until an acceptable bond was filed on January 10, 1986, George County, under the direction, management and control of respondent Pitts, continued to operate as a dealer buying and selling livestock in commerce for its own account and as a market agency selling livestock in commerce for the accounts of others, without maintaining adequate bond coverage.

Such is a willful violation of the Act (7 U.S.C. § 204) and the regulations (9 CFR §§ 201.19, 201.30) issued pursuant to it. *In re Donald Hageman*, 43 A.D. 531 (1983); *In re Molnar Packing Company*, 41 A.D. 935 (1982); *In re C. J. Edzards*, 37 A.D. 1880 (1978). The circumstances portraying respondents' efforts to obtain adequate bonding do not mitigate this violation.

Failure to Properly Maintain and Use Custodial Account

It has long and consistently been held by the Secretary, and the courts, that the improper handling and use of the shippers' proceeds violate the integrity of the Custodial Account for Shippers' Proceeds and the regulations promulgated to preserve it. Improper handling and use of the custodial account is plainly contrary to the Act and the regulations. *In re Farmers and Ranchers Livestock Auction, Inc.*, 45 A.D. ___ (February 1986); *In re Arab Stock Yard, Inc.*, 37 A.D. 293 (1978) aff'd, 582 F.2d 39 (5th Cir. 1978); *W. I. Bowman* v. *U.S. Department of Agriculture*, 363 F.2d 81 (5th Cir. 1966). Further, in *In re Harry C. Daniels d/b/a Harry C. Daniels and Co.* v. *United States*, 242 F.2d 39, 41-42 (7th Cir., 1957), *cert. denied*, 354 U.S. 939, the court held:

> "The argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required" (citations omitted).

Although respondents were previously warned by P&S letter of February 25, 1977, of abuse of the custodial account, and advised in P&S letter of January 16, 1985, of the required method of designating the custodial account as a trust account, respondents continued to misuse this account and failed to properly designate it as a trust account. As noted from the record, receipts from sales of consignor's livestock were placed in respondents' expense account, and on two occasions the custodial account was deficient. Further, that these certificates of deposit (CD's) were only assigned to the custodial account as pledged securities, and not titled in the name of the account as required. Additional evidence of record shows that the CD's were not considered by the bank to be part of George County's custodial account. As was previously pointed out, the custodial account is a trust account which is a conduit for funds received for sale of consignor's livestock. When properly designated as required, such funds are protected from attachment by creditors and each consignor is further protected by the insurance coverage of the Federal Deposit Insurance Corporation. It was therefore correct not to include the amount of the CD's in the computation of deficiencies in the custodial account.

Under these circumstances it must be found that respondents violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations (9 CFR § 201.42). See *In re Sechrist Sales Company*, 36 A.D. 665 (1977); *In re L. S. Hansen*, 38 A.D. 223 (1979).

Failure to Pay When Due

Unrebutted evidence from records of respondents clearly show that under the direction and control of respondent Pitts, George County made livestock purchases and failed to pay, when due, the full purchase price for such livestock.

Failure to pay, when due, the full purchase price of livestock is a serious violation of the Act and constitutes an unfair and deceptive practice in willful violation of sections 312(a) and 419 of the Act (7 U.S.C. 213(a), 228b). *In re Farmers and Ranchers Livestock Auction, Inc., supra; In re Donald Hageman, supra; In re W. I. Bowman, supra; In re Mid-States Livestock, Inc.*, 37 A.D. 547 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978).

Failure to Properly Keep and Maintain Accounts, Banks and Records

As noted, the Act requires respondents to create, keep and maintain records sufficient to disclose all the details of the business (7 U.S.C. § 221). Complete and accurate records are essential to effective enforcement of the regulatory program. *In re Trenton Livestock, Inc.*, 41 A.D. 1965 (1982); *In re Livestock Marketing Development Co.*, 33 A.D. 784 (1974). The record is clear that respondents failed to keep and maintain a separate ledger showing their purchases and sales in support of the market. Such a ledger is required to be maintained by the Act to show all purchases by the company itself to support the purchase or selling price of livestock. Such record ledger was not maintained. Thus, section 401 of the Act, 7 U.S.C. § 221, has been violated.

As the Act and the regulations reflect, respondents are required to create, keep and maintain scale tickets for livestock transactions (7 U.S.C. § 221; 9 CFR §§ 201.49, 201.55). Respondents' scale tickets were not issued in numerical order, voided scale tickets and those used to balance the scale were discarded, the date of weighing and the name or initials of the weighmaster were not shown. Scale tickets are a basic and important record of livestock transactions and, standing alone failure to keep and maintain such record constitutes a serious violation of the Act. *In re Saylor*, 44 A.D. ___ (September 20, 1985); *In re Elmer A. Kath*, 36 A.D. 1707 (1977).

Sanction

The Secretary has long urged a policy to impose severe sanctions where serious violations, as shown here, have been found even when a significant suspension period may have an adverse economic effect on the violator's customers. *In re Saylor, supra; In re Espo-*

sito, 38 A.D. 613, 624–625 (1977); *In re Worsley,* 33 A.D. 1547, 1556–1571 (1974).

Complainant here seeks a twenty-eight (28) day suspension of George County's registration, a twenty-eight (28) day prohibition forbidding respondent Pitts from operating or otherwise engaging in business subject to the Act, and a civil penalty of $4,000 against respondents, jointly and severally. Both the suspensions and civil penalty are consistent with the statutory criteria for imposing civil penalties, 7 U.S.C. § 213(b), and with the Secretary's sanction policies to effectuate the purposes of the regulatory program.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend on appeal that the ALJ's findings and conclusions are not adequately supported by the record, but the record abundantly supports the ALJ's findings and conclusions. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required.[2] Respondent's argument on appeal, in this respect, merely reargues matters that were fully considered and correctly decided by the ALJ.

Custodial account violations have long been recognized as serious violations of the Packers and Stockyards Act. In addition to the cases cited by the ALJ, see *Roseth* v. *Bergland,* 636 F.2d 1224 (8th Cir. 1980); *Miller* v. *Butz,* 498 F.2d 1088, 1089 (5th Cir. 1974); *Hyatt and Ward* v. *United States,* 276 F.2d 308, 310–13 (10th Cir. 1960); *United States* v. *Donahue Bros., Inc.,* 59 F.2d 1019, 1020–23 (8th Cir. 1932). Similarly, failing to maintain the proper bond or bond equivalent and failing to pay, when due, the full purchase price of livestock have long been recognized as serious violations of the Act.

The serious nature of recordkeeping violations was stated in *In re Saylor,* 44 Agric. Dec. 2238 (Sept. 20, 1985) (decision on remand), quoting from *In re Sol Salins, Inc.,* 37 Agric. Dec. 1699, 1734 (1978), as follows:

> Respondent's recordkeeping violations, which are intertwined with respondent's accounting violations, are also serious violations of the Act inasmuch as accurate records are essential to effective enforcement of a Federal regulatory program. See, *e.g., United States* v. *Ruzicka,* 329 U.S. 287, 288–289; *United States* v. *Darby,* 312 U.S. 100, 124–125;

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[2] *See Herman & MacLean* v. *Huddleston,* 459 U.S. 375, 387–92 (1983); *Steadman* v. *SEC,* 450 U.S. 91, 92–104 (1981); *In re Rowland,* 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd,* 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.,* 37 Agric. Dec. 1336, 1346 (1978), *aff'd,* No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.,* 614 F.2d 770 (3d Cir. 1980).

Electric Bond Co. v. *Comm'n.*, 303 U.S. 419, 439; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U.S. 194, 204-216; *Baltimore & Ohio RR.* v. *Interstate Com.*, 221 U.S. 612, 620-623; *Hyatt* v. *United States*, 276 F.2d 308, 312 (C.A. 10); *Panno* v. *United States*, 203 F.2d 504, 510 (C.A. 9); *United States* v. *Turner Dairy Co.*, 166 F.2d 1 (C.A. 7), certiorari denied, 335 U.S. 813; *United States* v. *Turner Dairy Co.*, 162 F.2d 425, 425-428 (C.A. 7), certiorari denied, 332 U.S. 836; *Bartlett Frazier Co.* v. *Hyde*, 65 F.2d 350 (C.A. 7), certiorari denied, 290 U.S. 654; *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1529 (1977).

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Saylor*, 44 Agric. Dec. 2238, slip op. at 498-520 (Sept. 20, 1985) (decision on remand),[3] which is set forth as Appendix C to this decision.[4]

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[3] The Department's severe sanction policy did not originate with *Saylor*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[4] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; (1977) *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpub-

Continued

Respondents contend that any violations of the Act were not intentional, but as stated by the Court in *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 186–87 (1973), with respect to the Packers and Stockyards Act:

> The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent.

The $4,000 civil penalty and 28-day suspension imposed here is not nearly as severe as numerous sanctions that have been issued in recent years under the Packers and Stockyards Act, *e.g.*, *In re Welch*, 45 Agric. Dec. ___ (Sept. 25, 1986) (decision as to Benson) ($10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act); *In re Garver*, 45 Agric. Dec. ___ (June 19, 1986), *appeal docketed*, No. 86-4081 (6th Cir. ___, 1986) (2-year suspension); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ___ (May 8, 1986) ($50,000 civil penalty), *appeal docketed*, No. 86-7332 (9th Cir. June 6, 1986); *In re Corn State Meat Co.*, 45 Agric. Dec. ___ (May 8, 1986) ($50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. ___ (Mar. 7, 1986) (6-month suspension), *appeal docketed*, No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. ___ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985) (decision on remand) (8-month suspension and $10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. ___ (Mar. 18, 1985); *final consent decision*, 44 Agric. Dec. ___ (Oct. 24, 1985) ($10,000 civil penalty); *In re Mid-West Veal Distributors*, 43 Agric. Dec. ___ (July 13, 1984) ($77,000 civil penalty, with $27,000 suspended); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. ___ (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985) ($20,000 civil penalty).

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lished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

In *In re Garver, supra*, 45 Agric. Dec. ____ , slip op. at 17-21 (June 19, 1986), it is explained that 2-to-5 year suspension orders are now issued in the case of serious failures to pay for livestock where 30-to-60 day suspension orders would have been issued in comparable cases a few years ago.

In assessing a civil penalty, the Act requires consideration of the "gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). Those factors were fully considered by the ALJ.

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

George County Stockyard, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and M. H. Pitts, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act without filing and maintaining a reasonable bond or its equivalent as required by the Act and the regulations;

2. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

3. Using funds received as proceeds receivable from the sale of consigned livestock for purposes of their own or for any purpose other than the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondents as compensation for services rendered or for other lawful marketing charges;

4. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;

5. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42); and

6. Failing to pay, when due, the full purchase price of livestock.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers

and Stockyards Act, including a separate ledger showing their purchases and sales in support of the market and scale tickets which are kept in strict conformity with the provisions of section 201.49 of the regulations (9 CFR § 201.49). Scale tickets shall be used in numerical order and show the date of the weighing and the name or initials of the weighmaster.

George County Stockyard, Inc., is suspended as a registrant under the Act for 28 days and thereafter until (1) it demonstrates that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated and (2) until such time as it complies fully with the bonding requirements under the Act and regulations. When the corporate respondent demonstrates the deficit in its custodial account has been eliminated, and that it is in compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 28-day period.

M. H. Pitts is prohibited for 28 days from engaging in business or operating subject to the Act as a market agency, buying or selling livestock in commerce on a commission basis, or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either for his own account or as the employee or agent of the vendor or purchaser.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), the respondents are jointly and severally assessed a civil penalty in the amount of $4,000. The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on respondents.

The cease and desist and recordkeeping provisions of this order shall become effective on the day after service of this order. The 28-day suspension and prohibition provisions shall become effective on the 30th day after service of this order.

APPENDIX A

Pertinent Statutory Provisions

1. § 307 (7 U.S.C. § 208)

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, reasonable, or discrimi-

natory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer from rendering service on other markets or in occasional and incidental off-market transactions.

2. § 312(a) (7 U.S.C. § 213(a))

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.

3. § 401 (7 U.S.C. § 221)

Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

4. § 409 (7 U.S.C. § 228(b))

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer

of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the fully amount of the purchase price; or, in the case of a purchase on a carcass or 'grade and yield' basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a). Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an 'unfair practice' in violation of this Act. Nothing in this section shall be deemed to limit the meaning of the term 'unfair practice' as used in this Act.

APPENDIX B

Pertinent Regulations

§ 201.29 Market agencies, packers and dealers required to file and maintain bonds.

(a) Every market agency, packer, and dealer, except as provided in paragraph (d) herein, and except packer buyers registered as dealers to purchase livestock for slaughter only, shall execute and maintain a reasonable bond on forms approved by the Administrator containing the appropriate condition clauses, as set forth in § 201.31 of the regulations, applicable to the activity or activities in

which the person or persons propose to engage, to secure the performance of obligations incurred by such market agency, packer, or dealer. No market agency, packer, or dealer required to maintain a bond shall conduct his operations unless there is on file and in effect a bond complying with the regulations in this part.

(b) Every market agency buying on a commission basis and every dealer buying for his own account or for accounts of others shall file and maintain a bond. If a registrant operates as both a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed. Any person operating as a market agency selling on a commission basis and as a market agency buying on a commission basis or as a dealer shall file and maintain separate bonds to cover his selling and buying operations.

(c) Each market agency and dealer whose buying operations are cleared by another market agency shall be named as clearee in the bond filed and maintained by the market agency registered to provide clearing services. Each market agency selling livestock on a commission basis shall file and maintain its own bond.

(d) Every packer purchasing livestock, directly or through an affiliate or employee or a wholly-owned subsidiary, except those packers whose annual purchases do not exceed $500,000, shall file and maintain a reasonable bond. In the event a packer maintains a wholly-owned subsidiary or affiliate to conduct its livestock buying, the wholly-owned subsidiary or affiliate shall be registered as a packer buyer for its parent packer firm, and required bond shall be maintained by the parent packer firm.

§ 201.30 Amount of market agency, dealer and packer bonds.

(a) *Market agency selling livestock on commission.* To compute the required amount of bond coverage, divide the dollar value of livestock sold during the preceding business year, or the substantial part of that business year, in which the market agency did business, by the actual number of days on which livestock was sold. The divisor (the number of days on which livestock was sold) shall not exceed 130. The amount of bond coverage must be the next multiple of $5,000 above the amount so determined. When the computation exceeds $50,000, the amount of bond coverage need not exceed $50,000, plus 10 percent of the excess over $50,000, raised to the next $5,000 multiple. In no case shall the amount of bond coverage for a market agency selling on commission be less than $10,000 or such higher amount as required to comply with any State law.

(b) *Market agency buying on commission or dealer.* The amount of bond coverage must be based on the average amount of livestock purchased by the dealer or market agency during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased during the preceding business year, or substantial part of that business year, in which the dealer or market agency or both did business, by one-half the number of days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of the bond coverage must be the next multiple of $5,000 above the amount so determined. When the computation exceeds $75,000, the amount of bond coverage need not exceed $75,000 plus 10 percent of the excess over $75,000, raised to the next $5,000 multiple. In no case shall the amount of bond coverage be less than $10,000 or such higher amount as required to comply with any State law.

(c) *Market agency acting as clearing agency.* The amount of bond coverage must be based on the average amount of livestock purchased by all persons for whom the marekt agency served as a clearor during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased by all persons for whom the market agency served as a clearor during the preceding business year, or substantial part of that business year, in which the market agency acting as clearing agency did business, by one-half the number of days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of bond coverage must be the next multiple of $5,000 above the amount so determined. When the computation exceeds $75,000, the amount of bond coverage need not exceed $75,000 plus 10 percent of the excess over $75,000, raised to the next $5,000 multiple. In no case shall the amount of bond coverage be less than $10,000 or such higher amount as required to comply with any State law.

(d) *Packer.* The amount of bond coverage must be based on the average amount of livestock purchased by the packer during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased during the preceding business year, or substantial part of that business year, in which the packer did business, by one-half the number of days on which business was conducted. The number

of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of the bond coverage must be the next multiple of $5,000 above the amount so determined. In no case shall the amount of bond coveraage for a packer be less than $10,000.

(e) If a person applying for registration as a market agency or dealer has been engaged in the business of handling livestock before the date of the application, the value of the livestock handled, if representative of future operations, must be used in computing the required amount of bond coverage. If the applicant for registration is a successor in business to a registrant formerly subject to these regulations, the amount of bond coverage of the applicant must be at least that amount required of the prior registrant, unless otherwise determined by the Administrator. If a packer becomes subject to those regulations, the value of livestock purchased, if representative of future operations, must be used in computing the required amount of bond coverage. If a packer is a successor in business to a packer formerly subject to these regulations, the amount of bond coverage of the successor must be at least that amount required of the prior packer, unless otherwise determined by the Administrator.

(f) Whenever the Administrator has reason to believe that a bond is inadequate to secure the performance of the obligations of the market agency, dealer or packer covered thereby, the Administrator shall notify such person to adjust the bond to meet the requirements the Administrator determines to be reasonable.

§ 201.42 Custodial accounts for trust funds.

(a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.

(b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission or agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that

have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

(d) *Withdrawals from custodial accounts.* The custodial account for shippers' proceeds shall be drawn on only for payment of (1) the net proceeds to the consignor or shipper, or to any person that the market agency knows is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the market agency shall, in its capacity as agent, be required to pay, and (3) to obtain any sums due the market agency as compensation for its services.

(e) *Accounts and records.* Each market agency shall keep such accounts and records as will disclose at all times the handling of funds in such custodial accounts for shippers' proceeds. Accounts and records must at all times disclose the name of the consignors and the amount due and payable to each from funds in the custodial account for shippers' proceeds.

(f) *Insured banks.* Such custodial accounts for shippers' proceeds must be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers' proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to its consignors. The savings account must be properly designated as a part of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

§ 201.49 Requirements regarding scale tickets evidencing weighing of livestock and live poultry.

(a) *Livestock.* When livestock is weighed for the purpose of purchase or sale, a scale ticket shall be issued which shall show: (1) The name and location of the agency performing the weighing service; (2) the date of the weighing; (3) the name of the buyer and seller or consignor, or a designation by which they may be readily identified; (4) the number of head; (5) kind; (6) actual weight of each draft of livestock; and (7) the name, initials, or number of the person who weighed the livestock, or if required by State law, the signature of the weigher. Scale tickets issued under this section shall be serially numbered and used in numerical sequence. Sufficient copies shall be executed to provide a copy to all parties to the transaction. In instances where the weight values are automatically recorded directly on the account of purchase, account of sale or other basic record, this record may serve in lieu of a scale ticket. When livestock is purchased on a carcass weight or carcass grade and weight basis, the hot carcass weights shall be accurately recorded, either manually or automatically, and retained as part of the person or firm's business records to substantiate settlement on each transaction.

(b) *Poultry.* When live poultry is weighed for the purpose of purchase, sale, acquisition, or settlement by a packer or live poultry dealer or handler, a scale ticket shall be issued which shall show: (1) The name of the agency performing the weighing service; (2) the name of the packer or live poultry dealer or handler; (3) the name and address of the grower, purchaser, or seller; (4) the name or initials of the person who weighed the poultry, (5) the location of the scale; (6) the gross weight, tare weight, and net weight; (7) the date and time gross weight and tare weight are determined; (8) the number of poultry weighed; (9) the weather conditions; (10) whether the driver was on or off the truck at the time of weighing; and (11) the license number of the truck or the truck number; *Provided,* That when live poultry is weighed on a scale other than a vehicle scale, the scale ticket need not show the information specified in (9), (10), and (11) of this paragraph. Scale tickets issued under this paragraph shall be at least in duplicate form and shall be serially numbered and used in numerical sequence. One copy shall be furnished to the grower, purchaser, or seller, and one copy shall be furnished to or retained by the packer or live poultry dealer or handler.

APPENDIX C

Excerpt from *In re Saylor*, 44 Agric. Dec. 2238, slip op. at 498–520 (Sept. 20, 1985) (decision on remand).

U.S.D.A SANCTION POLICY

[Excerpt omitted.—Ed.]

In re: JIMMY D. BRUNNING. P&S Docket No. 6769. Decided December 15, 1986.

Dealer and Market Agency—Failure to pay when due—Failure to maintain adequate bond—Failure to keep and maintain proper accounts, records and memorandum—Consent.

Respondent consented to the issuance of the decision in which they were ordered to cease and desist from engaging in business without filing and maintaining adequate bond; engaging in business while current liabilities exceed current assets; and failing to pay for purchases when due.

Sharlene Lassiter, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture alleging that the respondent's financial condition does not meet the requirement of the Act and that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jimmy D. Bruning, hereinafter referred to as the respondent, is an individual whose mailing address is Route 2, Superior, Nebraska 68978.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jimmy Bruning, his successors and assigns, agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;

2. Engaging in business subject to the Act while his current liabilities exceed his current assets; and

3. Failing to pay, when due, the full purchase price of livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Act, including but not limited to (1) periodic bank account reconciliations; (2) a general ledger; (3) buyers invoices; (4) bank statements; (5) deposit tickets; and (6) accounts of sale.

Respondent Jimmy Bruning is suspended as a registrant under the Act for a period of sixty (60) days and thereafter until such time as he is in full compliance with the bonding requirements under the Act and the regulations and demonstrates that he is no longer insolvent. When respondent demonstrates that he is in full compliance with such bonding requirements and that he is solvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the sixty (60) day period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: COURTWRIGHT CATTLE CO., INC. and J.C. COURTWRIGHT. P&S Docket No. 6774. Decided December 16, 1986.

Market Agency—Engaging in business while current liabilities exceed current assets—Failure to pay when due—Consent.
Respondent consented to the issuance of this decision in which they were ordered to cease and desist from engaging in business while current liabilities exceed current assets; issuing checks for payment without maintaining sufficient funds; and failing to pay for purchases when due.

Ben E. Bruner, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Courtright Cattle Co., Inc., hereinafter referred to as the corporate respondent, is a corporation with its principal place of business located in Warden, Washington. The corporate respondent's business mailing address is P. O. Box 398, Road #6 S.E., Warden, Washington 98857.

2. The corporate respondent, at all times material herein, was:

(a) Engaged in the business of a market agency, buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to purchase livestock in commerce on a commission basis.

3. J. C. Courtright, hereinafter referred to as respondent Courtright, is an individual whose business mailing address is P. O. Box 398, Road #6 S.E., Warden, Washington 98857.

4. Respondent Courtright, at all times material herein, was:

(a) President of the corporate respondent; and

(b) Responsible for the direction, management and control of corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent, its officers, agents, employees, successors and assigns, and respondent Courtright, his agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business subject to the Act while their current liabilities exceed their current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

3. Failing to pay, when due, for livestock purchases; and

4. Failing to pay for livestock purchases.

The respondents are suspended as registrants under the Act for a period of five years and thereafter until their current liabilities no longer exceed their current assets, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension and prohibition at any time after the expiration of 90 days upon demonstration that all unpaid livestock sellers have been paid in full, and that their current liabilities no longer exceed their current assets, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to provide the salaried employment of respondent Courtright by another registrant after the expiration of the 90 day period of suspension.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: POPLARVILLE STOCKYARDS, INC., THURMAN GUILOTT, JOE MACK SMITH, and TOMMY BOND. P&S Docket No. 6585. Decided December 18, 1986.

Market Agency—Failure to deposit in and maintain a Custodial Account for Shippers' Proceeds—Consent.

Respondent, Poplarville Stockyards, Inc., consented to the issuance of this decision in which they were ordered to cease and desist from failing to deposit in and maintain a Custodial Account of Shippers' Proceeds; permitting auction employees to purchase consigned livestock for their own accounts; selling consigned livestock to persons with whom the respondents have an ownership or financial interest; and issuing scale tickets without completing necessary information.

Thomas Heinz, for complainant.
James K. Dukes, Hattiesburg, Mississippi, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO POPLARVILLE STOCKYARDS, INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. Section 181, et seq.) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that respondents willfully violated the Act and the regulations issued thereunder (9 CFR Section 201.1 et seq.). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR Section 1.138).

Respondent Poplarville Stockyards, Inc., admits the jurisdictional allegations in paragraph I of the complaint as they pertain to it and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Poplarville Stockyards, Inc., hereinafter "respondent Poplarville," is a corporation with a mailing address at P.O. Box 306, Poplarville, Mississippi 39470.

(b) Respondent Poplarville is, and at all times material herein was:

(1) Engaged in the business of selling livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

CONCLUSIONS

Respondent Poplarville Stockyards, Inc., having admitted the jurisdictional facts and the complainant having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Poplarville, it successors, officers, directors, agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in any "Custodial Account for Shippers' Proceeds" within the time prescribed by Section 201.42 of the regulations (9 CFR Section 201.42) an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to maintain any "Custodial Account for Shippers' Proceeds" in conformity with the provisions of Section 201.42 of the regulations (9 CFR Section 201.42);

3. Permitting auctioneers, weighmasters and other employees of the livestock auction market engaged in the actual conduct of auction sales to purchase consigned livestock for their own accounts for speculative resale or for the accounts of others;

4. Selling consigned livestock to any owner, officer, agent, employee, or any person in whose business respondent Poplarville, its owners, officers, agents, or employees have an ownership or financial interest without disclosing the name of the buyer and the nature of the business relationship existing between respondent Poplarville and the buyer;

5. Issuing scale tickets for livestock sold on a weight basis which do not contain all the information prescribed by Section 201.49 of the regulations (9 CFR Section 201.49); and

6. Employing Joe Mack Smith in any capacity for a period of twenty-eight (28) days.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

In re: FORT SCOTT SALE COMPANY, INC., ROBERT E. WALROD and LEONA P. WALROD. P&S Docket No. 6630. Decided December 19, 1986.

Dealer and Market Agency—Engaging in business while insolvent—Failure to deposit in and maintain a Custodial Account for Shippers' Proceeds—Consent. Respondents consented to the issuance of this decision in which they were ordered to cease and desist from engaging in business while insolvent and failing to deposit in and maintain a Custodial Account for Shippers' Proceeds.

Roberta Swartzendruber, for complainant.
Daniel W. Olsen, Kansas City, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent does not meet the requirements of the Act (7 U.S.C § 204), and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Fort Scott Sale Company, Inc., hereinafter referred to as the corporate respondent, is a Kansas corporation. The corporate respondent's principal place of business is located at Fort Scott, Kansas, and its mailing address is Box 829, Fort Scott, Kansas 66701.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Fort Scott Sale Company, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Robert E. Walrod and Leona P. Walrod, hereinafter referred to as the individual respondents, are individuals whose mailing address is Box 829, Fort Scott, Kansas 66701.

4. The individual respondents are, and at all times material herein were:

(a) President and Vice-President, and Secretary and Treasurer, respectively, of the corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent; and

(c) A market agency within the meaning of that term as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent Fort Scott Sale Company, Inc., its officers, directors, agents, employees, successors and assigns, and individual respondents Robert E. Walrod and Leona P. Walrod, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while insolvent, *i.e.*, while current liabilities exceed current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the specific times prescribed in section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock whether or not such proceeds have been collected by respondents;

3. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42).

Corporate respondent Fort Scott Sale Company, Inc., is suspended as a registrant under the Act for a period of twenty-eight (28) days and thereafter until it demonstrates that it is no longer insolvent and that the shortage in its Custodial Account for Shippers' Proceeds has been eliminated. When corporate respondent demonstrates that it is no longer insolvent and that the shortage in its Custodial Account for Shippers' Proceeds has been eliminated, a

supplemental order will be issued in this proceeding terminating the suspension after the expiration of the twenty-eight (28) day period.

Registrant Miami County Sale Company, Inc., at Paola, Kansas, which is owned, directed and controlled by individual respondent Robert E. Walrod, is suspended as a registrant under the Act for a period of twenty-eight (28) days.

Respondents Robert E. Walrod and Leona P. Walrod are prohibited for a period of twenty-eight (28) days from engaging in business or operating subject to the Act as a dealer and/or a market agency selling livestock on a commission basis.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents, provided, however, that the twenty-eight day suspension period herein stated shall commence on January 15, 1987.

Copies of this decision shall be served upon the parties.

In re: CEDAR CREEK LIVESTOCK CO., INC., and HOLLAN A. WILSON, JR. P&S Docket No. 6718. Decided November 4, 1986.

Issuing checks without sufficient funds—Failing to pay when due—Suspended as registrant.

Respondents were ordered to cease and desist from issuing checks for payment without having or maintaining sufficient funds; failing to pay for purchases when due; and failing to pay for livestock purchases. Respondents were further suspended as registrants under the Act for a period of five (5) years.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Cedar Creek Livestock Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Georgia. Respondent's business mailing address is Route 1, Ware Road, Abbeville, Georgia 31071.

(b) The corporate respondent at all times material herein was:

(1) Engaged in the business of a market agency, buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to purchase livestock in commerce on a commission basis.

(c) Hollan A. Wilson, Jr., hereinafter referred to as respondent Wilson, is an individual whose business mailing address is Route 1, Ware Road, Abbeville, Georgia 31071.

(d) Respondent Wilson, at all times material herein, was:

(1) President of the corporate respondent; and

(2) Responsible for the direction, management and control of the corporate respondent.

2. (a) The corporate respondent, under the direction, management and control of the individual respondent, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the respondents did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks.

(b) The corporate respondent, under the direction, management and control of respondent Wilson, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph (a) above, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of May 30, 1986, there remained unpaid a total of approximately $9,430.84 for the livestock purchases set forth in paragraph II of the complaint.

CONCLUSIONS

By reason of the facts found in paragraph II herein, respondents have wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Cedar Creek Livestock Co., Inc., its officers, directors, agents and employees, and respondent Hollan A. Wilson, Jr., directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

The corporate respondent is suspended as a registrant under the Act for a period of five years, and the individual respondent is prohibited from operating subject to the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension and prohibition at any time after the expiration of 60 days upon demonstration that all unpaid livestock sellers have been paid in full; and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit the salaried employment of respondent Wilson by another registrant after the expiration of the 60 day period of suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final December 12, 1986 for respondent Hollan A. Wilson, Jr., and it became final December 22, 1986 for respondent Cedar Creek Livestock Co., Inc.—Ed.]

In re: VALDA, INC., and G.L. CHERRY. P&S Docket No. 6703. Decided December 31, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision in which they were assessed a civil penalty of $10,000 ($8,500 of which shall be held in abeyance for a period of five years) and ordered to cease and desist from issuing checks without having and maintaining sufficient funds, and failing to pay for purchases when due.

Peter Train, for complainant.
Leonard B. Gordon, Philadelphia, Pennsylvania, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraphs I and II of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this order.

FINDINGS OF FACT

1. Valda, Inc., doing business as Catelli Meat Packers, hereinafter referred to as the corporate respondent, is a corporation whose business address is 48 Almshouse Road, Richboro, Pennsylvania 18954.

2. The corporate respondent at all times material herein was:

a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

b) A packer within the meaning of and subject to the provisions of the Act.

3. G. L. Cherry, hereinafter referred to as the individual respondent, is an individual whose business address is 48 Almshouse Road, Richboro, Pennsylvania 18954.

4. The individual respondent at all times material herein was:

a) President and General Manager of the corporate respondent; and

b) Responsible for the direction, management and control of the corporate respondent.

5. Mrs. G. L. Cherry, wife of the individual respondent, owns all the corporate stock issued by the corporate respondent, but is not active in the operations of the firm.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and the individual respondent, individually or as an officer, director, agent or employee of the corporate respondent or its successors, in connection with their operations as a packer subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock;

3. Failing to pay for livestock;

4. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock;

5. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases; and

6. Failing to issue accountings to sellers of livestock on carcass grade, carcass weight, or carcass grade and weight basis which fully and completely disclose the number, weight and price of the carcasses of each grade (identifying the grade) and of any ungraded carcass and any other information affecting final accounting.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Valda, Inc., and G. L. Cherry are jointly and severally assessed a civil penalty in the amount of ten thousand dollars ($10,000.00), of which $8,500.00 shall be held in abeyance for a period of 5 years provided, however, that if respondents violate this order in any manner within this period, the full amount of this civil penalty shall immediately become due and payable. It is spe-

cifically acknowledged that such penalty is not intended to constitute an agreed settlement for such future violations, should they occur, and is in addition to whatever penalties and sanctions any future violations would warrant. If respondents do not violate this order for a five year period, the remaining $8,500.00 segment of the penalty shall be abated and shall no longer be due and payable.

This order shall have the same force and effect as if entered after the full hearing and shall be effective on the first day after service upon respondents.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: RICHARD N. GARVER. P&S Docket No. 6449. Decided November 3, 1986.

Peter Train, for complainant.
Thomas R. Smith, Cincinnati, Ohio, for respondent.

Decision by Donald A. Cambell, Judicial Officer.

STAY ORDER

The attorney for respondent has requested a stay of the order issued herein pending appeal to the United States Court of Appeals for the Sixth Circuit. The suspension order issued herein is hereby stayed pending the outcome of the appeal. The cease and desist provisions of the order shall remain in effect.

In re: SUE VIRTUE. P&S Docket No. 6701. Decided November 7, 1986.

Peter Train, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 16, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until she complies fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 16, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: WILLIAM and ARLENE MACKERRACHER. P&S Docket No. 6712. Decided November 13, 1986.

Andrew Stanton, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On August 4, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended respondents as registrants under the Act until such time as they complied fully with the bonding requirements under the Act and the regulations.

Respondents are now in full compliance with the bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued August 4, 1986, is terminated. The order shall remain in full force and effect in all other respects.

REPARATIONS DECISIONS

RAYMOND C. ANDREWS, M.D. *v.* ARTHUR L. MARTELLA. P&S Docket No. 6429. Decided November 10, 1986.

Complainant, *pro se.*
Robert Dowd, Hanford, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.) begun by a complaint received on March 30, 1984, alleging in substance market agency failure to obtain fair market value when selling consigned livestock. The amount claimed was $46,290.00.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent on August 6, 1984. A copy of the investigation report was served on complainant on the same day. An answer and request for oral hearing was received from respondent on September 27 after an extension of time. A copy thereof was served on complainant on October 12.

An oral hearing as requested was held on January 29 and 31, and February 1, 1985, in Visalia, California, before John J. Casey of the Office of the General Counsel of this Department. Complainant was accompanied and assisted by Mr. Peter Ventura, Bakersfield, a member of the Bar, who, however, did not enter appearance as counsel. Respondent was represented by Robert M. Dowd, Esq., Hanford. Complainant, respondent, and three witnesses testified. One exhibit was received. Briefs were filed by both sides.

The case involves a series of transactions in which a total of 108 Holstein heifers of complainant, a few fresh, having just calved, the rest springers, about to calve, were consigned to respondent, and sold by respondent, as follows:

Date 1984	Consigned	Sold	Balance
1/20	28		28
2/22		22	06
2/26	16		22
2/27	03		25
2/28	05		30
2/28	01		31
2/29		19	12
3/05	01		13

Date 1984	Consigned	Sold	Balance
3/07		12	01
3/09	50		51
3/10	03		54
3/14	01		55
3/14		46	09
3/21		05	04
3/28		04	00

The first 28 were culls, shipped to respondent to be fed until they looked better, then sold. The complaint did not allege wrongdoing in the February 22 sale of 22 of those. The contention of wrongdoing referred to the later sales, in that the average price brought by the animals sold later was lower than the average price brought by 22 culls on February 22. Complainant's contention was not established by a preponderance of the evidence as explained hereinafter.

Complainant and Mr. A. Sterling Cole, who pastured complainant's animals on his property and was familiar with them, both testified that, apart from the 28 culls, the animals were of average quality, were range fed, had been lotted with bulls when they weighed about 800 pounds, and had an average weight of about 1,000 pounds at the time of consignment. They described those animals as of a sort which would be expected to bring about average prices for the market for Holstein springer heifers, and higher prices than the 28 culls. Complainant and Mr. Cole were credible when they testified.

Respondent testified in substance that many of those animals were of lower than usual weight for Holstein heifers, springers or fresh, and could not have been sold for higher prices than they brought at the place and respective times of sale. Mr. Richard Iest, who bought 18 of the 28 culls and some of the later animals, and who regularly helps on the farm of his brother, who bought some of the later animals, corroborated this testimony of respondent as to the animals with which he was familiar. Respondent and Mr. Iest were also credible when they testified.

No other witness testified who saw the animals in dispute.

The record shows the weights of a few of the animals according to respondent's scale. Those were sold on a weight basis for slaughter as uneconomic for milking. Those weights were as follows:

Investigation report exhibits	Sale date	Weight in pounds
E-1, 5	2/22	825 *
G-1, 17-20	3/07	950
		775
		865
H-4, 15-16	3/14	745
I-1, 5	3/21	995
J-1, 5	3/28	890

(* one of the 28 culls)

The record contains much discussion of an announcement, made by respondent at the auction, at the time of the sale of 46 of complainant's animals on March 14. The evidence is inconsistent as to the words used, but clearly shows the substance. It was that some of the animals had needed assistance from respondent and employees of his in calving at respondent's market, and that, on the basis of that experience, buyers of the remaining springers had better take precautions to avoid loss of them in calving. A finding of unfairness to complainant in the making of that announcement is not established by the evidence in the record as explained hereinafter.

The account of sale issued to complainant (Investigation report exhibits H-1-4) shows only one fresh animal, tag no. 659. However, other documents in the record show fresh animals of complainant sold on that date as follows:

Investigation report exhibits H-:	Tag nos.
34-39	658
11-12	659
11-12	677
28-29	678
20-23	679
11-12	832
28-30	835-6 (2)
34-39	837
13-16	844
14-16	873
17-19	966
34-39	967
20-22	968
34-39	969
28-31	970

Thus the record shows that 16 were fresh, of the 46 animals of complainant sold that day. This is credible in view of the testimony

of Mr. Cole that the basis for selection of such animals for market, other than the 28 culls, was that he, Mr. Cole, did not have a milking operation and those animals were close to freshening.

Respondent testified that some animals of complainant which calved on his property, before that announcement, needed assistance in calving. He was credible when he did so. Also, since the record shows that less than 16 were fresh when shipped to respondent's market, at least some must have calved there. A market agency like respondent, selling consigned animals, has a duty to the consignor to sell at the highest price obtainable at the time and place of sale, but also has a duty to the buyers not to defraud them. This is not to make a finding that some animals of complainant required assistance in calving at the market, that it would have been fraudulent not to make the announcement, or that the announcement was compelled by the Act. Such a finding is not necessary to a decision in this case. What we hold is, as stated above, that unfairness to complainant in the making of the announcement is not established by the evidence in the record.

A few of complainant's animals were bought by dealers who buy and sell on speculation for their own accounts, and resold shortly afterward at higher prices elsewhere. Complainant would draw the conclusion from this that the sales to those dealers were not at the best prices obtainable at respondent's market at the respective times of sale. Such a conclusion does not follow. Such dealers, notwithstanding the names they get called, such as "scalpers," and the understandable fury of persons whose animals are sold to them, perform useful economic functions, sometimes unintentionally, including enforcing an equilibrium in prices in different locations. The fact that such dealers survive in business shows that animals regularly get bought at one place and resold quickly at another at a higher price.

Some of the animals were sold by private treaty, not at auction. Complainant appears to contend that this was unfair to him. It was not. This is entirely customary in the livestock business. It would be unfair only to a consignor of animals who directs the market agency to sell them only at auction.

Respondent showed some confusion of complainant's animals with some of Mr. Cole's animals which were consigned to the market during the same time period, in statements he made some time after the sales in question. Also, one invoice for animals sold to Mr. Iest, some from complainant recorded on one line, and some from Mr. Cole recorded on the adjoining line, has the sellers' names and brands transposed. Complainant would draw a conclusion from this that the animals were mixed at the market, or that

respondent must have been thinking of animals of Mr. Cole and not animals of complainant when he made the announcement on March 14. Such a conclusion is not compelled by such facts.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States* v. *I.C.C.*, 337 U.S. 426.

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

JAMES HOENE *v.* INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION and SAINT LOUIS NATIONAL STOCKYARDS COMPANY. P&S Docket No. 6470. Decided November 24, 1986.

Complainant, *pro se.*
Respondents, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.) begun by a complaint received on May 23, 1984 and amended October 1, alleging in substance a mixup of animals shipped to the stockyard and consigned to the commission firm for sale. The amount claimed was $3,720.60.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondents on November 5, 1984. A copy of the investigation report was served on complainant on the same day. No answer was received from either respondent, but respondent commission firm filed a written request for an oral hearing. Copies of the request were promptly served on each party other than the one filing it.

It is undisputed, particularly in view of the lack of any answer from either respondent, that a mixup took place. However, the alle-

gations of the complaint, which are deemed to be admitted by the failure to file answers, do not include an allegation as to who mixed complainant's animals with others. Thus, notwithstanding the failures to file answers, an oral hearing as requested was held on April 12, 1985 in Greenville, Illinois, before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Complainant and four witnesses testified. No exhibit was received. No brief was filed.

The following is undisputed. On April 1, 1984, 26 animals were loaded by complainant on a truck of Mr. Leroy Krampe. Complainant did not accompany the animals to the National Stockyards. Twenty six animals were delivered on Mr. Krampe's truck to the National Stockyards with instructions that they were to be consigned to respondent Producers for sale there for complainant's account. Twenty six animals were so consigned. The next morning, 26 animals were so sold.

It is further undisputed that they were not all the same animals. Complainant testified credibly that his animals had an average weight of about 1,250 pounds by his estimate and included at least five herefords. It is undisputed that the animals sold had an average weight of 1,090 pounds and included no more than three herefords.

The record, even with the allegations of the complaint deemed to be admitted, does not contain anything to show who mixed complainant's animals with others before they were sold. There is precedent for shifting the burden to respondents in a case to furnish information to exonerate themselves, and for holding liable any who do not. However, in such a case, the persons who are made respondents must include every person who could have caused the damage. See *Graff* v. *United Stockyards Corp.*, 37 Ag. Dec. 529 (1978); and *Loizzo* v. *St. Francis Hospital*, 121 Ill. App. 3d 172, 76 Ill. Dec. 677, 459 N.E.2d 314 (1984). The trucker having had exclusive custody of the animals for a time between their departure from complainant's farm and their sale, the burden of proof cannot be so shifted without the trucker as a respondent in the case.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States* v. *I.C.C.*, 337 U.S. 426.

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

JOSEPH CUTTONE *v.* USDA
Volume 45 Number 6

COURT DECISIONS

CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE CO. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE and UNITED STATES OF AMERICA. Civil Action 85-1591 (USDA PACA Docket No. 2-6761). Decided November 10, 1986.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

BEFORE: WALD, CHIEF JUDGE AND EDWARDS AND STARR, CIRCUIT JUDGES.

PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY OF AGRICULTURE

This case came to be heard on the record on petition for review from the decision and order of the Secretary of Agriculture and briefs were filed by the parties. The issues have been accorded full consideration by the court and occasion no need for a published opinion. *See* Local Rule 13(c). On consideration of the issues and for the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED by the court that the decision and order of the Secretary of Agriculture be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14.

Per Curiam

MEMORANDUM

Carl D. Cuttone, doing business as Joseph A. Cuttone Co., is licensed as a merchant and dealer under the Perishable Agricultual Commodities Act ("Act"). *See* 7 U.S.C. § 499c (1982). On March 18, 1985, the Department of Agriculture ("Department") initiated a disciplinary proceeding against Cuttone alleging that he had failed to make full payment promptly for agricultural commodities. *See* 7 U.S.C. § 499b(4) (1982). The Department sought revocation of Cuttone's license. At the time, Cuttone's license had been suspended, in an unrelated proceeding, for failure to pay a reparation award.

The Department served a copy of the complaint on Cuttone by certified mail. The complaint was accompanied by a letter advising Cuttone that an answer was due within 20 days of his receipt of the complaint. The complaint and letter were sent to "Carl D. Cuttone d/b/a Joseph A. Cuttone Co." at his business address. The return receipt was signed by "Joesph A. Cuttone".

On April 25, 1985, the Department moved for a decision by the Administrative Law Judge ("ALJ") because Cuttone had failed to file a timely answer. This motion was served on Cuttone in the

same manner as the complaint, and the return receipt was signed "John J. Cuttone".

Cuttone filed a timely opposition to the motion for a decision and a motion for leave to file an answer. He claimed he had never received a copy of the complaint. The ALJ denied the motion for leave to file an answer stating that it appeared that Cuttone was properly served. The Judicial Officer of the Department adopted the default order of the ALJ. The Judicial Officer stated:

> Respondent claims that he was not properly served with a copy of the complaint. But the record shows that a copy of the complaint was sent by certified mail to respondent at his last business address and the return receipt was signed by "Joesph A. Cuttone" (respondent conducts his business in the name of "Joesph A. Cuttone Co."). That constitutes adequate service under the rules of practice.

Cuttone seeks review of this final agency order in this court.

Cuttone argues that he did not receive actual notice of the revocation proceedings and therefore was not accorded due process. He argues that because he was suspended at the time of service, the Department should at least have sent the notice to his home address. We disagree. The notice given was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted). Due process does not require actual notice in every case. *Stateside Machinery Co.* v. *Alperin*, 591 F.2d 234, 240–42 (3d Cir. 1979); *NLRB* v. *Clark*, 468 F.2d 459, 464 (5th Cir. 1972); *Smith* v. *Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957). The suspension of Cuttone's license did not bar him from his place of business. *See* 7 CFR § 46.35(c) (1986). Thus, Cuttone's reliance on *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972), is misplaced.

Cuttone also argues that the Department failed to comply with the statutory and regulatory requirements for notice. He claims that they require actual notice. We disagree. Section 6(c) of the Act requires that the complaint be "served by registered mail or by certified mail or otherwise on the person concerned . . . " 7 U.S.C. § 499f(c) (1982). Cuttone offers no support for his assertion that the statute requires actual notice. To infer such a requirement would be contrary to a common sense reading of the statute. The regulations provide that the complaint "shall be served upon the parties" in one of three ways. 7 CFR § 1.147(b) (1986). Cuttone argues that these words require actual notice in every case. The Judicial Officer, however, specifically rejected that interpretation, holding that

the service in this case was adequate under this regulation. The agency's construction of its regulation is controlling unless it is plainly erroneous or inconsistent with its language. *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977). We hold that the Department's construction is not plainly erroneous.

Finally, Cuttone argues that the Department violated its regulations by denying the motion for leave to file an answer and granting the motion for a decision. Whether to grant an extension of time to file an answer or to enter a default is within the discretion of the Judicial Officer and the ALJ. *See* 7 CFR § 1.139, 1.147(c) (1986). The ALJ did not abuse her discretion by entering the default order. Cuttone has never filed an affidavit that he did not receive the complaint and never adequately explained how he received the motion for a decision but not the complaint.

PRANGE FOODS CORPORATION and ST. JOSEPH BANK AND TRUST COMPANY d/b/a CAPITAL CREDIT COMPANY *v.* DEBRUYN PRODUCE COMPANY, S&S FARMS, INC., CENTRAL MICHIGAN PACKING, BARBEE PRODUCE, MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, DWAN'S FRUIT FARM, VERN HAUCH, WESLEY DANNEFFEL, SOUTHERN MICHIGAN COLD STORAGE COMPANY, WILDERNESS FOODS, GATEWAY REFRIGERATION COMPANY, MERCHANT'S REFRIGERATING COMPANY, BROCKPORT COLD STORAGE, PAW PAW FREEZERS, and RICHARD REMES. Civil Action K85-137 (USDA PACA Docket No. 2-1799). Decided December 15, 1986.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN

BEFORE: RICHARD A. ENSLEN, U.S. DISTRICT JUDGE

REVIEW OF THE SPECIAL MASTER'S RECOMMENDATION

This case is before the Court for review of the Special Master's Recommendation dated August 1, 1986, together with the Report he entered on May 8, 1986. The pertinent facts are fully stated in the Special Master's Report, *St. Joseph Bank and Trust Co.* v. *DeBruyn Product Co. (In re Prange Foods Corp.)*, 63 Bankr. 211 (Bankr. W.D. Mich. 1986), and the Court will only briefly summarize them here. This adversary proceeding arises out of a bankruptcy proceeding involving Prange Foods Corporation. Prange Foods was a dealer in fresh vegetables. Plaintiff St. Joseph Bank and Trust Company (d/b/a Capital Credit Company) was Prange Foods' secured lender. Defendants are various warehousemen and growers

who were creditors of Prange Foods. Plaintiff initiated this action in bankruptcy court on January 22, 1985, seeking a declaration of its rights in the debtor's inventory and accounts receivables vis-a-vis the defendants. On May 24, 1985 the Court withdrew its reference of this proceeding to the bankruptcy court. *See* 28 U.S.C. § 157(d). It concurrently appointed Bankruptcy Judge Howard as a Special Master pursuant to rule 53 of the Federal Rules of Civil Procedure to handle the pretrial proceedings and to prepare a report and recommendation on any dispositive motions filed by the parties.

In December of 1985 plaintiff and the grower defendants filed cross-motions for summary judgment. Pursuant to the Order of Reference, the Special Master prepared the Report and Recommendation on such motions referred to above. By this time, the debtor's assets had been liquidated, and the amounts representing proceeds from the sale of perishable agricultural commodities had been placed in escrow. Four grower defendants—Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA") (who, as the Special Master noted, is a trade organization that represents a number of individual growers whose claims the Court must consider separately), Dwan's Fruit Farm, Vern Hauch, and Wesley Danneffel—filed timely objections to the Special Master's Report and Recommendation. Pursuant to rule 72 of the Federal Rules of Civil Procedure, the Court has reviewed *de novo* the Report and Recommendation and the parties' motions in light of these defendants' objections. Order of Reference (May 24, 1985); FRCP 72(b); *see also* FRCP 53(e). I note here that all of the other defendants either have entered into settlements with plaintiff or have had default judgments entered against them.

The Special Master determined that the objecting defendants' claims are subordinate to plaintiff's claims, and hence that they should recover none of the funds in the escrow account. For the reasons discussed below, the Court finds that the Special Master's determinations are correct, and will adopt his Report and Recommendation as modified by this opinion. In this opinion the Court will first review the Special Master's legal conclusions. It will then apply those conclusions to the claims raised by MACMA, Dwan's, Hauch, and Danneffel. The Court assumes that the reader of this opinion has already reviewed the Special Master's Report and Recommendation, which as I indicated has been published.

The Special Master identified eleven (11) issues of law that he felt controlled his recommended disposition of the parties' claims. The Court will briefly discuss each issue.

The first issue is whether the 1984 amendments to the Perishable Agricultural Commodities Act ("PACA") became effective when President Reagan signed them into law on May 7, 1984, or when the regulations the Department of Agriculture promulgated pursuant to the amendments took effect, which was on December 20, 1984. Like the Special Master, the Court believes that this issue was correctly resolved in the case of *In re Fresh Approach Inc.*, 48 Bankr. 926 (Bankr. N.D. Tex. 1985). I believe that the amendments are sufficiently specific to be self-executing, and that Congress intended for them to be effective immediately. The amendments thus cover the produce defendants sold to Prange Foods in the fall of 1984.

The second issue is whether the regulations apply retroactively. Again, the Court agrees with the Special Master that the bankruptcy court correctly analyzed this issue in *Fresh Approach*. The regulations state that they apply to "all transactions existing as of and entered into on or after the[ir] effective date." 7 CFR § 46.46(a). The Court interprets the phrase existing transactions as encompassing transactions for which the produce grower had not yet received final payment.

The third issue is whether those defendants who had contracts calling for payment more than thirty days from the date of delivery qualify for protection under the amendments. The Court agrees with the Special Master that those growers who had written contracts with Prange Foods can qualify for protection even though such contracts called for payment more than thirty days from the date of delivery. I cannot penalize any grower who complied with the plain language of the statute.

With regard to the fourth issue, which concerns growers who had oral contracts with Prange Foods, the Court notes that the Special Master primarily discussed the arguments of DeBruyn Produce, who has settled its claims with plaintiff. This issue also has significance, however, for those MACMA members who had contracts for the sale of peppers with Prange Foods. MACMA argues that these contracts were written. As the Court discusses below, however, it agrees with the Special Master that these contracts were not written contracts within the meaning of the PACA trust fund provisions. It thus becomes important to determine what kinds of oral contracts, if any, can qualify a grower for protection under the amendments. On this point the Court agrees with the Special Master that the new regulations, which provide that only those oral contracts that provide for payment within ten days of delivery can qualify for protection, control. A claimant on an oral contract

thus has forty days after delivery in which to file a written notice of his claim under the amendments.

The Court has nothing to add to the Special Master's discussion of the fifth issue, which concerns whether the date of "receipt and acceptance" of produce may be understood as referring to either the shipment date or the invoice date. I similarly believe that the Special Master fully and correctly analyzed the sixth issue, which is whether the filing of a petition for bankruptcy by the debtor either stayed the filing deadline under the amendments or excused the defendants from the filing requirement. The objecting defendants argue that the filing requirement was stayed or excused when Prange Foods filed for bankruptcy. Although defendants make a good policy argument for their position, the Court agrees with the Special Master's resolution of this issue.

The seventh issue is whether the defendant's notice of intent to preserve their trust fund benefits had to comply fully with the requirements set forth in the regulations. I agree with the Special Master that any notices filed after the regulations were published in the Federal Register, which was on November 20, 1984, had to comply with the regulatory requirements. The Court notes here that this ruling means that the notice MACMA filed on December 5, 1984 was not effective. The Court also agrees with the Special Master's suggested disposition of the eighth issue, which is whether the amended notices filed by MACMA relate back to the filing date of its incomplete December 5th notice. The Special Master correctly held that they do not.

The ninth issue is whether the "filing" of a notice under the amendments occurs upon mailing of the notice to the Secretary or upon the Secretary's receipt of the notice. The Special Master correctly held that "filing" occurs upon receipt of the notice.

The Court is somewhat troubled by the Special Master's resolution of the tenth issue. As I indicated above, I believe that he correctly resolved this issue by ruling that the pepper growers did not have written contracts with Prange Foods within the meaning of the amendments. The payment terms of the "contracts" between the pepper growers and Prange Foods were in writing, *i.e.*, the Salverson letter. The Court does not believe, however, that the growers and Prange Foods "expressly agreed in writing" to their payment terms before "entering into" their transactions. *See* 7 U.S.C. § 499e(c)(3)(ii). I think that it is clear that Congress meant for section 499e(c)(3)(ii) to cover contracts like the one between Prange Foods and Richard Vanden Heuvel. It did not intend for the section to cover written offers that are accepted by performance. The

Court is sympathetic to the pepper growers' argument, but does not believe it is correct under the amendments.

Finally, the Court believes that the Special Master's eleventh issue is inapplicable because Mr. Tidey's claim must be rejected on other grounds. At this point, the Special Master asked the parties to determine how the above legal rulings applied to the diverse factual situations before it. To clarify the record, however, the Court believes it should explicitly apply these rulings to the claims of the objecting defendants.

The first claims the Court will discuss are those of the MACMA defendants. The first MACMA claims the Court will discuss are the zucchini claims filed by Carl Tidey and Greg Tidey. The parties agree that Carl Tidey had a written contract with Prange Foods, but disagree about the status of Greg Tidey's contract. I do not believe that the factual issue regarding Greg Tidey's contract is material, however, because even assuming that this contract was written, the Tideys' notice of their PACA claims was not timely. Specifically, defendants acknowledge that the notice was due on November 17, 1984 if it was not excused by the filing of the bankruptcy petition by Prange. The Court has already ruled that the filing of the petition did not stay or excuse the notice requirement. The Special Master therefore properly concluded that the Tideys are not entitled to prevail on their claims.

The next MACMA claims are those of the pepper growers, who are defendants Ronald Brush, Wesley Danneffel, the Dominion Brothers, Charles Goodrich, A.L. Karnemaat, Robert Kramer, Ed Kretchman, the Marschke Brothers, Joe Scherer, Arthur Whitaker, Dwan's Fruit Farm, and Vern Hauch. Since these growers had oral contracts with Prange Foods, they are covered under the amendments only if they had filed written notice of their claims within forty days—*i.e.*, thirty days after the expiration of the ten day payment period—after their last delivery of peppers to Prange Foods. In each case, the defendant filed an untimely notice of his/its claim. The Court notes that defendants Dwan's and Hauch filed their claims close to the forty day period, but that such claims still were untimely.

The next claimant is Richard Smith, who had sold some snap beans to Prange Foods. In Mr. Smith's case, assuming that he had a written contract with Prange Foods (which is subject to dispute), his written notice of his PACA claim was due, at the latest, on March 1, 1985. The Court determined this filing deadline by giving Mr. Smith the benefit of the Special Master's ruling on issue number three. Mr. Smith failed, however, to meet this deadline as he did not file a notice that conformed with the regulations until

sometime after June 27, 1985. The Special Master thus correctly rejected his claim.

The final claim is Mr. Danneffel's claim for payment for cabbage he had sold to Prange Foods. The filing deadline for notice of this claim was either November eighteenth, nineteenth, or twentieth, 1984. Since Mr. Danneffel did not file his notice until December 5, 1984 (even assuming that notice was sufficient), the Special Master correctly rejected his claim.

In summary, the Court agrees with the Special Master's Report and his Recommendation, and adopts them as clarified and/or modified by this opinion. The Court appreciates Judge Howard's assistance on this case. I also complement the attorneys on the excellent quality of their written submissions.

In accordance with the opinion dated December 12, 1986;

IT IS HEREBY ORDERED that the Special Master's Report of May 8, 1986 and his Recommendation of August 1, 1986 are ADOPTED, as clarified and/or modified, as the opinion of the Court;

IT IS FURTHER ORDERED that plaintiff's Motion for Summary Judgment is GRANTED with respect to the objecting defendants, and DENIED as moot with respect to the other defendants;

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by defendants Michigan Agricultural Cooperative Marketing Association, Inc., Dwan's Fruit Farm, Vern Hauch, and Wesley Danneffel is DENIED;

IT IS FURTHER ORDERED that the Motions for Summary Judgment filed by defendants Central Michigan Packing, DeBruyn Produce, and S & S Farms, Inc. are DENIED as being moot;

IT IS FURTHER ORDERED that plaintiff's Motion to Strike Defendant MACMA's Jury Trial Demand and defendant MACMA's Objection to Report and Recommendation of Special Master re: Jury Trial are DENIED as being moot;

IT IS FURTHER ORDERED that JUDGMENT is entered for plaintiff and against the objecting defendants.

DISCIPLINARY DECISIONS

In re: MARY FRAN HAMILTON and M. F. HAMILTON, INC. PACA Docket No. 2-7166. Decided October 9, 1986.

Failure to pay promptly—Revocation of license—Application for license denied. Respondent purchased and received fruits and vegetables in interstate commerce but failed to pay promptly for these purchases. Respondent's license was revoked and her application of a license was denied.

Kenneth Vail, for complainant.
Ian MacDonald, Honolulu, Hawaii, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is a Notice to Show Cause and Complaint proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act," instituted by a complaint filed on April 30, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May 1985 through August 1985, M. F. Hamilton, Inc., purchased, received and accepted, in interstate commerce, from two sellers, seven lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices on balances thereof in the total amount of $218,255.62. It is further alleged in the Notice to Show Cause and Complaint that during the period of the violations, Mary Fran Hamilton was the president, secretary, director and 100% stockholder of M. F. Hamilton, Inc.

A copy of the Notice to Show Cause and Complaint was served upon the respondents. The respondents filed a timely answer thereto in which they admit all of the material allegations but claim that the amount remaining unpaid is $20,000 less than the amount alleged. For purposes of this decision, complainant does not dispute respondents' statement in this regard. Respondents have further agreed that the issues should be determined on the pleadings. Each party has filed a motion for decision, a proposed decision and order and a supporting memorandum. Upon consideration of those documents, the arguments of the parties, and what constitutes the evidence of record in this proceeding, complainant's motion is hereby granted and the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139). Attached to this Decision and Order is a copy of the Memorandum filed by complainant in support of its motion for decision, which has been found to correctly state con-

trolling law and existing Departmental policy and is incorporated herewith and adopted as part of this Decision.

FINDINGS OF FACT

1. Respondent M. F. Hamilton, Inc., is a Hawaiian corporation whose address is 4620 Kalaniiki Place, Honolulu, Hawaii 96821.

2. Pursuant to the licensing provisions of the Act, license number 820713 was issued to respondent M. F. Hamilton, Inc., on March 16, 1982. This license was renewed annually, but terminated on March 16, 1986, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a)) when it failed to pay the required annual license fee.

3. Mary Fran Hamilton is, or was, the president, secretary, director, and 100% stockholder of M. F. Hamilton, Inc., during the period of violations alleged herein.

4. As more fully set forth in paragraph 7 of the Notice to Show Cause and Complaint, during the period May 1985 through August 1985, respondent M. F. Hamilton, Inc., purchased, received and accepted in interstate commerce, from two different sellers, seven lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices. The total amount past due and unpaid to these sellers is $198,255.62.

5. Mary Fran Hamilton was responsible for the violations set forth in paragraph 4 above.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the seven transactions set forth in Finding of Fact 4 constitutes wilful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Mary Fran Hamilton was responsible for such violations and has engaged in practices of the character prohibited by the Act prior to the submission of the application.

ORDER

Respondent M. F. Hamilton, Inc.'s license is revoked.

Respondent Mary Fran Hamilton's application for a license is denied.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision and Order will become final and effective without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice.

Copies hereof shall be served upon the parties.
[This decision and order became final November 18, 1986—Ed.]

In re: MARY FRAN HAMILTON and M.F. HAMILTON, INC. PACA Docket No. 2-7166. Decided November 20, 1986.

The Judicial Officer denied a late appeal filed on the day the initial decision had become final. However, even if respondents' appeal had been timely filed, it would have been to no avail because respondents' argument that an expired license cannot be revoked is without merit. Furthermore, if a timely appeal had been filed, the Judicial Officer would have included a finding that respondents have committed repeated and flagrant violations of § 2(4) of the Act, which would have the same effect on respondents and all persons responsibly connected with respondents as a revocation order.

Kenneth Vail, for complainant.
Ian MacDonald, Honolulu, Hawaii, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING LATE APPEAL

Respondent M. F. Hamilton, Inc., filed an appeal with the Hearing Clerk on November 18, 1986, which is the day the initial decision had become final and effective. Accordingly, respondent's appeal must be dismissed because it was not timely filed. See *In re Bushelle Cattle Co.*, 45 Agric. Dec. ____ (May 14, 1986); *In re Hulings*, 44 Agric. Dec. ____ (Jan. 15, 1985), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re PowellT1, 44 Agric. Dec.* ____ (May 28, 1985), the latter of which is attached as Appendix A.

Even if respondent's appeal had been timely filed, it would have been to no avail. Respondent contends that an expired license cannot be revoked. However, it has been held that an expired license under the Perishable Agricultural Commodities Act can be suspended or revoked. See Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, § 419 (1981 and 1986 Cum. Supp.), attached as Appendix B. Nonetheless, in order to avoid any doubt with respect to the matter, if respondent had filed a timely appeal, the Judicial Officer would have included in the order, in addition to the revocation provisions, an additional statement that respondents have committed repeated and flagrant violations of § 2(4) of the Act (7 U.S.C. § 499b(4)). See, *e.g., In re Top Quality Fruit & Produce Distributors, Inc.*, 45 Agric. Dec. ____ (Jan. 27, 1986), attached as Appendix C. That would have the same effect on respondents and all persons responsibly connected with respondents as a revocation order. As stated in *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2440-

41 (1982) (order revoked respondent's license and also found that respondent has committed repeated and flagrant violations of § 2(4)), *aff'd*, 728 F.2d 347 (6th Cir. 1984):

> Although respondent's license is not presently in effect, it has been held that a terminated license can be suspended or revoked. [Footnote omitted.] But it is of no practical consequence whether respondent's license is revoked since it has been found that respondent has committed flagrant and repeated violations of the Act, and, as a result of that finding, the same consequences flow to the respondent and those responsibly connected with respondent as flow from a revocation order (see note 9, *supra*).
>
> Specifically, as a result of the finding that respondent has committed flagrant and repeated violations of the Act, respondent cannot again become licensed under the Act for two years after the effective date of the Order issued in this case (7 U.S.C. § 499d(b); see, also, 7 U.S.C. § 499d(c)). Similarly, the persons "responsibly connected" with respondent cannot be licensed under the Act for two years (7 U.S.C § 499d(b); see, also, 7 U.S.C. § 499d(c)); and they cannot work for another licensee under the Act for one year (7 U.S.C. § 499d(b)). After one year, the Secretary may approve their employment by another licensee if the licensee furnishes a satisfactory bond; after two years, the Secretary may approve their employment by another licensee without a bond (7 U.S.C. § 499h(b)).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent's appeal is denied since it was not timely filed.

APPENDIX A

In re Powell, 44 Agric. Dec. ____ (May 28, 1985).
[Omitted.—Ed.]

APPENDIX B

Excerpt from Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, § 4.19 (1981).

§ 4.19 Disciplinary Orders Issued in Formal Cases

Disciplinary orders issued in formal cases are of three types: suspending a license,[165] revoking a license[166] or simply finding that a person has committed a flagrant or repeated violation of § 2 of the act.[167] The act does not provide authority for issuing cease and desist orders.

As discussed in §§ 4.04 and 4.06, a suspension or revocation order has consequences affecting licensing and employment involving the violator or anyone "responsibly connected"[168] with the violator. In view of these collateral effects, a suspension or revocation order is meaningful even if the license of the violator terminates (e.g., for nonpayment of the annual fee) before issuance of the final order. It has been held that such an order can be issued notwithstanding the termination of the license prior to the issuance of the order.[169]

As a practical matter, however, the PACA Regulatory Branch generally does not request a suspension or revocation order where the license is no longer in effect, but requests, instead, that a finding be made that the respondent

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[165] See § 4.05.

[166] *Id.*

[167] See § 4.12. In addition, an order may be issued denying an applicant's request for a license, but this is regarded as a licensing action rather than a disciplinary action, see § 4.04.

[168] The definition of "responsibly connected" and the procedure for determining responsibly connected persons are discussed in § 4.21.

[169] *In re* M&H Produce Co, 34 Agric Dec 700, 750 (1975), *affd mem*, 549 F2d 830 (DC Cir), *cert denied*, 434 US 920 (1977); *In re* J Acevedo & Sons, 34 Agric Dec 120, 138–40, *affd per curiam*, 524 F2d 977 (5th Cir 1975); *In re* George Steinberg & Son, Inc, 32 Agric Dec 236, 250–53 (1973), *affd*, 491 F2d 988 (2d Cir), *cert denied*, 419 US 830 (1974); *accord*, *In re* Kafcsak, 39 Agric Dec 683, 686 (1980), *appeal docketed*, No. 80–3406 (6th Cir June 26, 1980); *In re* Atlantic Produce Co, 35 Agric Dec 1631, 1633 (1976), *affd mem*, 568 F2d 772 (4th Cir), *cert denied*, 439 US 819 (1978); and *see* Quinn *v* Butz, 510 F2d 743, 749–50 (DC Cir 1975). The legislative history of the act suggests that suspension or revocation orders cannot be issued as to nonactive licenses, HR Rep No 1546, 87th Cong, 2d Sess 8 (1962); S Rep No 750, 87th Cong, 1st Sess 7 (1961); S Rep No 554, 73d Cong, 2d Sess 2 (1934); HR Rep No 489, 73d Cong, 2d Sess 2 (1934); and *see* Marvin Tragash Co *v* USDA, 524 F2d 1255, 1258 (5th Cir 1975), but the matter is of no practical consequence, at least as far as revocation is concerned, since a finding that a violation was flagrant or repeated has the same effect as a revocation order, see note 170 and related text. However, if a suspension order could not be issued as to a nonactive license, the much more severe order finding that a violation was flagrant or repeated would have to be issued, where appropriate. The suspension of a terminated license was upheld, without discussing the authority to take such action, in Mandell, Spector, Rudolph Co *v* United States, 364 F2d 889, 893–94 (3d Cir 1966), *cert denied*, 385 US 1008 (1967).

has committed a flagrant or repeated violation of § 2 of the act. Such a finding has the same licensing and employment consequences as to the respondent and those "responsibly connected" with the respondent as an order revoking the respondent's license.[170] Nonetheless, it can be made without first sending a warning letter,[171] irrespective of whether the violation is wilful [172] or the license has terminated.[173]

About 45 percent of the disciplinary proceedings instituted under the act are disposed of by consent orders, usually suspending the respondent's license. A few consent orders revoke the respondent's license. The Regulatory Branch requires the respondent to admit the violations in any consent settlement.

§ 4.19 Disciplinary Orders Issued in Formal Cases

Add to note 169, fourth line, before "accord":

In re Perfect Potato Packers, Inc, 45 Agric Dec ____ *(Feb 14, 1986); In re* Melvin Beene Produce Co, 41 Agric Dec 2422, 2440 (1982), *affd,* 728 F2d 347 (6th Cir 1984); *In re* United Fruit & Vegetable Co, 40 Agric Dec 396, 402 (1981), *affd,* 668 F2d 983 (8th Cir), *cert denied,* 456 US 1007 (1982).

Add to note 169, sixth line, after end of In re Kafcsak citation:

In re Kafcsak should now be cited as 39 Agric Dec 683 (1980), *affd* (unpublished), 673 F2d 1329 (6th Cir 1981), *reprinted in* 41 Agric Dec 88 (1982). *In re* Connecticut Celery Co, 40 Agric Dec 1131, 1150–52 (1981).

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[170] See §§ 4.04, 4.06 and 4.12; *In re* John H Norman & Sons Distrib Co, 37 Agric Dec 705, 714–15 (1978); *In re* M&H Produce Co, 34 Agric Dec 700, 750–51 (1975), *affd mem,* 549 F2d 830 (DC Cir), *cert denied,* 434 US 920 (1977).

[171] See § 4.17, note 158 and related text.

[172] Marvin Tragash Co *v* USDA, 524 F2d 1255, 1256 n 1 (5th Cir 1975); *In re* Kafcsak, 39 Agric Dec 683, 685–87 (1980), *appeal docketed,* No 80-3406 (6th Cir June 26, 1980); *accord, In re* Atlantic Produce Co, 35 Agric Dec 1631, 1641 (1976), *affd mem,* 568 F2d 772 (4th Cir), *cert denied,* 439 US 819 (1978); *In re* George Steinberg & Son, Inc, 32 Agric Dec 236, 262–63 (1973), *affd,* 491 F2d 988, 993–94 (2d Cir), *cert denied,* 419 US 830 (1974).

[173] Quinn *v* Butz, 510 F2d 743, 750 (DC Cir 1975); *In re* Kafcsak, 39 Agric Dec 683, 685–87 (1980), *appeal docketed,* No 80-3406 (6th Cir June 26, 1980); *In re* Atlantic Produce Co, 35 Agric Dec 1631, 1633, 1643 (1976), *affd mem,* 568 F2d 772 (4th Cir), *cert denied,* 439 US 819 (1978); *In re* George Steinberg & Son, Inc, 32 Agric Dec 236, 243–45, 261–63, 270 (1973), *affd,* 491 F2d 988 (2d Cir), *cert denied,* 419 US 830 (1974).

In the first and second paragraphs on page 354, delete "Regulatory Branch" and substitute:

PACA Branch

Add to note 170:

In re Connecticut Celery Co, 40 Agric Dec 1131, 1151-52 (1981); *In re* United Fruit & Vegetable Co, 40 Agric Dec 396, 404 n 23 (1981), *affd,* 668 F2d 983 (8th Cir), *cert denied,* 456 US 1007 (1982).

Add to note 172:

In re Kafcsak should now be cited as 39 Agric Dec 683 (1980), *affd* (unpublished), 673 F2d 1329 (6th Cir 1981), *reprinted in* 41 Agric Dec 88 (1982). *In re* A Pellegrino & Sons, Inc, 44 Agric Dec ___ *(Aug 21, 1985), appeal docketed,* No 85-1590 (DC Cir Sept 19, 1985); *In re* Finer Foods Sales Co, 41 Agric Dec 1154, 1191-92 (1982), *affd,* 708 F2d 774 (DC Cir 1983); *In re* CB Foods, Inc, 40 Agric Dec 961, 971 (1981), *affd mem,* 681 F2d 804 (3d Cir), *cert denied,* 459 US 831 (1982).

Add to note 173:

In re Kafcsak should now be cited as 39 Agric Dec 683 (1980), *affd* (unpublished), 673 F2d 1329 (6th Cir 1981), *reprinted in* 41 Agric Dec 88 (1982). *In re* CB Foods, Inc, 40 Agric Dec 961, 971 (1981), *affd mem,* 681 F2d 804 (3d Cir), *cert denied,* 459 US 831 (1982).

APPENDIX C

In re Top Quality Fruit & Produce Distributors, Inc., 45 Agric. Dec. ___ (Jan. 27, 1986).

[Omitted.—Ed.]

In re: E. M. OATES & COMPANY, INC.. PACA Docket No. 2-7246. Decided October 20, 1986.

Failure to pay promptly—Publication of the facts.

Andrew Y. Stanton, for complainant.
Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER (DEFAULT)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 21, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1984 through December 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 25 sellers, 95 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $228,511.43.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent E. M. Oates & Company, Inc. is a corporation, whose address is Unit No. 33, Produce Row, St. Louis, Missouri 63131.

2. Pursuant to the licensing provisions of the Act, license number 830733 was issued to respondent on March 25, 1983. This license was renewed annually, but terminated on March 25, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period December 1984 through December 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from 25 sellers, 95 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full pay-

ment promptly of the agreed purchase prices, in the total amount of $228,511.43.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 95 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This default decision and order became final December 2, 1986.—Ed.]

In re: AL NAGELBERG & CO., INC. PACA Docket No. 2-7064. Decided November 20, 1986.

Failure to pay—License revoked.

Respondent failed to pay promptly or fully for 200 transactions, constituting repeated and flagrant violations of the Act. Respondent's license is revoked.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on January 21, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February through May, 1985, respondent received and accepted on con-

signment, in interstate and foreign commerce, from 16 sellers, 70 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the net proceeds or balances thereof in the total amount of $142,580.94. The complaint also alleges that during the period February through May, 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 15 sellers, 130 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the amount of $692,293.89.

Respondent filed an answer, denying liability, and requesting an oral hearing. Complainant also filed a motion for hearing. An oral hearing was set for September 22, 1986. Respondent subsequently moved for a postponement of the hearing date, to which complainant objected, alleging that respondent was incurring additional produce debts. Respondent's motion was granted and the hearing was rescheduled for November 20, 1986. Prior to the hearing, respondent's counsel indicated that neither respondent nor counsel would be attending the hearing, and, by hand delivered letter of November 18, 1986, advised:

> "By letter this date, I have transmitted to Mr. James Frazier, Director of the Fruit and Vegetable Division of PACA, the license certificate of Al Nagelberg & Co., Inc.
>
> With the transmission of this license certificate, I trust there will be no need for further proceedings."

Complainant acknowledged receipt of said license. Both parties were aware that the oral hearing would be held as scheduled.

An oral hearing was held on November 20, 1986. At the hearing, two witnesses testified on behalf of complainant. No one appeared on behalf of respondent. After the introduction of evidence by complainant, complainant moved for the immediate issuance of a decision and order under 7 CFR § 1.141(e). Complainant's motion is hereby granted and the following Decision and Order is issued.

FINDINGS OF FACT

1. Respondent, Al Nagelberg & Co., Inc., is a corporation, whose address is Hunts Point Terminal Market, Row B, Room 216, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the Act, license number 176559 was issued to respondent on June 20, 1958, was renewed annually, presently is in effect, and is next subject to renewal on or before June 20, 1987.

3. As more fully set forth in paragraph 5 of the complaint, during the period February through May, 1985, respondent received and accepted on consignment in interstate and foreign commerce, from 16 sellers, 70 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the net proceeds or balances thereof, in the total amount of $142,580.94.

4. As more fully set forth in paragraph 6 of the complaint, during the period February through May, 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 15 sellers, 130 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the amount of $692,293.89.

5. Since the filing of the complaint, respondent has made numerous additional purchases of perishable agricultural commodities from many different sellers, in interstate and foreign commerce, but has failed to make full payment promptly of the agreed purchase prices or balances thereof in the amount of approximately $800,000.00.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 200 transactions set forth in Findings of Fact 3 and 4 above, and the additional transactions set forth in Finding of Fact 5 above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final December 29, 1986.—Ed.]

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE Co. PACA Docket No. 2-6761. Decided December 10, 1986.

Order issued by Donald A. Campbell, Judicial Officer.

REMOVAL OF STAY ORDER

The stay order previously issued in this proceeding pending the outcome of proceedings for judicial review is hereby lifted. Respondent's license is revoked effective on the 30th day after service of this order on respondent.

In re: AAA PRODUCE COMPANY. PACA Docket No. 2-7324. Decided December 18, 1986.

Peter Train, for complainant.
Leslie Davis, St. Louis, Missouri, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

MOTION TO AMEND DECISION AND ORDER

On October 28, 1986, a decision and order, agreed to by the parties, was entered by Administrative Judge Dorothea A. Baker. The order provided that respondent AAA's license was to be revoked, provided, however, that if AAA made restitution in the amount of $451,000.31 by December 15, 1986, the revocation would be remitted to a suspension of the license for a period of 90 days commencing March 1, 1987.

The parties have agreed to a proposed modification of the order and therefore move that the order of October 28, 1986 be amended on page 3 of the decision by substituting the date of January 5, 1987, for December 15, 1986 as the date by which payment must be made and the date upon which the order shall become effective.

AMENDMENT AND MODIFICATION OF DECISION

The Complainant's Motion to Amend Decision and Order, filed December 17, 1986, is hereby Granted.

The Decision and Order, issued October 28, 1986, is hereby amended and modified as set forth in said Motion to Amend.

Copies hereof shall be served upon the parties.

REPARATION DECISIONS

CLEMENTS CITRUS SALES OF FLORIDA *v.* GREG REEVES d/b/a REEVES FUND RAISING CO. PACA Docket No. 2-6914. Decided November 5, 1986.

FOB Sale—Inspection—Failure to prove damages—Reparation awarded. Respondent purchased numerous loads of fund-raising citrus from complainant and failed to pay for 22 orders. Respondent claimed he paid and also claimed set-offs for a purported rebate the parties entered into as well as a spoilage allowance and advertising allowance. Respondent didn't prove set-offs or payment by preponderance of evidence. Respondent shall pay to complainant, as reparation, $43,783.45, with interest thereon at the rate of 13 percent per annum from February 1, 1985, until paid.

Allan R. Kahan, presiding officer.
Roger G. Orr, Fort Pierce, Florida, for complainant.
Clinton W. Lanier, Vero Beach, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). An informal complaint was filed on May 7, 1985. On May 17, 1985, complainant filed a formal complaint in which complainant seeks an award of reparation against respondent in the amount of $43,783.45 in connection with the shipment of oranges and grapefruit in interstate commerce.

A copy of the report of investigation prepared by the Department was served on each of the parties, and respondent was served with a copy of the complaint. Respondent filed an answer to the complaint denying any liability thereunder, claiming payment of some of the invoices, as well as set-offs equal to or exceeding the amount complainant claimed.

Complainant requested an oral hearing and such hearing was held on January 27, 1986, in Fort Pierce, Florida. Three witnesses testified for complainant, and two witnesses testified on behalf of respondent. Complainant introduced six (6) exhibits, which will hereafter be designated by the prefix CX. Respondent introduced twenty-one (21) exhibits which will hereafter be designated by the prefix RX. References to the transcript will be designated by the prefix Tr.

FINDINGS OF FACT

1. Complainant Henry T. Clements, Jr., is an individual doing business as Clements Citrus Sales of Florida, whose address is P.O. Box 2691, Stuart, Florida 33495.

2. Respondent Greg Reeves is an individual doing business as Reeves Fund Raising Company whose address is 1717 Dixie Highway, Suite 431, Fort Wright, Kentucky 41011. At the times of the transactions involved herein respondent was not licensed under the Act, but was subject to its provisions.

3. On or about November 16, 1984, complainant sold to respondent, on invoice no. 84036-D, 469½ 4/5 bushel cartons of oranges and grapefruit for a total price of $4,763.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel carton and 2/5 bushel cartons. Respondent made an unauthorized deduction of $334.75, and paid $4,428.25.

4. On or about November 19, 1984, complaint sold to respondent, set forth on invoice no. 84046-A, 500 4/5 bushel cartons of oranges and grapefruit for a total price of $4,325.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

5. On or about November 19, 1984, complainant sold to respondent, set forth on invoice no. 84046-B, 252½ 4/5 bushel cartons of oranges and grapefruit for a total price of $2,385.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

6. On or about November 19, 1984, complainant sold to respondent, set forth on invoice no. 84046-C, 100 4/5 bushel cartons of oranges for a total price of $1,000.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 2/5 bushel cartons. Respondent did not pay complainant for said produce.

7. On or about November 28, 1984, complainant sold to respondent, set forth on invoice no. 84073, 1170 4/5 bushel cartons of oranges and grapefruit for a total price of $12,480.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 2/5 bushel cartons. Respondent made an unauthorized deduction of $117.50 from the invoice price and paid $12,362.50.

8. On or about December 1, 1984, complainant sold to respondent, set forth on invoice no. 84076-A, 258 4/5 bushel cartons of oranges and grapefruit for a total price of $2,487.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent made an unauthorized deduction of $68.00 from the invoice price and paid $2,419.00.

9. On or about December 1, 1984, complainant sold to respondent, set forth on invoice no. 84076-B, 313½ 4/5 bushel cartons of oranges and grapefruit for a total price of $2,766.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in

4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of $19.00 from the invoice price and paid $2,747.00

10. On or about December 1, 1984, complainant sold to respondent, set forth on invoice no. 84100, 329½ 4/5 bushel cartons of oranges and grapefruit for a total price of $3,358.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of $503.70 from the invoice price and paid $2,854.30.

11. On or about December 3, 1984, complainant sold to respondent, set forth on invoice no. 84079, 397 4/5 bushel cartons of oranges for a total price of $4,740.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent made an unauthorized deduction of $108.00 from the invoice price and paid $4,632.00.

12. On or about December 3, 1984, complainant sold to respondent, set forth on invoice no. 84114, 700 4/5 bushel cartons of oranges for a total price of $7,500.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent made an unauthorized deduction of $414.00 from the invoice price and paid $7,086.00.

13. On or about December 4, 1984, complainant sold to respondent, set forth on invoice no. 84150, 225 4/5 bushel cartons of oranges and grapefruit for a total price of $2700.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent paid complainant $2400.00, leaving a balance due of $300.00 for said produce.

14. On or about December 6, 1984, complainant sold to respondent, set forth on invoice no. 84149, 375 4/5 bushel cartons of oranges for a total price of $4,275.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent did not pay complainant for said produce.

15. On or about December 6, 1984, complainant sold to respondent, set forth on invoice no. 84080-B, 565 4/5 bushel cartons of oranges for a total price of $6,060.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent made an unauthorized deduction of $249.00 from the invoice price and paid $5,811.00.

16. On or about December 7, 1984, complainant sold to respondent, set forth on invoice no. 84081-A, 450 4/5 bushel cartons of oranges and grapefruit for a total price of $4,154.75 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent did not pay complainant for said produce.

17. On or about December 8, 1984, complainant sold to respondent, set forth on invoice no. 84191-B, 450 4/5 bushel cartons of oranges and grapefruit for a total price of $3,750.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packed in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

18. On or about December 8, 1984, complainant sold to respondent, set forth on invoice no. 84194, 942½ 4/5 bushel cartons of oranges and grapefruit for a total price of $8,217.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

19. On or about December 8, 1984, complainant sold to respondent, set forth on invoice no. 84191, 300 4/5 bushel cartons of oranges and grapefruit for a total price of $3,064.50 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of $321.25 from the invoice price and paid $2,743.25.

20. On or about December 9, 1984, complainant sold to respondent, set forth on invoice no. 84141, 745 4/5 bushel cartons of oranges and grapefruit for a total price of $6,595.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of $204.00 from the invoice price and paid $6,391.00.

21. On or about December 3, 1984, complainant sold to respondent, set forth on invoice no. 84096-A, 460 4/5 bushel cartons of oranges and grapefruit for a total price of $4,377.50 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel cartons. Respondent did not pay complainant for said produce.

22. On or about December 10, 1984, complainant sold to respondent, set forth on invoice no. 84139, 780 4/5 bushel cartons of oranges and grapefruit for a total price of $6,920.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

23. On or about December 12, 1984, complainant sold to respondent, set forth on invoice no. 84145, 26½ 4/5 bushel cartons of oranges and grapefruit for a total price of $257.50 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent did not pay complainant for said produce.

24. On or about December 13, 1984, complainant sold to respondent, set forth on invoice no. 84138-A, 692 4/5 bushel cartons of or-

anges and grapefruit for a total price of $6,625.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of $450.00 from the invoice price and paid $6,175.00.

25. On or about December 14, 1984, complainant sold to respondent, set forth on invoice no. 84083, 917½ 4/5 bushel cartons of oranges and grapefruit for a total price of $9,185.00 f.o.b. complainant's packing plant in Stuart, Florida. The citrus was packaged in 4/5 bushel and 2/5 bushel cartons. Respondent made an unauthorized deduction of $1,032.50 from the invoice price and paid $8,152.00.

26. All transactions set forth in paragraphs 3 through 25 were in interstate commerce. For the transactions and invoices set forth above, respondent paid a total of $65,801.80 of the invoiced price of $109,585.25, leaving a balance remaining unpaid of $43,783.45.

27. A formal complaint was filed on May 17, 1985, which was within nine months of the accrual of the causes of action stated herein.

CONCLUSIONS

Complainant seeks to recover the full invoice price of the subject oranges and grapefruit less the amount respondent has paid to complainant. Respondent interposes as his defense to complainant's action that although he admits he owes $26,930.50 to complainant, respondent has certain set-offs against said sum, which include a 25¢ commission on each box sold by respondent, a spoilage allowance, an advertising allowance, and a breach by complainant, which resulted in respondent having to go out and "cover" to meet his obligations, at a price greater than contracted for with complainant.

THE TERMS OF THE SALE

The evidence discloses that the terms of the sale were that respondent purchased the citrus in an f.o.b. sale, with ownership passing at the loading dock of complainant's packing house, where the citrus was loaded by respondent onto trucks procured by respondent, with payment to be made thirty (30) days after shipment. The parties agreed to a one percent (1%) spoilage "allowance" in which complainant would make some form of compensation to respondent if the product arrived at its destination point with greater than one percent spoilage provided prompt notice was given to complainant and some sort of verification could be made. This "spoilage allowance" was neither a credit to respondent, nor a rebate, set-off or reduction in price. It was a mutually agreed figure

below which respondent would accept spoilage loss and above which complainant would make compensation to respondent.

Respondent's attempt to incorporate terms of other contracts which complainant may have agreed to with other parties (Tr. 218–233) by inference because of their similarity with the contract respondent had with complainant, is unsuccessful. The terms contained in other contracts complainant negotiated with other parties are irrelevant to the terms agreed to by these two parties in their contract for the 1984–85 season.

A. The Purported Spoilage

An examination of the spoilage claims made by respondent, conveniently set forth at Exhibit 1B of the investigative report, indicates that respondent made seven deductions for alleged spoilage in the transactions at issue. The evidence discloses that only two out of the eleven lots had less than 1% spoilage. The remaining lots hd 2.27, 3.09, 4.1, 5.52, and 15% spoilage. Yet in no case did respondent promptly inform complainant or request federal inspection. If such degree of spoilage did, in fact, exist, the cost of inspection would have been money well spent by respondent.

The contract provided for ownership passing at the point of shipment. Even if the sales to respondent had been "delivered" sales, the absence of a valid inspection is a fatal flaw in respondent's proof. In addition, the alleged documentation of such spoilage, is unpersuasive. One purported letter was undated (RX 2 p. 12) and the other letter was dated almost six months after the citrus was delivered. Both read as if they were requested by respondent long after the events, and the knowledge of the parties to the events in question, had passed. In addition, respondent presented no credible evidence that he gave complainant prompt or any other notice of the spoilage he eventually claimed. Testimonial evidence has often been discounted where a neutral inspection could have been obtained. *Mutual Vegetable Sales* v. *Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); *S.J. Albert, Inc.* v. *Salvo*, 36 A.D. 240 (1977); *Edgar H. Graff, Jr.* v. *Chandler-Topic Co.*, 41 A.D. 1787 (1982). Therefore, the letters cannot receive any weight in this proceeding.

Complainant had the citrus inspected prior to releasing it to respondent for shipment. The inspection certificates were submitted with the complaint, are a part of the investigative report, and were introduced by complainant as exhibits at the hearing. At the point of the sale, the citrus met the grade and quality standards. Respondent presented no persuasive or credible evidence to show that the fruit's condition was otherwise on arrival. Respondent's deductions from the invoice price due to spoilage are disallowed.

B. The Purported Rebate

The largest amount claimed by respondent as set-off relates to the purported written contract giving respondent a twenty-five cents (25¢) per box commission. At issue is whether the alleged signature of complainant, Mr. Henry R. Clements, Jr., contained on this document, is the actual signature of Mr. Clements. Both parties presented their expert handwriting analysts. Both experts supported their analyses with reasoned explanations of their examination of the purported signature. After careful analysis of the testimony of both expert witnesses, as well as review of the questioned signature with the numerous examples of known signatures which were introduced into the record, we find that the questioned signature of "Henry T. Clements, Jr.", contained on the purported contract for a 25¢ per box rebate, was not proved to have been made by Mr. Clements. We come to this conclusion for the reasons which follow.

Initially, the language of the document is suspicious in nature. What purports to be an agreement or contract which, as the circumstances indicated, would have a value of in excess of $13,000.00, was poorly drafted. Rather than "Clements Citrus Sales of Florida" hereby agrees to pay Greg Reeves 25¢ per box for fruit Greg Reeves Fund Raising Co. purchases and Clements Citrus ships for the 1984–85 season," the purported contract, just refers to "Clements", does not define the size of the box, and does not refer to the period involved. In addition, the purported contract was handwritten on stationary of one of respondent's company's "R Distribution Co." and ostensibly signed by the parties at the offices of complainant, rather than typed up by one of complainant's clerical employees. (Tr. 118)

As to the questioned signature itself, both handwriting experts raised relevant considerations regarding both the validity and invalidity of the signature. If one were to consider the testimony of just the handwriting experts, the decision would be a toss-up. However, having seen and heard the testimony of both Henry Clements and Greg Reeves, we find the testimony of Mr. Clements more credible, believable and persuasive. Therefore, for the reasons enumerated above, we find the signature to be a forgery. That being so, no contract existed between the parties regarding a 25¢ per box rebate, and such amount is not a set-off from the amount respondent owes complainant.

C. Respondent's Claim to Having Paid Various Invoices

Respondent claimed to have paid many of the invoices in dispute, and presented documentary evidence claiming payment for particu-

lar invoices. Although complinant was initially at a loss as to why his records and respondent's did not agree, the discrepancy disappeared when Ms. Carrera, complainant's office manager, testified to the procedure used in crediting payments made by Mr. Reeves, Ms. Carrera's testimony is most credible, and her explanation was most persuasive.

Ms. Carrera testified to the usual procedure followed by complainant's office upon the receipt of Mr. Reeve's check. Respondent usually paid a number of invoices with each check. When she received the check, the invoices the check was in payment for were attached to the check; she would credit respondent with the payment for the appropriate invoices, make a photocopy of the check and write the invoice number(s) and amount(s) of the invoice(s) that the check was in payment for on the sheet of paper containing the photocopy of the check. (CX 4, 5, and 6, p. 1). A comparison of these exhibits, with the check and invoice exhibits introduced by respondent, RX 1-3, indicates why the discrepancy regarding payment exists between the parties. A comparison of CX 4 with RX 1 shows that complainant's claim regarding the invoices for which the check was in payment, is reconciled with the total amount of the check *without* making a deduction for spoilage, while respondent's claim requires a reduction in price of one invoice, for alleged spoilage, to reconcile the check amount with the invoices. A similar comparison of CX 6 with RX 3 shows that the invoices respondent claims the check is in payment for *do not* even add up to the amount of the check. There is a difference of $71.25.

Respondent explained the $71.25 difference on the basis of a delivery of citrus products respondent purportedly made to a customer of complainant's "Youth Opportunity United", purported by respondent to be complainant's customer. (RX 5; Tr. 121-125). Such "explanation" is not credible. To begin with, the transaction occurred on or about December 16, 1984, but respondent didn't "deduct" it from his payment to complainant until his payment of February 6, 1985, more than 45 days later. In addition, the amount claimed for mileage, which equalled the $71.25 amount, is suspect. Respondent's invoice and exhibit charges complainant for 57 miles of delivery at $1.25 per mile. Yet the approximate mileage from Cincinnati to Dayton is 56 miles; from Dayton to Vandalia is 11 miles; and from Cincinnati to Florence, KY is approximately 12 miles, or a total of 79 miles. Respondent's invoice is off by 22 miles, or almost 50%. It is noted that no other combination of miles and price per mile will work. In addition, respondent's exhibits or proof of the $71.25 was not contained in the documentation previously submitted as an attachment to this Answer or in the investigative

report. No evidence, other than the invoice prepared by respondent and respondent's testimony, indicates that "Youth Opportunity United" is complainant's customer. Respondent's Exhibit 5 appears to be fabricated evidence, to permit the respondent's check #1197 to reconcile with the invoices, in amount, with the invoices respondent claims it is for. It is interesting to note that all four of the invoices respondent claims check No. 1197 (RX 3 p. 1) was in payment for, are shown as unpaid by complainant. The failure to reconcile these amounts raises serious questions as to whether that check was in payment of those invoices. Respondent's testimony and evidence on this question is not credible. The testimony and evidence of Ms. Carrera, complainant's bookkeeper is. Respondent did not pay the invoices in dispute.

D. Respondent's Reductions in Price for Fruit Size

Respondent alleged that part of his reduction in price related to fruit not complying with size requirements. A comparison of the size information contained on the invoice, as well as an examination of the "Manifest Inspection Certificates and Bills of Ladings" or pack-out records, contained in CX 1 clearly indicates that the respondent's reductions in price as a result of size problems were unjustified. Although the signature of the authorized USDA inspector is not contained on the copies of such "Manifest Inspection Certificates" which are part of the record, [neither those attached to the Complaint, those of the report of investigation, nor those introduced at the hearing have them], the shipper's representative certified that the fruit had been inspected and no challenge to their accuracy was made. Such being the case, the validity and integrity of the information contained thereon is high. Respondent's reduction in price due to fruit size was unjustified.

E. Respondent's Claim that the Agreement Required Only Indian River Fruit

Respondent claimed that complainant agreed to supply only Indian River fruit. Complainant denied such claim, stating that the brand which was shipped to respondent, River Mist, was not an exclusive Indian River product. At the hearing Complainant's attorney graphically displayed the box the fruit was packed in, and no reference to the contents being Indian River fruit was contained thereon. This must be compared with respondent's testimony as well as with the statement contained on complainant's stationary that it was a "Fund Raising Development Specialists Serving Schools, Churches and Civic Organizations with *Quality Indian River Citrus,*" (emphasis added) Complainant admitted in his testi-

mony, that the negotiations with respondent were for the purchase and sale of Indian River Fruit (Tr. 43). Complainant's own stationary supports respondent's claim. Had respondent presented evidence to substantiate the difference in cost between Indian River and Interior citrus fruit for this period, such award of a set-off could have been granted to the extent that complainant shipped interior fruit rather than the contracted Indian River fruit.

The only evidence on the issue of the price differential between Indian River and Interior citrus was the testimony of complainant, who stated that there was no difference on price (Tr. 45). Mr. Gallo, testifying on behalf of respondent, stated that interior oranges are cheaper than Indian River (Tr. 233), but provided no price difference for the period and varieties in question. The failure of respondent to present such evidence and prove the amount of damages, precludes the respondent from asserting his right to recover such damages. In addition, the Manifest Inspection Certificates, referred to above, were of two types, one that clearly indicated that Indian River citrus was involved by such designation being printed on the invoice, and one that had no indication of Indian River fruit printed thereon. Examination of the information contained on the bottom of the non "Indian River" manifest discloses the total number of standard boxes involved in the manifest, broken down by type; i.e. grapefruit, oranges and tangerines. Immediately above those figures is an entry of designation of "Area 1—Area 2", and the numbers set forth to either side of those areas equals the total number of "standard boxes" involved. All the "Indian River" manifests indicate that the fruit involved therein came from Area 2. Mr. Clements testified that Area 1 meant Interior fruit and Area 2 was Indian River fruit (Tr. 45). However, there was no evidence that respondent received a copy of the invoice. The record indicates, by an examination of those manifests, that the substantial majority of the fruit purchased by respondent from complainant was Indian River Fruit.

F. The Advertising Allowance

Respondent claims as a further set-off a $1500.00 advertising allowance which complainant agreed to. The evidence presented by both parties was self-serving and contradictory. Respondent did not prove such advertising allowance being agreed upon by a preponderance of the evidence. Evidence of neither side is of greater weight. Therefore, the claim for a set-off of the amount of the advertising allowance, $1500.00, is denied.

G. Respondent's Other Claims and Setoffs

In respondent's answer, respondent alleged the complainant had agreed to provide gift boxes to respondent for an agreed price; that complainant failed to provide the necessary citrus for such boxes which caused respondent to locate said citrus from other sources and "cover" at a higher price; and that such action by complainant caused an additional loss to respondent of approximately $9,000.00. Respondent presented no evidence regarding this matter, so it is hereby denied.

Respondent did, however, present evidence that citrus purchased by respondent was sent to fill an order of complainant's, for a customer complainant had in Ohio. (RX 5; Tr. 121) As discussed in Section A of this Decision, such explanation is not credible. That respondent did not raise this fact previously in his answer, nor at the time of the investigation, since it is not in the investigative report, makes the claim unpersuasive, and is herby denied.

Having raised several set-offs to the amount owing to complainant respondent has the burden of proving them by a preponderance of the evidence. *The Grower-Shipper Potatoe Company* v. *Southwestern Potato Co.*, 28 A.D. 511 (1969); *Branix Trucking* v. *Cumberland Produce Co., Inc.*, 41 A.D. 1814 (1982); *Harry Wolfe* v. *Mendelson-Zeller Co.*, 34 A.D. 690 (1975)

The preponderance of the evidence is not necessarily controlled by the number of witnesses or the number of exhibits. Rather the preponderance or weight of the evidence is governed by the credibility of the witnesses. *Richardson on Evidence* Fourth Edition, Section 179. At the hearing, the Presiding Officer had an opportunity to observe the demeanor, under oath, of all the witnesses, including the complainant and respondent, on direct and cross examination. He is of the opinion that the greater weight should be attached to the testimony of the complainant and his witnesses. In the circumstances, it is concluded that respondent has *not* sustained his burden of proof by a preponderance of the evidence. *Great Western Food Distributors* v. Brannan, 201 F.2d 476 (7th Cir. 1953); *United States ex rel Ohm* v. *Perkins*, 79 F.2d 533 (2d Cir. 1935).

Therefore, as a result of respondent's failure to pay for the invoices at issue, as well as respondent's failure to prove the setoffs claimed, respondent is liable for the contract price remaining unpaid of $43,783.45. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be rewarded, with interest. Since neither party has submitted a request for fees and expenses, such right to the award is hereby waived.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $43,783.45, with interest thereon at the rate of thirteen percent per annum from February 1, 1985, until paid.

Copies of this order shall be served on the parties.

RITCLO PRODUCE, INC. *v.* JOHN LIVACICH PRODUCE, INC. and/or LARRY ELMER, INC. PACA Docket No. 2-6476. Decided November 6, 1986.

FOB Sale—Inspection—Failure to pay—Reparation awarded.
Respondent agreed to be liable for all payments due in regards to purchase of produce and failed to pay complainant in full. Respondent was ordered to pay complainant, as reparation, $53,166.40, with interest thereon at the rate of 13 percent per annum from June 1, 1983, until paid. Respondent shall also pay to complainant, as additional reparation for fees and expenses incurred, the sum of $5,948.55, with interest thereon at the rate of thirteen percent per annum from the date of this order, until paid.

George S. Whitten, presiding officer.
James A. Soto, Nogales, Arizona, for complainant.
Patricia J. Rynn, Newport Beach, California, for respondent (Livacich)
Respondent (Elmer), *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant requested an award of reparation against respondents in the amount of $53,166.40 in connection with the shipment in interstate commerce of eight truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondents which filed a joint answer thereto, in which respondent John Livacich Produce, Inc. denied any liability to complainant, and respondent Larry Elmer, Inc., admitted liability to complainant in the amount of $30,733.40, and denied liability for the balance claimed. On March 2, 1984, an order requiring payment of the undisputed amount was issued against respondent Larry Elmer Inc. On April 27, 1984, after being advised that respondent Larry Elmer Inc. had filed a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11

U.S.C. §§ 1101–1174), and in view of the automatic stay provisions of 11 U.S.C. § 362, an order was issued holding this proceeding in abeyance as against Larry Elmer, Inc., until receipt by this Department of proper notification that the Chapter XI proceeding has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

The amount claimed in the formal complaint exceeds $15,000.00, and an oral hearing was requested in the answer. An oral hearing was held August 15 and 16, 1985, in San Bernardino, California. Two witnesses testified on behalf of complainant, and four witnesses testified on behalf of respondent. In addition four depositions previously taken were received in evidence following the hearing. Both parties filed briefs and claims for fees and expenses.

FINDINGS OF FACT

1. Complainant, Ritclo Produce, Inc., is a corporation whose address is P.O. Box 794, Nogales, Arizona.

2. Respondent, John Livacich Produce, Inc., is a corporation whose address is P.O. Box 5519, San Bernardino, California. At the time of the transactions involved herein this respondent was licensed under the Act. Respondent Larry Elmer, Inc., is a corporation whose address is P.O. Box 45586, Los Angeles, California. At the time of the transactions involved herein this respondent was licensed under the Act. This proceeding has been stayed as against respondent Larry Elmer, Inc.

3. In the latter part of February, 1983, Edward Stoller, Jr., general manager of Ritclo Produce (hereafter Ritclo), received a telephone call from Joe Saccamano, a partner of Larry Elmer, Inc. (hereafter Elmer) in the purchase and sale of (principally) tomatoes. Mr. Saccamano proposed that Elmer purchase tomatoes from Ritclo. Edward Stoller, Jr., after running a credit check on Elmer, informed Mr. Saccamano that, although he would like to sell produce to Elmer, he could not extend Elmer any credit. Saccamano informed Stoller, Jr., that he would have Larry Elmer contact Stoller, Jr., about the possibility of working together with John Livacich Produce, Inc. (hereinafter Livacich) on the purchase and sale of produce. On the same day Stoller Jr., received a call from Larry Elmer, who asked whether complainant would sell to Elmer if Livacich could be involved. Stoller Jr., responded that he would have no problems with such an arrangement. Later that day Stoller Jr. and John Livacich, president of respondent Livacich, talked by phone, and agreed that Livacich would guarantee pay-

ment on merchandise sold by Ritclo to Elmer, and would take invoicing on such merchandise.

4. Between March 14, 1983, and April 24, 1983, complainant sold and shipped to Elmer or Elmer's customers eight truckloads of tomatoes, and invoiced Livacich on each of the eight truckloads. John Livacich received each of the invoices and forwarded each of them unopened to Elmer. The total agreed invoice cost of the eight truckloads of tomatoes was $53,166.40. Stoller, Jr., made several contacts with Livacich by telephone during the month of May requesting payment on the eight tomato invoices. Edward Stoller III, salesman with complainant, talked by telephone with Teddy D. Elmer, office controller for Elmer, during the latter part of May, and requested payment on the invoices. On June 8, 1983, Stoller Jr., wrote to Livacich reviewing their agreement and requesting payment of the entire balance of $53,166.40. In the latter part of June, Stoller III talked by telephone with Ted Elmer and Al Brasile, salesmen for Elmer, at which time the parties went over each of the invoices. Ted Elmer and Al Brasile admitted full liability on the first six invoices, but stated that there were quality problems with the tomatoes in the last two invoices. Stoller III, asked if federal inspections had been made on the two loads of tomatoes in question, and was told that no inspections were made. Stoller III, then informed Ted Elmer and Al Brasile that without federal inspections, and without notifying complainant much sooner, he had no authority to grant any kind of adjustment. Ted Elmer indicated a willingness to pay only $954.10 on the next to the last invoice (original amount $11,214.30), and $1,081.00 on the last invoice (original amount of $12,142.55). Ted Elmer also indicated that they had a "dump certificate" on the two loads. Stoller III, ended the conversation by telling Ted Elmer that he had no authority to grant any kind of adjustment, and that Ted Elmer should send the money owed on the first six invoices, and the paper work on the remaining two.

5. On July 15, 1983, Ted Elmer wrote the following letter to Ritclo Produce:

> Atn: Eddie
>
> Enclosed is our check in the amount of $31,844.55 in settlement of our account in full. Following is summary of your account. As you know this merchandise was purchased by Larry Elmer, Inc. with John Livacich Produce Co., Inc. guaranteeing payment.
>
> We are paying as follows:

Inv. # 1475		$17,269.20	
Inv. # 1490		2,732.40	
Inv. # 1560		(4,065.00)	Credit
Inv. # 1560		7,609.55	
Inv. # 1564		6,996.00	
Inv. # 1645		558.90	
Inv. # 1646		5,488.20	
Inv. # 1658		4,432.20	
Inv. # 1706		1,102.20	
Inv. # 1707		13,465.25	
Inv. # 2008		4,762.80	
Inv. # 2139*		954.10	
Inv. # 2176*		1,081.00	
		$62,386.80	
Payment 4/1/83	Less	2,732.40	Our Check # 1535
Payment 4/20/83	Less	27,809.75	Our Check # 1592
		$31,844.65	

*Sold on open account as agreed between Eddie and Joe Saccamano

Their (sic) was a total of 2,471 cartons of which 1605 were dumped. (a copy of the dumping certificate is attached)

The return of the balance of 866 return an average price of $2.35 per box.

Sincerely,

Ted D. Elmer
(Controller)

cc John Livacich Produce Co., Inc.

6. On July 19, 1983, Edward Stoller Jr., wrote the following letter to John Livacich Produce, Inc.:

Mr. John Livacich:

This deal with Larry Elmer has really been a nightmare. John. I have never consented for Joe Saccamano to handle anything for our account. He did call me a couple of times that he was having a hard time moving the merchandise. . .

John, both of you and I have not been unfair in our trading practices, for either you or I would not be trading members, or have been in Business Character Awards Listings.

John, once more I am asking for you to honor your commitment to us, as was first agreed. You took the billing and what arrangements you had with Larry Elmer is your business. The amount owed is $53,166.40, Larry Elmer did send a check for $31,844.65 but stated in writing, that payment was in full, which we will not accept. I will send you Mr. Elmer's check so that you can make other arrangements. Please call us where to send check and please mail yours by return mail.

Sincerely yours,

Edward Stoller, Jr.

7. The formal complaint was filed on August 25, 1983, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Livacich asserts that complainant agreed to a settlement on the last two loads of tomatoes following arrival of such tomatoes. This respondent contends that since a check was tendered in the amount of $31,844.65 based upon the alleged settlement agreement, and such check was rejected by complainant, the liability of Livacich ended at that point. Livacich also contends that "because there was no clear understanding between Livacich and Ritclo with respect to the number of shipments involved and the duration of the credit obligation, no contract existed between the parties" and that "complainant's failure to mitigate the loss makes imposition of an award against Livachich inequitable".

In an effort to show that there was an agreement between the parties following delivery of the tomatoes for a settlement on the last two loads, respondent Livacich offered the testimony of Teddy D. Elmer, Larry Elmer, and Al Brasile, all of whom claimed to have been involved in some phase of the alleged settlement negotiations. However, complainant did not submit any testimony from Joe Saccamano, the person who allegedly first elicited an agreement from Ritclo to settle on the last two loads. Complainant's testimony consisted of that of Edward Stoller Jr., and Edward Stoller III, the only two parties who entered into any negotiations on behalf of complainant. Complainant asserted that it was the policy of their company to require federal inspections whenever there was an adjustment for quality. Both Stollers testified that at no point did they ever agree to any adjustment in price on the last two loads of tomatoes, nor did they agree to such loads being handled on an "open" basis. Respondent urges that a transaction in regard to bell peppers, which occurred between complainant and Elmer

prior to the sale of the eight loads of tomatoes, demonstrates that complainant would agree to adjustments without a federal inspection having been made. However, complainant maintained that the adjustment which was admittedly made in regard to the bell pepper shipment was an adjustment for market decline. We also note that an important distinction between the bell pepper transaction and the disputed tomato transactions exists in the fact that complainant issued a prompt credit memo following its making of an adjustment in regard to the bell peppers, but issued no credit memo in regard to the disputed tomato transactions. In fact, the record is devoid of any prompt documentation indicating in any way that there was an adjustment in regard to the last two loads of tomatoes. The earliest written reference to any such adjustment in the record is contained in the July 15, 1983, letter from Ted Elmer which states that the two loads were "sold on open account as agreed between Eddie and Joe Saccamano".

In looking at the specific testimony of Livacich's three principal witnesses we find that the actual words which these witnesses said were used in regard to the alleged settlement negotiations fall short of indicating an agreement on the part of Ritclo to an adjustment, or to the two loads being handled on an open basis. For instance Al Brasile, who was directly associated with Joe Saccamano in the tomato transactions, stated that following the arrival of the next to the last truck Joe Saccamano called and talked with one of the Eddies, had a heated argument, and that both parties hung up. Brasile states that shortly thereafter there was a second conversation to which Brasile was a party "and, to my best recollection, Eddie told Joe, he said, do the best you can to move these. I know what the merchandise is supposed to be. Get the best price you can." Later Brasile again stated as follows:

Q. And were you on the telephone the second time?

A. Yes, I was.

Q. And what was said during that conversation?

A. We were told to get the best price we could and to move the product, keep it moving.

We have held many times that such phrases as "do the best you can", "the buyer should work it out", "handle best possible", and "handle to best advantage", do not amount to authorization to handle a load on an open basis or on account. See *Relan Produce Farms* v. *Rushton & Co., Inc.*, 38 Agric. Dec. 1636 (1979); *Barkley* v. *Ifsco, Inc.*, 31 Agric. Dec. 279 (1972); *Frank Gaglione & Son* v.

Theron Hooker Co., 30 Agric. Dec. 528 (1971); and *Ralph Samsel* v. *L Gillarde Sons Co.*, 19 Agric. Dec. 374 (1960).

All three of respondent's principal witnesses testified concerning a conversation that was had with one of the Eddie Stollers during the middle or latter part of June at the place of business of Elmer in Los Angeles. Each of respondent's principal witnesses stated that they were present for the conversation, and were on the line together at least during parts of the conversation. Mr. Brasile stated that although there was no inspection on either of the two disputed invoices, nor was any confirming memo ever sent concerning the two invoices, notations were made on respondent's copy of one of the invoices indicating a settlement figure. Mr. Brasile's testimony was as follows:

Q. The notation where it starts with return average $2.35 per Al Brasile, do you know whose notation that is?

A. I believe that is Larry Elmer's.

Q. Do you recall when that was placed on there?

A. I believe this was placed on there the time that we had a conversation and I went down to Los Angeles. I believe that is when it was done.

Q. It is your recollection, then, that that notation was placed on the invoice at that meeting in Los Angeles?

A. Yes.

Q. Is that the same time the phone call occurred with the elder Eddie at Ritclo?

A. Yes.

Q. The same day?

A. The same day.

Q. Were these notations placed there during the course of the conversation or prior to the conversation?

A. During the conversation.

Q. Looking up above there there are some numbers that are written in, do you know—first of all, do you know who placed those numbers on there?

A. I believe Larry Elmer did. He had the invoice.

Q. Do you know when those numbers were placed on there?

A. That day.

Q. Was that also during this conversation with elder Eddie?

A. Yes, it was.

Q. And you were on the line when this conversation was taking place?

A. Yes, I was.

Q. What do those numbers mean?

A. That means an adjusted price.

Q. Were those the adjusted prices per box?

A. Yes.

Q. Of each item?

A. Yes, it was.

Q. And that is what was agreed upon on that date?

A. Yes, it was.

During the course of this testimony the Presiding Officer interrupted, and asked the witness "could you tell us again how you know it was the elder Eddie?" To this the witness responded: "It sounded like him. I have had numerous conversations with him over the phone." Later Mr. Brasile, while continuing his testimony on the same subject stated as follows:

Q. Why don't you tell me exactly what you recall being said during that conversation?

A. I recall, to the best of my ability I can think of, I got Eddie on the phone, elder Eddie. We specifically started with invoice No. 2139. I said we want to get this straightened out with you, as Joe had prior to this. Larry jumped in on the line and we started going down and making deductions.

Q. And Eddie agreed to all of these deductions?

A. Well, they were back and forth on the deductions.

Q. There was some negotiation that went on to arrive at these figures?

A. Yes.

Q. What else was said, that you recall?

A. Well, on both invoices they had done the same thing and they come to an agreement on payment.

Q. At that time Larry Elmer, yourself and elder Eddie were on the phone?

A. Yes. And then—I take that back. I believe I got off the phone and Ted Elmer got on and I think Larry hung up too, with Eddie and Ted Elmer got on the phone. I believe that's what happened, later.

Q. Do you know what was said between Ted Elmer and Eddie?

A. No, I do not. I was not in that room.

Q. And basically it is your understanding that what was agreed to was that the Invoice No. 2139 in the original amount of $11,214.30 was adjusted down to $954.10?

A. I don't know. That I don't know.

Q. Weren't you on the telephone when——

A. (Interrupting) I was on the telephone, but they were reading, they were going by the 11.85 down to 2.35, that's what I recall the most. I don't recall the end figure. I believe that was done with Ted.

Q. And the same thing was done on Invoice No. 2176?

A. Yes.

Q. Didn't you say that you heard them agree to this?

A. These prices on the side.

Q. You didn't hear them agree to the 954, just the prices on the side?

A. Right.

Later Larry Elmer testified concerning the same conversation as follows:

Q. All right, now, do you know when your brother wrote on these invoices?

A. Yes, it was sometime in June. This was when we closed out the files. I had Al fly down because John had called me and requested that I make the payment.

Q. That is John Livacich?

A. Yes. . .

* * * * * * *

I called Al and told him to bring all his files and paper work down, to fly down. And we closed out the files, and I put Al on because I didn't want to have any problem. I said, O.K., lets call up and settle the open invoices, as were agreed upon, and he says, O.K. So, we called up Ritclo, asked for Eddie, Sr., and he wasn't there. I talked to, I guess, his son. . .

* * * * * * *

Q. How many loads did you discuss with Ritclo, do you recall?

A. Well, it was basically the eight open invoices. You know, we agreed on all the invoices except for the last two.

Q. So, you went through, invoice by invoice, over the telephone, did you on this day?

A. Yes.

Q. The eight invoices?

A. Eddie did not agree with the way that the last two invoices were, because he asked for an inspection. I said we didn't have an inspection because Joe and Eddie had worked it out and there was no inspection needed. It was an open invoice—it was an open load.

Q. And did he respond?

A. He said, "Well, if that's the agreement, then, get off the payment". And he asked for dumping certificates because he was astonished at the amounts that were dumped. . .

Teddy Elmer also testified in the regard to this conversation that it was initiated by Al Brasile and that after negotiations between Brasile and the representative of Ritclo he was asked to get on the telephone to verify the figures:

> . . . He asked me to pick up the phone. I picked up the phone and I verified the adjustments that we had made on their invoices with Eddie, and he said to send the paper work and that along with the check.
>
> * * * * * * *
>
> Q. Which Eddie is this that you are referring to?
>
> A. I was told it was Eddie, Jr., the reason for that being—I assumed—that I didn't know the senior Eddie was a Junior and this was a III, so I was talking with the younger Eddie.
>
> * * * * * * *
>
> Q. Who initiated this call?
>
> A. Al Brasile.
>
> Q. Was there anyone else present in the room?
>
> A. My brother.
>
> Q. And that is Larry?
>
> A. Yes.
>
> Q. What did Al say?
>
> A. He, basically, was telling them of the problem on these particular invoices and of the problem that the majority of the produce had to be dumped and of the return, that the quality, you know, was very bad, and that these are the adjustments and this would be the payment that would be made. I got on the phone to verify it and I went over it exactly with what these figures were and we agreed to $31,844.65, which was, as far as I knew, Eddie had agreed of the new balance, and that was the amount that we were to pay to completely liquidate the tomatoes with Ritclo, completely pay them off.

Taking this testimony as a whole it can be interpreted in the following manner: First, it is claimed that immediately following the

arrival of the tomatoes a protest was made to Ritclo, and Ritclo responded that Elmer was to move the produce as quickly as possible, and do the best they could with it. This may have been taken to mean that the two tomato invoices were to be viewed henceforth as "open." Later in June when the younger Eddie was called to reach a final settlement he was told that there had been a prior agreement that the two loads were to be handled on an open account, and he responded "well, if that's the agreement, then, get off the payment". This was interpreted by Teddy Elmer to mean that the amount for which payment was then to be made was a settlement figure. However, the testimony of Larry Elmer indicates that the younger Eddie was not in agreement that there should be a settlement at that point, but was merely stating that if there had been a prior agreement Elmer should pay on that basis. Whether this is the correct interpretation to be put on the testimony of respondent's principal witnesses, we do not know. However, the resolution of this issue is to be found in the very basic proposition that it was respondent's responsibility to prove by a preponderance of the evidence that a settlement in regard to the two loads was in fact entered into. As we have stated before, there was no documentation confirming such a settlement, and we conclude that respondent has not proven by a preponderance of the evidence that there was such a settlement.

Respondent Livacich's contention that because there was no clear understanding between Livacich and Ritclo with respect to the number of shipments involved and the duration of the credit obligation, no contract existed between the parties, is without merit. Mr. Livacich testified at the hearing that at the time the agreement was entered into there was no discussion regarding how many shipments were to be involved, and that he did not have any approximate idea of the number of shipments that would be shipped subject to his guarantee. Mr. Livacich received invoices on all of the eight shipments in question and chose of his own violation not to open the letters containing the invoices but to send them on to Elmer. The fact that these letters were sent to Elmer shows that Mr. Livacich knew what they contained and indeed, there is no contention to the contrary. There was obviously an ongoing guarantee as to each of the invoices, and Mr. Livacich's consent to the continuation of such guarantee is obvious.

Respondent Livacich's contention that "complainant's failure to mitigate the loss makes imposition of an award against Livacich inequitable" is also without merit. Respondent states, first, that Ritclo failed to communicate with Livacich on a regular basis concerning Elmer's payment practices, adjustments or other problems

best copy available

with the condition of the commodities sold. However, the record shows that complainant did communicate with Livacich promptly when it became evident that Elmer was having problems in paying. In further support of its contention respondent states that "when Ritclo received payment of $31,844.65 from Elmer in July of 1983, Ritclo failed to seek an agreement from Livacich to guarantee the disputed balance it claimed was due from Elmer. However, the payment was explicitly made conditional upon it being accepted as payment in full. Since it was not in fact payment in full it amounted to no payment at all as far as complainant was concerned, and complainant was fully justified in rejecting the check. We know of no requirement that it "seek an agreement from Livacich to guarantee the disputed balance" claimed due from Elmer. Further, we do not comprehend how any such guarantee would have negated the conditional tender of the check. Livacich further complains that after return of the check Elmer's attorney "offered to pay $30,733.40 on a 'without prejudice' basis in a letter dated October 12, 1983." Livacich states that this offer should have been accepted. It should be noted that this "offer" was made in a letter to the Department of Agriculture approximately 2½ months following the filing of the formal complaint. The "offer" was phrased as follows:

> Ritclo may retain the check in the amount of $31,844.65 only if it will accept that check in full settlement of the amounts due as previously agreed, and dismiss the complaint with you. Otherwise, Elmer makes claim against Ritclo for the additional charges totaling $1,111.25, and the only amount Elmer is prepared to pay on a "without prejudice" basis is $30,733.40, rather than $34,844.65.

A copy of the letter was sent to Larry Elmer, Inc., but there is no indication that a copy went to complainant. Furthermore the letter was not accompanied by a check in the amount of $30,733.40 made out to complainant. On January 13, 1984, the previously filed complaint was served on Elmer and Livacich along with the Department's report of investigation. A copy of the report of investigation, which contained the letter from Elmer's attorney, was also served upon complainant's attorney at this time. This apparently was the first notice which complainant had of the "offer" in the letter. The answer, filed on behalf of both respondents, was filed on February 8, 1984, and contained an admission of liability in the amount of $30,733.40. The Department, following its usual procedures, issued an order for payment of such amount as an undisputed amount on March 2, 1984. The Department was not aware when this order was issued that respondent Elmer had already filed for reorganiza-

tion under Chapter 11 of the Bankruptcy Act. We do not see in any of this a failure on complainant's part to mitigate damages.

Since respondent Elmer was primarily liable to complainant for the full amount of $53,166.40, and since none of such amount has been paid, respondent Livacich is liable to complainant for such amount under its guarantee agreement.

Our finding herein of primary liability on the part of Elmer is purely for the purpose of determining the liability of Livacich. The action of complainant against Elmer has been stayed, Elmer was not a party at the hearing, and our statement in regard to Elmer's liability is not to be regarded as res judicata in any further litigation that might take place in this forum, or in any other forum.

We find that respondent Livacich's failure to pay complainant the sum of $53,166.40 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Complainant filed a claim for attorney fees and expenses in the total amount of $5,948.55. Reasonable fees and expenses incurred in connection with an oral hearing may be awarded pursuant to section 7 of the Act (7 U.S.C. 499g) and section 47.19(d) of the Rules of Practice (7 CFR § 47.19(d)). We have examined complainant's claim, and find that the expenses and the attorney fees requested therein are reasonable and were incurred in connection with the oral hearing. Additional reparation in the sum of $5,948.55 should be awarded to complainant against respondent Livacich.

ORDER

Within thirty days from the date of this order, respondent Livacich shall pay to complainant, as reparation, $53,166.40, with interest thereon at the rate of thirteen percent per annum from June 1, 1983, until paid.

Within thirty days from the date of this order, respondent Livacich shall pay to complainant, as additional reparation for fees and expenses incurred in connection with the oral hearing, the sum of $5,948.55 with interest thereon at the rate of thirteen percent per annum from the date of this order, until paid.

Copies of this order shall be served upon the parties.

U.S. GATEWAYS, INC. *v.* FINEST FRUIT, INC. PACA Docket No. 2-6947. Decided November 6, 1986.

Consignment sale—Failure to properly account and remit—Failure to obtain dumping certificate.

Where consignee's records failed to disclose full disposition of consigned produce, investigator's use of average sales price for the missing cartons was only course available. Respondent shall pay to complainant, as reparation, $2,808.40 plus interest thereon at the rate of 13 percent per annum from May 1, 1984, until paid.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,808.40 in connection with the shipment of four loads of produce in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. In addition, respondent was served with a copy of the formal complaint, filed an answer thereto in which it denied any further liability to complainant.

The amount claimed in the formal complainant does not exceed $15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Neither party filed one. Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, U.S. Gateways, Inc., is a corporation whose mailing address is 531 Chestnut Street, Cedarhurst, New York 11516.

2. Respondent, Finest Fruit, Inc., is a corporation whose mailing address is 260-265 New York City Terminal Market, Bronx, New York 10474. At all material times, respondent was licensed under the Act.

3. During the period March 23, 1984 through April 9, 1984, respondent received, on consignment, from complainant, four loads of produce, to wit; on March 23, 1984—258 cartons of peppers and 232 cartons of okra which were identified as lot number 320; on March

31, 1984—800 Galia melons which were assigned lot number 361; on April 3, 1984—1,733 Galia melons which were assigned lot number 373; and on April 9, 1984—1,328 Galia melons which were assigned lot number 418. In addition, respondent's receiving records disclosed that it had other lots of okra, peppers, and melons on hand during the same period of time as that in which it was selling complainant's commodities.

4. On or about April 12, 1984, the respondent remitted to the complainant for these commodities submitting checks to it totalling $7,587.02. At the same time, it provided complainant with accounts of sales for these items which may be summarized as follows:

		Peppers		
4	@	$10.00	$40.00	
5	@	8.00	40.00	
4	@	7.50	30.00	
21	@	7.00	147.00	
46	@	6.50	299.00	
11	@	6.00	66.00	
85	@	5.00	425.00	
2	@	4.00	8.00	
12	@	2.00	24.00	
25	@	1.50	37.50	
20	@	1.25	25.00	
23	@	1.00	23.00	
258				1164.50
		Okra		
3	@	$5.00	$15.00	
100	@	1.00	100.00	
129	dumped		0	
				115.00
			Total	$1,279.50
Less Expenses:				
USDA Inspection			$42.00	
Terminal charge			9.80	
Handling charge			73.50	
Commission			191.92	
				(317.22)
				$962.28
		Melons		
10	@	$6.50	$65.00	
39	@	6.00	234.00	
50	@	5.50	275.00	
480	@	5.00	2,400.00	

670	@	4.75	3,182.50	
51	@	4.50	229.50	
61	@	4.00	244.00	
5	@	3.50	17.50	
55	@	3.25	178.75	
138	@	3.00	414.00	
30	@	2.75	82.50	
5	@	2.50	12.50	
80	@	2.00	160.00	
225	@	1.50	337.50	
437	@	1.00	437.00	
323	@	.75	242.25	
108	@	.50	54.00	
4	lost re-pack		0	
1,090	dumped		0	
3,861			$8,566.00	
Less Expenses:				
Terminal charge			77.22	
Handling charge			579.15	(1,941.26)
Commission			1,284.89	
				$6,624.74
				$7,587.02

5. An informal complaint was received by the Department on May 7, 1984, which was within nine months after the causes of action herein accrued.

6. During the period February 19, 1985 through March 1, 1985, the matter was the subject of a personal investigation by Mr. James E. Bright, an investigator employed by the PACA branch of the Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. Mr. Bright's investigation indicated that respondent received the produce as indicated above, and that it accounted for the produce also as indicated above. The investigation further indicated that respondent's sales tickets were sequentially numbered and filed by date with charge and cash tickets filed separately within each date. However, the investigation also disclosed that respondent did not record identifying lot numbers on the sales tickets. Therefore, in order to complete his investigation, Mr. Bright had to locate sales of all peppers and okra between March 23, 1984, and April 2, 1984, and sales of all Galia melons between April 2, 1984, and April 10, 1984 i.e., during the time periods when the lots of produce at issue would have been

for sale. A review of those records by Mr. Bright did not indicate the complete disposition of all of the produce. That is, although the respondent reported to the complainant that 1,090 cartons of melons had been dumped, Mr. Bright was not able to locate any documentation supporting this claim in the respondent's files. Therefore, Mr. Bright included the value of the missing cartons at the average sales price in the account of sales which he compiled from the respondent's records with regard to the Galia melons. In this regard,it should be noted that Mr. Bright's review of respondent's records indicated that respondent sold 2,964 cartons of melons rather than 2,771 as it reported to complainant. Additionally, Mr. Bright's review of respondent's sales records reflected sales of more peppers and okra than were contained in the subject shipments. These extra cartons were deducted from his accounts of sales at the average sales price. The audit accounts of sales compiled by Mr. Bright is as follows:

		Peppers	
1	@	$22.00	$22.00
3	@	10.00	30.00
4	@	8.00	32.00
4	@	7.50	30.00
20	@	7.00	140.00
6	@	6.50	39.00
46	@	6.00	276.00
101	@	5.00	505.00
2	@	4.00	8.00
3	@	3.00	9.00
17	@	2.00	34.00
25	@	1.50	37.50
20	@	1.25	25.00
23	@	1.00	23.00
275			$1,210.50
(−)	@ASP 4.4018		74.83
17			
258	Adj. Gross Proceeds		$1,135.67

		Okra	
2	@	$8.00	$16.00
1	@	7.00	7.00
10	@	6.00	60.00
49	@	5.00	245.00
50	@	4.00	200.00
10	@	3.50	35.00
36	@	3.00	108.00
24	@	2.00	48.00
125	@	1.00	125.00
307			844.00

(–) 75	@ASP 2.7491	(206.18)		
232	Adj. Gross Proceeds	$637.82		
490 Ctns.	Total Gross Proceeds		$1,773.44	
Less Expenses				
Inspection U.S.D.A.		$42.00		
Term. Charge @1½/ctn		7.35		
Handling Charge @.15		73.50		
Commission @15%		266.02		
Total Expenses			$388.87	
Net Proceeds Due			$1,384.62	
Net Proceeds Reported and Paid			962.28	
Net Proceeds Underreported and Underpaid				$422.34

		Melons	
10	@	$6.50	$ 65.00
34	@	6.00	204.00
50	@	5.50	275.00
480	@	5.00	2,400.00
670	@	4.75	3,182.50
51	@	4.50	229.50
61	@	4.00	244.00
5	@	$3.50	17.50
55	@	3.25	178.75
138	@	3.00	414.00
30	@	2.75	82.50
5	@	2.50	12.50
65	@	2.00	130.00
225	@	1.50	337.50
447	@	1.00	447.00
586	@	.75	439.50
108	@	.50	54.00
4	@ lost re-pack		0
2,964			$8,713.25
+897	@ ASP 2.94		+2,637.18
3,861	Adj. Gross Prcds.		$11,350.43

Less Expenses:			
Terminal charge @1½¢		57.92	
Handling charge @.15		579.15	
Commission @15%		1,702.56	
Total Expenses		($2,339.63)	
Net Proceeds Due		9,010.80	
Net Proceeds Reported and Paid		(6,624.74)	
Net Proceeds Underreported and Underpaid			$2,386.06
			$2,808.40

7. As respondent denied being obligated to the complainant as indicated by the Department's audit of its records, on May 31, 1985, the complainant filed its formal complaint.

CONCLUSIONS

The focus for decision in this matter is upon the respondent's failure to provide any evidence that it dumped 1,090 cartons of Galia melons. The regulations issued by the Department have, for about the last 30 years, required that a consignee, before dumping in excess of 5% percent of a consignment, must obtain documentation supporting its claim that the produce needed to be dumped, i.e., a federal inspection certificate, before dumping the produce unless it has written permission from the consignor prior to sending out its account of sales permitting it to avoid the necessity of having such an inspection done. *See* 7 CFR §§ 46.22, 46.23. In the instant case, it appears as if the respondent did not obtain any written permission from the complainant to enable it to avoid the necessity of having the produce federally inspected and, apparently, it did not obtain such an inspection. Moreover, despite the regulations' requirement that a consignee maintain some sort of evidence that the produce was actually dumped, the respondent has provided no documentation showing that the melons were in fact dumped. Furthermore, while the respondent claimed that 1,090 cartons were dumped, the department's investigator was able to locate sales tickets reflecting the sale of some of these cartons and only was unable to document sales of 897 cartons, a difference of 193 cartons. Because of the failure of respondent's records to actually reflect that these items were dumped and because of the discrepancy between respondent's claim that it dumped 1,090 cartons of melons while the investigator found that its records reflected sales of 193 of these cartons, we find that the investigator's audit correctly reflects respondent's obligation to complainant, and that the respondent failed to truly and correctly account to the complainant in the amount of $2,808.40 with regard to the subject shipment of produce. Respondent's failure to truly and correctly account and remit to the complainant in this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $2,808.40 plus interest in the amount of 13% percent per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

DOVEX IMPORTS, INC. d/b/a UNIFRUTTI OF AMERICA *v.* NATIONAL PRODUCE DISTRIBUTORS, INC. and/or CENTRAL PRODUCE EL JIBARITO, INC. PACA Docket No. 2-7036. Decided November 6, 1986.

Jurisdiction—Burden of Proof—Sufficiency of evidence—Default judgment. Where the complainant alleges failure to pay for two shipments of grapes, it has the burden to prove jurisdiction, i.e. the interstate character of the transactions, by a preponderance of the evidence. The respondent's failure to answer the complaint constitutes an admission of the facts alleged. The order is against the defaulting respondent.

Sharlene W. Lassiter, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). The complainant filed a timely complaint in which it sought an award of reparation against respondents in the amount of $40,007.75 in connection with two transactions of grapes in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served on each respondent. Respondent Central Produce El Jibarito, Inc., filed an answer thereto, denying liability. Respondent National Produce Distributors, Inc., did not file an answer to the formal complaint and therefore is in default under section 47.8(c) of the Rules of Practice (7 CFR § 47.8(c)).

Although, the amount of damages claimed in the formal complaint exceeds $15,000, the parties waived oral hearing. Accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable herein. Pursuant to such procedure, the parties had the opportunity to submit additional evidence in support of their respective positions by means of verified statements. Complainant did not file an opening statement

and neither of the respondents filed an answering statement. None of the parties filed a brief.

FINDINGS OF FACT

1. Complainant, Dovex Imports, Inc., doing business as Unifrutti of America, hereinafter Dovex, is a corporation whose mailing address is P.O. Box 2300, Wenatchee, Washington 98801.

2. Respondent National Produce Distributors, Inc., hereinafter respondent National, is a corporation whose mailing address is 439 New York City Terminal Market, Bronx, New York 10474. At the time of the transactions involved in this proceeding, respondent National operated subject to license under the Act.

3. Respondent Central Produce El Jibarito, Inc., hereinafter El Jibarito, is a corporation whose mailing address is P.O. Box ZZ, Caparra Heights, Kennedy Avenue, Room 3.9, Monterey Dev., Puerto Nuevo, Puerto Rico 00922. At the time of the transactions involved in this proceeding, El Jibarito was not licensed under the Act.

4. On or about May 9, 1985, in the course of interstate commerce, Dovex sold and shipped to National and a corporation known as Central Produce, Inc., Bronx, New York, hereinafter Central-New York, 2112 lugs of grapes, at a total f.o.b. price of $20,592.00

5. On or about May 20, 1985, in the course of interstate commerce, Dovex sold and shipped to National and Central-New York, 2099 lugs of grapes at a total f.o.b. price of $19,415.75.

6. Respondent National and Central-New York received and accepted both shipments of grapes in Bronx, New York.

7. Respondent National and Central-New York have yet to pay Dovex for the two shipments of grapes.

8. Dovex filed a formal complaint on October 9, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

This proceeding involves the purchase of two shipments of grapes from Dovex by at least one of the respondents. Dovex alleges that National and El Jibarito, jointly and severally, purchased two shipments of grapes on or about May 9 and 20, 1985, for which the total purchase price, $40,007.75, remains due. First, we will discuss the allegations against El Jibarito.

As the moving party, the complainant has the burden to prove by a preponderance of the evidence the affirmative allegations of its complaint. *New York* v. *Sandler*, 32 Agric. Dec. 702, 705 (1973). The first issue is jurisdiction. Dovex alleges that El Jibarito was not licensed under the Act but operated subject to the licensing requirements of the Act. (7 U.S.C. § 499d(a)). In this regard, Dovex

must establish the interstate character of the transactions, i.e., that El Jibarito of Puerto Rico purchased, received and accepted two shipments of grapes in New York, shipped by Dovex from Washington. *Jebavy-Sorenson* v. *Lynn Foods,* 32 Agric. Dec. 529, 531 (1973); See *Kellam* v. *Virginia Tomato Corp.,* 29 Agric. Dec. 835, 837 (1970).

The documents proffered by Dovex do not constitute sufficient evidence to establish that El Jibarito accepted the grapes in New York. Dovex proffers only an invoice and a bill of lading for each shipment. Each invoice is addressed to Central-New York. The bill of lading for the 2099 lug shipment contains two signatures of persons who received the shipment in New York. The bill of lading for the 2112 lug shipment contains a signature without further explanation. The invoices and the bills of lading are sufficient evidence to show the interstate character of the transaction but not that El Jibarito accepted the grapes in Dovex. First, the invoices are not addressed to El Jibarito. Second, the invoices do not indicate whether the addressee, Central-New York, was an authorized agent of El Jibarito in New York through which El Jibarito purchased, received, or accepted the grape shipments from Washington. Third, neither the invoices nor the bills of lading establish a legal relationship between El Jibarito and the individuals who signed the bills of lading. Thus, there is insufficient evidence of interstate operations by El Jibarito in this case. Therefore, we conclude that Dovex did not meet its burden of proving that El Jibarito operated subject to the Act and that the Secretary had jurisdiction over El Jibarito. The complaint against El Jibarito must be dismissed for lack of jurisdiction.

The second issue is the default of respondent National. The failure of respondent National to file an answer to the formal complaint constitutes an admission of the facts alleged in the complaint as provided in section 47.8(c) of the Rules of Practice (7 CFR § 47.8(c)). Respondent National's failure to pay to Dovex the purchase price of the two shipments of grapes is in violation of section 2 of the Act (7 U.S.C. 499b). Accordingly, Dovex must be awarded reparation in the amount of $40,007.75, with interest.

ORDER

The complaint against Central Produce El Jibarito, Inc., is dismissed.

Within 30 days from the date of this Order, respondent National Produce Distributors, Inc., shall pay to Dovex, as reparation, $40,007.75, with interest thereon at the rate of 13% per annum from June 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

INTERNATIONAL A. G., INC. *v.* MACK C. DEMPSEY d/b/a MACK DEMPSEY CO. PACA Docket No. 2-7073. Decided November 6, 1986.

Burden of proof—Sufficiency of evidence—Liability for failure to pay.
Respondent is liable to the complainant for the contract purchase price, where complainant satisfies its burden to prove the price term of the oral contract by a preponderance of the evidence with an invoice, and respondent fails to prove that the price term is incorrect under the same standard.

Sharlene W. Lassiter, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $6,234.64 in connection with a transaction involving melons in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto admitting liability for $3,340.50 of the purchase price and denying liability to the complainant for the remainder.

Because the amount claimed as damages was less than $15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. Although both parties were given an opportunity to file a brief, neither party did so.

FINDING OF FACT

1. Complainant, International A. G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida 33142.

2. Respondent, Mack C. Dempsey is an individual doing business as Mack Dempsey Co., whose mailing address is P.O. Box 1229, 758 Main Street, Gardenville, Alabama 35071. At the time of the trans-

action involved in this proceeding, respondent was licensed under the Act.

3. On January 17, 1985, in the course of interstate commerce, complainant sold and shipped to respondent, from Miami, Florida to Gardenville, Alabama, one truckload of melons consisting of cantaloupes, honeydews and watermelons, pursuant to an oral contract negotiated by A.J. Regoli, Jr., for the complainant and Gary Syracuse for the respondent, at a total agreed f.o.b. price of $6,234.64.

4. Respondent received and accepted the truckload of melons at Gardenville, Alabama.

5. Payment for the truckload of melons was due within 10 days from January 17, 1985, the date of the invoice. Respondent received the invoice without complaint.

6. On March 12, 1986, an order requiring payment of the undisputed amount of the purchase price, $3,340.50, was issued and served on both parties.

7. Complainant filed a formal complaint on November 7, 1985. It also filed an informal complaint on September 25, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This proceeding involves respondent's purchase of one truckload of mixed melons from complainant. The only issue for discussion concerns the agreed upon total purchase price for the load of melons.

Complainant alleges that the parties agreed to a total purchase price of $6,234.64 for the load, while respondent submits that the agreed upon total price is only $3,340.50. Complainant, as the moving party, has the burden of proving the essential elements of the allegations in his complaint by a preponderance of the evidence. *New York* v. *Sandler*, 32 Agric. Dec. 702, 705 (1973). The evidence submitted by the complainant consists of an invoice indicating that the total purchase price of the mixed melons was $6,234.64. The invoice does not represent the contract between the parties but is evidence of the agreed upon terms of the oral contract between the parties when, as here, it is received without objection by the buyer. *Casey* v. *Albanese*, 31 Agric. Dec. 311, 317 (1972).

The respondent claims that the total price which appears on the invoice is incorrect. Yet, respondent has submitted no substantive evidence whatsoever to support his assertion. Rather, respondent proffers a copy of the complainant's invoice which contains handwritten alterations to the prices per crate and the total purchase price. The respondent does not proffer evidence to indicate 1) who

made the changes on his copy of the invoice, 2) when the price changes were made, 3) whether respondent communicated with the complainant, or attempted to communicate, that he did not agree with the prices indicated on the invoice, 4) whether the complainant agreed to any changes in the price, or 5) whether respondent took any steps to reject the truckload because of a conflict with the prices on the invoice. Therefore, we hold that the complainant, by submission of its copy of the invoice, has carried its burden of proving that the purchase price for the truckload of melons was $6,234.64.

The respondent here, having accepted the truckload of melons, is liable to the complainant for the contract purchase price as indicated by the invoice provided by the complainant. *J.R. Simplot Co.* v. *Red L. Foods Corp.*, 17 Agric. Dec. 384, 390 (1958).

The order requiring payment of the undisputed amount of the purchase price, $3,340.50, issued on March 12, 1986, remains in effect. In addition, respondent is liable to the complainant for the remaining $2,894.14 of the purchase price.

ORDER

Within 30 days from the date of this Order respondent shall pay to complainant, as reparation, $2,894.14, with interest thereon at the rate of 13% per annum from February 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

WEST FOODS, INC. *v.* WEINSTEIN PRODUCE SALES, INC. PACA Docket No. 2-6896. Decided November 10, 1986.

FOB Sale--Failure to rebut evidence--Modification of Contract--Complaint dismissed.

Respondent admitted purchase of 5 trucklots of mushrooms but was found, on the basis of its unrebutted denial, not to have purchased a sixth trucklot. Respondent's handling of the mushrooms received was found to have been in accord with contract modification agreed to by complainant after the arrival of the produce. The complaint was dismissed.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,706.75 in connection with the shipment in interstate commerce of six trucklots of fresh mushrooms.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant in part, but admitting liability in the total amount of $2,683.51. On September 27, 1985, an order requiring payment of the undisputed amount was issued in complainant's favor against respondent. Respondent's liability for the remaining disputed amount was left for determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had issued. See 7 U.S.C. 499g(a).

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, West Foods, Inc., is a corporation whose address is P.O. Box 3500, Salinas, California.

2. Respondent, Weinstein Produce Sales, Inc., is a corporation whose address is P.O. Box 7364, Boise, Idaho. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about the following dates complainant sold and shipped to respondent five trucklots of fresh mushrooms as follows:

Date	Invoice No.	Amount
10-03-84	29827	$946.50
10-16-84	30991	1,095.50
10-26-84	32047	1,143.50
11-08-84	33291	749.75
11-21-84	34488	582.75
	TOTAL	$4,518.00

4. After receipt of each of four of the shipments of mushrooms respondent contacted complainant, and complained of poor condition in the mushrooms. Complainant told respondent no inspection was necessary, and authorized respondent to rework the mushrooms. Respondent reworked each lot of mushrooms, dumped a portion of each, and accounted to complainant for the remainder on the basis of original contract price less a $1.00 per carton charge for repacking, and less freight on the cartons dumped. Respondent paid for the shipment of October 16, 1984, in the original contract amount. The total amount which respondent has paid on all five transactions is $2,683.51.

5. The formal complaint was filed on February 25, 1985, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase prices alleged to be due on six trucklots of fresh mushrooms allegedly sold by complainant to respondent. Respondent admits the purchase and receipt of five of the trucklots, but denies that a trucklot allegedly shipped on October 4, 1984, having a total invoice price of $188.75, was ordered or received by respondent. This denial by respondent was made during the informal stages of this proceeding, and was again repeated in respondent's answer. Complainant has not rebutted or in any way commented on respondent's denial. We conclude that complainant has not adequately proved that respondent purchased and received the alleged shipment of October 4, 1984.

Respondent has admitted purchase and receipt of the remaining five trucklots of fresh mushrooms, and has admitted liability to complainant for the full contract amount in regard to the shipment of October 16, 1984, having a total invoice price of $1,095.50. As to the remaining four shipments respondent maintains that it notified complainant immediately upon receipt of each such shipment, complained about the condition of the mushrooms and was granted authority by an employee of complainant named "Steve" to rework the mushrooms, and account to complainant without securing a

federal inspection. Complainant has not replied to these allegations by respondent although it had ample opportunity to do so. Respondent accounted to complainant for the full purchase price of all cartons of mushrooms not dumped, less freight on the cartons dumped, and a modest fee for resorting. Complainant did not take issue with the method in which these accountings were done. We conclude from all of the evidence that respondent was authorized by a representative of complainant to deal with the mushrooms in the manner reflected by its accountings. We also conclude that no amount remains due from respondent to complainant. The complaint should be dismissed.

ORDER

The complaint is dismissed.
Copies of this order shall be served upon the parties.

MENDELSON-ZELLER CO., INC. *v.* OTAY PACKING CO. PACA Docket No. 2-6978. Decided November 10, 1986.

Admission of liability—Payment—Complaint dismissed.
Respondent purchased on an FOB basis and accepted 9 trucklots of tomatoes from complainant. Respondent was ordered to pay for 8 of the trucklots on the basis of its admission, in its answer, of liability to complainant. Respondent denied liability for the remaining lot and submitted evidence that it had previously paid complainant for such tomatoes. Complainant admitted the payment, and the complaint was dismissed.

George S. Whitten, presiding officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $25,023.00 in connection with the shipment in interstate commerce of nine truck lots of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability in the amount of $23,970.00, and denying liability to complainant for the remaining amount. On November 20, 1985, an

order was issued on the basis of respondent's admission requiring that respondent pay complainant $23,970.00 as an undisputed amount.

The amount claimed in the formal complaint exceeds $15,000.00, however, the parties have waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Mendelson-Zeller Co., Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California.

2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between October 4, and October 16, 1984, complainant sold and shipped to respondent 9 trucklots of fresh tomatoes, of various sizes and prices, having a total invoice cost of $25,023.00, f.o.b.

4. Respondent received and accepted all of the tomatoes on arrival. Respondent has paid complainant the full f.o.b. invoice cost in the amount of $1,053.00 for the load of tomatoes sold and shipped on October 4, 1984. Respondent has been ordered to pay complainant as an undisputed amount the full purchase price of the remaining 8 loads of tomatoes in the amount of $23,970.00.

5. An informal complaint was filed on February 13, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent admitted liability to complainant in its answer for the full purchase price of the 8 trucklots of tomatoes shipped October 6, through October 16, 1984, and a total f.o.b. invoice price of $23,970.00. Respondent was ordered to pay complainant this amount on November 20, 1985.

In its answer respondent denied owing complainant any amount on the first lot of tomatoes shipped October 4, 1984, and having a total invoice value of $1,053.00. Respondent stated that this amount had already been paid, and submitted a copy of a cancelled check dated May 17, 1985, made out to complainant in the amount $1,053.00. The copy of the stub relative to this check references the

invoice number applicable to the October 4, 1984, shipment of tomatoes. Complainant, in its opening statement admits that respondent has paid in full for the October 4, 1984, shipment of tomatoes. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

A. LEVY & J. ZENTNER CO. *v.* GARDEN STATE FARMS, INC. PACA Docket No. 2-7310. Decided November 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on April 28, 1986. Complainant seeks to recover $4,550.10, which amount is alleged to be the purchase price for cantaloupes sold to and accepted by respondent on or about August 2, 1985. Respondent filed an answer to the complaint on August 18, 1986. In this answer, respondent admitted owing complainant $3,211.10 of the $4,550.10 claimed by complainant.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $3,211.10. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

PHOENIX VEGETABLE DISTRIBUTORS *v.* FARO VITALE & SONS, INC.
PACA Docket No. 2-7038. Decided November 14, 1986.

FOB Sale—Contract modification—Mishandling by consignee—Reparation awarded.

Respondent sustained its burden of proving that it was authorized by complainant to handle part of the load on consignment. However, respondent mishandled the produce and is liable to complainant for the net proceeds which sale of the produce should have brought. Respondent is liable for the full contract price for the portion of the load not handled on consignment.

Andrew Stanton, presiding officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
James V. Billanca, Detroit, Michigan, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,720.50 in connection with the sale and shipment of a trucklot of mixed produce to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability, and asserted a counterclaim for $1,354.79. Complainant filed a reply, denying liability.

Since the amount claimed as damages does not exceed $15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be a part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement and respondent submitted an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Phoenix Vegetable Distributors, is a corporation whose address is 1932 West McDowell Road, Phoenix, Arizona. At

the time of the transaction alleged in the counterclaim, complainant was licensed under the Act.

2. Respondent, Faro Vitale & Sons, Inc., is a corporation whose address is 2820 Rivard Street, Detroit, Michigan. At the time of the transaction involved in the complaint, respondent was licensed under the Act.

3. On approximately March 23, 1985, complainant sold to respondent a trucklot of mixed produce consisting of 360 cartons of mustard greens at $4.15 per carton, 220 cartons of turnip greens at $4.15 per carton, 433 cartons of collard greens at $4.15 per carton, 50 sacks of turnips at $5.00 per sack, and 47 cartons of spinach at $4.65 per carton, plus $48.00 for top ice, for a total of $4,720.50, f.o.b., payment within 30 days from the date of acceptance. The contract was negotiated by a broker, Ralph Jarson, Phoenix, Arizona, with whom both parties exclusively communicated. The broker issued a confirmation of sale on March 26, 1985, which contained the agreed upon contract terms, and sent a copy to each party.

4. The mixed produce was loaded onto a truck operated by D. C. F & B, Inc., provided by a truck broker, Agra Transport Service, Inc., Phoenix, Arizona, and on March 23, 1985, was shipped in interstate commerce to respondent's place of business. Upon arrival, on or before March 28, 1985, the mixed produce was unloaded and accepted.

5. On March 28, 1985, at 11:55 a.m. respondent had the mustard, turnip and collard greens federally inspected, resulting in the following, in relevant part:

WHERE INSPECTED	Applicant's Warehouse Floor
Products Inspected:	Bunched MUSTARD, TURNIP OR COLLARD Greens in separate cartons printed "Garnish brand, Phoenix Vegetable Distributors, Phoenix, Arizona, 2 dozen." Applicant States: 360 cartons Mustard Greens, 220 cartons of Turnip Greens, 433 cartons of Collard Greens.
Condition of Load:	Stacked on pallets at above location.
Condition of Pack:	Fairly well filled, good amount of pack ice.
Temperature of Product:	In various cartons: 37°F to 38°F

Condition: Mustard Greens: Fresh and green color. No decay. Turnip Greens: Fresh and mostly green color. Damage by yellow leaves from 4 to 9 bunches per carton, average 24%. No decay. Collard Greens: Fresh and mostly green color. Damage by numerous dark brown to black spots affecting 3 to 6 leaves from 1 to 6 bunches per crate, average 14%. No decay.

6. Upon receiving the inspection results, respondent's employee, Sam Pizzo, contacted the broker, who notified complainant's employee, Eric Soper. Mr. Soper authorized respondent to handle the turnip and collard greens on consignment for complainant's account. The broker conveyed this information to respondent.

7. Respondent sold a portion of the turnip and collard greens and prepared accounts of sales, which it sent to complainant. The account of sales for the turnip greens showed 12 cartons sold on March 29, 1985, for $3.00 per carton, two on April 1, 1985 for $4.00 per carton, and 30 on April 2, 1985, for $3.00 per carton, for a total of $134.00 for the 35 cartons sold. The remaining 176 cartons were shown as dumped. Regarding the collard greens, the account of sales showed five cartons sold on March 29, 1985, at $5.00 per carton, two on April 1, 1985, at $2.00 per carton, one on April 2, 1985, for $6.50 per carton, 20 on April 2, 1985, for $3.00 per carton, and 14 on April 6, 1985, for $7.00 per carton, for a total of $187.50 for the 42 cartons sold. The remaining 391 cartons were shown as dumped.

8. On March 28, 1985, respondent paid freight to D. C. F. and B. Inc., in the amount of $1,810.85 and commission to Agra Transport Service, Inc., in the amount of $162.90, for a total of $1,973.75.

9. On August 12, 1985, the broker wrote a letter to the Department which reads as follows, in relevant part:

> Upon arrival at Faro Vitale, inspection were [sic] taken and reported to Eric Soper of Phoenix Vegetable Distributors. Sam Pizzo of Vitale were very distressed over the quality of the Collards and Turnip Greens which failed inspection. Eric Soper told me to have Vitale handle these rejected greens on consignment and to remit a full accounting of sales. To my knowledge this was done.

10. A formal complaint was filed on July 26, 1985, which was within nine months from when the cause of action herein accrued.

A timely counterclaim dealing with the subject matter of the complaint was filed on October 16, 1985.

CONCLUSIONS

Respondent contends that after receiving the trucklot of mixed produce shipped by complainant, it obtained a federal inspection which disclosed poor condition. Respondent alleges having been told by the broker that it had consulted with complainant, who had authorized respondent to sell the merchandise on consignment for complainant's account. Respondent claims that after deducting from the proceeds of its sales the costs of freight, inspection, commission, storage and dumping, complainant is liable for $1,354.79, which respondent asserts as a counterclaim.

It is clear that respondent accepted the turnips and spinach, as respondent admits receiving them but does not allege having given notice of rejection to the broker or complainant. *Farm Market Service, Inc.* v. *Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). It is also evident that respondent accepted the greens, as the March 28, 1985, inspection report states that the products inspected, the mustard, turnip, and collard greens, were located on the warehouse floor (Finding of Fact 5). We have held that the unloading of a commodity is an exercise of dominion over it, and constitutes acceptance. *Mario Saikhon* v. *Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975). Having accepted the produce, respondent became liable for the contract price, less damages resulting from any breach of warranty. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc.* v. *Albertson's Inc. a/t/a Southco Division, supra*. Respondent also has the burden of proving its claim that the contract terms were changed to a consignment. *Joe Phillips, Inc.* v. *G & T Terminal Packaging Co., Inc.*, 42 Agric. Dec. 1199 (1983).

The report of investigation contains a letter, dated August 12, 1985, from the broker to the Department which states that complainant authorized a change in the contract terms to a consignment for only the turnip and collard greens. Respondent has thus sustained its burden of proving a change in the contract terms with respect to these commodities. There is no evidence in the record of any change in contract terms for the mustard greens, turnips, or spinach, nor is there any evidence that these commodities were in breach of warranty. Therefore, respondent is liable for the full contract price of $1,494.00 for the mustard greens, $250.00 for the turnips, and $218.55 for the spinach, for a total of $1,962.55.

Complainant argues that respondent mishandled the consignment sales of the turnip and collard greens, as respondent's ac-

counts of sale show that on April 25, 1985, respondent had sold only 44 cartons of turnip greens for $134.00, while dumping the remaining 176 cartons, and sold only 42 cartons of collard greens for $187.50, while dumping the remaining 391 cartons. Respondent contends that the greens were very difficult to move because of their poor condition and the presence of competing product in the Detroit area. However, the March 28, 1985, federal inspection shows that neither commodity was greatly damaged. There was no decay, and the turnip greens exhibited only an average of 24% yellow leaves and the collard greens only an average of 14% black spots. The extent of the damage found by the inspection is not sufficient to justify the large percentage of cartons dumped. If the greens were as difficult to move as respondent asserts, respondent should have kept complainant fully informed of the situation to enable complainant to reconsign the greens or sell them itself. *Jobb Packing Co., Inc.* v. *Peter Condakes Company*, 30 Agric. Dec. 1076 (1971). However, there is no evidence that respondent made any attempt to do so. It is our conclusion that based on the evidence in the record, there is justification for dumping at most one-third of the turnip greens and none of the collard greens. Respondent is therefore liable for the value of the cartons which should not have been dumped based on the average sales price of the cartons which were sold. For the turnip greens, 44 cartons sold for $134.00, resulting in an average sales price of $3.05 per carton. Out of the 196 cartons dumped, two thirds, or 147 cartons, should have been sold, which should have brought proceeds of $448.35. For the collard greens, 42 cartons sold for $187.50, resulting in an average sales price of $4.46. Therefore, all 433 cartons in the load should have sold for $1,931.18. The 653 cartons of consigned greens should thus have brought gross proceeds of $2,379.53. Respondent is entitled to deduct commission of 15%, or $356.93. Respondent may also deduct the portion of its freight payment attributable to the 653 consigned cartons. Respondent has provided evidence that it paid shipping charges of $1,973.75 for all 1,110 cartons originally purchased from complainant. The portion of these charges which respondent may deduct is $1,161.13. An additional cost of shipping for which respondent is liable is the portion of the $48.00 for top ice provided by complainant which can be attributed to the 457 cartons sold, or $19.76. None of the other deductions alleged by respondent for dumping and storage are supported by the evidence, and the cost of inspection is not a permissable deduction.

In summary, respondent is liable to complainant for $1,962.55 for the mustard greens, turnips and spinach, $2,379.53 for the consigned turnips and collard greens, and $19.76 for top ice, totalling

$4,361.84. Respondent is entitled to deduct from this sum the $1,161.13 which it paid for freight for the consigned greens, and $356.93 in commission, resulting in $2,843.78. There is no merit to respondent's counterclaim, and it must be dismissed. Respondent is liable to complainant for $2,843.78, and its failure to pay such sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,843.78, with interest thereon at the rate of 13% per annum from May 1, 1985, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

SEABOARD PRODUCE DISTRIBUTORS, INC. *v.* INTERNATIONAL A. G., INC. PACA Docket No. 2-7274. Decided November 14, 1986.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,292.00 in connection with a shipment of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto. Such answer did not admit or deny its indebtedness to complainant. Respondent was therefore sent a letter advising it to show cause why an appropriate order should not be entered against it. Respondent was further advised in such letter that a failure to respond would result in the issuance of an order on admission of liability. Respondent has failed to respond. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Seaboard Produce Distributors, Inc., is a corporation whose address is P. O. Box 486, Camarillo, California 93011. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $6,292.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $6,292.00, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

Copies of this order shall be served upon the parties.

BORDER FRUIT CO., INC. *v.* FRUIT DISTRIBUTING CORP. PACA Docket No. 2-6825. Decided November 21, 1986.

FOB Sale—Inspection—Accounting—Protection agreement—Reparation awarded. Complainant sold five lots of mangoes to respondent and such mangoes were accepted on arrival. As to four of the lots, respondent failed to subject mangoes to inspection by a neutral party and therefore failed to establish breach on the part of the complainant. Respondent also failed to submit proof of damages. As to the remaining lot of mangoes, respondent failed to prove that it was granted full protection. Adjustment in price was allowed on basis of protection for market decline which complainant admittedly granted to respondent.

George S. Whitten, presiding officer.
Robert F. Barnes, Hidalge, Texas, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $17,497.00 in connection with the shipment in interstate commerce of five lots of mangoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which defaulted in the filing of an answer. Prior to the issuance of a default order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR § 47.25(e)). On May 6, 1985, respondent's motion was granted, respondent's default was set aside, and a proposed answer previously submitted by respondent was ordered filed and served upon complainant. Respondent's answer denied liability to complainant in

the amounts claimed, and admitted liability in the amount of $6,450.00 in connection with the last shipment of mangoes. On July 2, 1985, an order was issued requiring payment of the $6,450.00 as an undisputed amount.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Border Fruit Co., Inc., is a corporation whose address is P.O. Box 1229, Hidalgo, Texas.

2. Respondent, Fruit Distributing Corp., is a corporation whose address is 746 South Central Avenue, Room 230, Los Angeles, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about April 30, 1984, complainant sold and shipped to respondent's customer 300 cartons of mangoes at a total price of $2,325.00, f.o.b. Respondent has paid complainant $1,425.00 in connection with this shipment of mangoes which leaves a balance still due and owing of $900.00.

4. On or about May 3, 1984, complainant shipped on one truck, to three of respondent's customers in Los Angeles, California, three lots of mangoes under separate invoices as follows: Invoice No. 6297, 1,000 cartons at a total price of $6,350.00 f.o.b.; Invoice No. 6298, 400 cartons at a total price of $2,869.00 f.o.b.; Invoice No. 6299, 507 cartons at a total price of $3,429.75 f.o.b. Complainant has paid respondent a total of $8,276.75 toward the purchase price of this truckload of mangoes.

5. On or about May 11, 1984, complainant sold and shipped to respondent one truckload containing 2,300 cartons of mangoes at a total price for the truckload of $12,225.00 f.o.b. Complainant granted respondent protection for market decline as to this load. Respondent's admission of liability in the amount of $6,450.00 related to this truckload of mangoes.

6. The formal complaint was filed on September 27, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

In regard to the first two shipments of mangoes (Findings of Fact 3 and 4) respondent admits that such mangoes were sold on a f.o.b. basis. However, respondent alleges that when the mangoes arrived at the places of business of respondent's customers in Los Angeles, some of the cartons were crushed due to faulty carton construction and the mangoes were green and immature. In consequence of these alleged problems respondent has paid complainant less than the original f.o.b. purchase price for these mangoes. There are two problems with respondent's defense in regard to complainant's claim for the balance of the purchase price as to the mangoes covered by Findings of Fact 3 and 4. First, respondent did not have any inspection made of these mangoes by a neutral third party. Such inspections are necessary to establish both the fact and the percentage of defects claimed in perishable produce. See *Mutual Vegetable Sales* v. *Select Distributors*, 38 Agric. Dec. 1359 (1979). While we infer that respondent claims that all of the mangoes were immature, there is no allegation in the record as to what percentage of the mangoes are claimed to have been damaged by crushed containers. The second problem with respondent's defense in regard to the mangoes covered by Findings of Fact 3 and 4 is that respondent has furnished us with no accountings covering the resale of such mangoes. Without such accountings we would be unable to award damages to respondent even had we been able to find a breach of contract on the part of complainant. See *Genbroker Corp.* v. *Super Food Services*, 38 Agric. Dec. 83 (1979).

In regard to the last shipment of mangoes respondent claims that it was granted full protection by complainant and then it equates this with a consignment sale. However, a protection agreement is not the same thing as a consignment. See *Dave Walsh Co., Inc.* v. *Liberty Fruit Co., Inc.*, 38 Agric. Dec. 533 (1979). A protection agreement has reference to a base price, and concerns goods that are sold, whereas in the case of a consignment there is no sale of the produce, and the shipper at all times retains title to the produce. In this case complainant strongly maintains that this produce was sold on a f.o.b. basis, and that protection was granted to respondent only for market decline. We find on the basis of all of the evidence of record that respondent has not shown that it was granted full protection relative to the load of produce shipped on May 11, 1984, and that the protection granted was only for market decline.

A personal investigation was conducted by an employee of this Department relative to the transactions which are the subject of the dispute between complainant and respondent. This investiga-

tion revealed, on the basis of applicable Market News Service reports, that there was no market decline relative to the 1,500 size 16 or the 200 size 18 mangoes included in the shipment of May 11. However such investigation disclosed that there was a decline relative to the 200 size 12 and 400 size 14 mangoes, and that such market decline justified a protection allowance in the total amount of $550.00. We conclude that respondent should be allowed $550.00 as an adjustment to the original $12,225.00 purchase price of the mangoes shipped on May 11, 1984.

The load of mangoes shipped on April 4, 1984, had a total purchase price of $2,325.00. Respondent has paid complainant $1,425.00 of this amount which leaves a balance still due and owing of $900.00. The total f.o.b. prices of the three lots of mangoes shipped on May 3, 1984, was $12,648.75. Of this amount respondent has already paid complainant $8,276.75, which leaves a balance still due and owing of $4,372.00. The original purchase price of the mangoes shipped on May 11, 1984, was $12,255.00. We have previously found that an adjustment to this price in the amount of $550.00 should be allowed to respondent leaving a balance of $11,675.00. Of this amount respondent has already been ordered to pay $6,450.00, which leaves a balance still due as to this shipment of $5,225.00. The total which we have found to be still due and owing from respondent to complainant in this proceeding is $10,497.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $10,497.00, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BYRD PRODUCE COMPANY *v.* LOWELL V. SCHY d/b/a LOWELL SCHY BROKERAGE. PACA Docket No. 2-7145. Decided November 21, 1986.

FOB Sale—Brokers duties and responsibilities—Damages—Reparation awarded.
Where broker failed to negotiate a binding damage he is liable to shipper for difference between contract price and the amount actually received.

Edward M. Silverstein, presiding officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,512.00 in connection with one transaction in foreign commerce involving broccoli, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. In addition, respondent filed a counterclaim against complainant seeking payment of brokerage in the amount of $201.60 in connection with the same transaction made the subject of the complaint.

As the amount in dispute is less than $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. Also, the parties were given the opportunity to file further evidence by way of verified statements. Complainant filed a verified opening statement. Neither party filed a brief.

FINDING OF FACT

1. Complainant, Byrd Produce Company, is a corporation whose mailing address is P.O. Box 965, Guadalupe, California 93434.

2. Respondent, Lowell V. Schy is an individual, doing business as Lowell Schy Brokerage, whose mailing address is 7568 North Valentine, Fresno, California 93711.

3. At all material times complainant and respondent were licensed under the Act.

4. On January 6, 1985, respondent contacted complainant seeking to purchase 1008 cartons of broccoli, size 18, on behalf of his client, Lenson Celery, Toronto, Ontario, Canada. The parties agreed that complainant would ship such a lot of broccoli to Lenson Celery with the latter to pay complainant $5.50 per carton ($5,544.00), plus 85¢ per carton for cooling and palletizing ($856.80), 20¢ per carton for brokerage ($201.60), $77.50 for top ice, and $22.50 for a Ryan recording thermometer, for a total agreed f.o.b. price of $6,702.40.

Complainant was to pay respondent $201.60 as brokerage. Later that same day, complainant discovered that it was not able to harvest enough broccoli from its own fields to satisfy the contractual agreement. Mr. Chad Smith, complainant's General Manager and Sales Manager, telephoned respondent with that information, and was informed by respondent that he did not care whose broccoli complainant shipped. Complainant, therefore, purchased the broccoli from another shipper whose brand name was "Uncle Miltie," and, after notification to respondent of this purchase, shipped the broccoli to Lenson Celery on January 7, 1986. Respondent issued a broker's memorandum of sale also on January 7, 1986, indicating that the complainant agreed to ship "Uncle Miltie" brand broccoli to Lenson Celery. Presumably, the memorandum was sent to, and received by, both complainant and Lenson Celery.

5. Lenson Celery received and accepted the "Uncle Miltie" brand broccoli shipped by complainant. No inspection was made of the broccoli after it was received and, as there was no complaint as to its quality by Lenson Celery or respondent, it appears to have arrived in good order. However, Lenson Celery has paid complainant only $5,190.40, or $1.50 per carton less than was agreed upon between complainant and respondent. Lenson Celery refused to pay the full agreed purchase price because it allegedly was not satisfied with the brand of broccoli shipped by complainant. Respondent was aware, before the broccoli was shipped, that complainant was shipping "Uncle Miltie" brand broccoli and expressed no concern regarding its shipment.

6. Complainant has not paid respondent the $201.60 brokerage owed the latter for this transaction.

7. The informal complaint was filed on June 14, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

In this reparation proceeding the sole issue is whether the respondent, a broker, negotiated a binding contract between complainant and Lenson Celery for the 1008 cartons of broccoli. It appears from the record that Lenson Celery had a strong dislike for "Uncle Miltie" brand broccoli. The record does not reflect any cause for such dislike. However, the record is clear that Lenson Celery refused to pay the full $5.50 contract price, despite the good arrival of the broccoli, solely because of the brand of broccoli shipped rather than because of any grade or condition defect in existence. Were Lenson Celery subject to the Act and were it the respondent, under these facts, we would have no qualms about ordering it to pay the complainant the balance due. *Van Buren County*

Fruit Exch. v. *B. F. Roberts Farms*, 28 Agric. Dec. 1365 (1969). As it is not, we must decide whether respondent has any liability for the failure of Lenson Celery to pay the full contract price for the broccoli. Respondent knew that complainant was shipping "Uncle Miltie" brand broccoli. He should have known that Lenson Celery would not accept this brand at the contract price.[1] His failure, under these circumstances to notify complainant not to ship the "Uncle Miltie" brand broccoli was therefore a failure to perform the specifications and duties of a broker in violation of section 2 of the Act, and caused complainant to be damaged in the amount of $1,512.00. *Salinas* v. *Wholesale, et al.*, 31 Agric. Dec. 1453 (1972).

Respondent claims that complainant has not paid it the $210.60 brokerage due for this shipment. Complainant does not deny this. Accordingly, we hold that complainant is obligated to respondent in this amount.

On the basis of the record contained herein, we find that respondent is obligated to complainant in the amount of $1,310.40 ($1,512.00 −$201.60), and that his failure to pay complainant this amount is a violation of the Act for which reparation plus interest ought to be awarded.

In view of the above, the respondent's counterclaim ought to be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay complainant, as reparation, $1,310.40 plus interest at the rate of 13% per annum from February 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

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[1] If he did not know whether or not Lenson Celery would accept an alternative brand, under the circumstances, respondent should have checked with Lenson Celery to determine whether the "Uncle Miltie" brand broccoli complainant proposed to ship was acceptable or whether any broccoli other than that grown by complainant was acceptable before agreeing to allow complainant to ship any alternative brand. Had he done so, perhaps the filing of this action could have been avoided.

SUN WORLD INTERNATIONAL, INC. *v.* INTERNATIONAL A. G., INC.
PACA Docket No. 2-7283. Decided November 21, 1986.

Andrew Stanton, presiding officer.
Complainant, *pro se*.
C. Peter Buhler, Miami, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $7,720.20 in connection with a shipment of produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, apparently admitting the material allegations of the complaint, including the indebtedness claimed by complainant. On September 18, 1986, the Department sent a letter to respondent giving respondent 10 days from its receipt thereof to show cause why a reparation order should not immediately be issued against it, based on respondent's apparent admission of liability. Respondent has submitted a letter, but it does not deal with the issue of the apparent admission of liability, and thus is insufficient to prevent the immediate issuance of a reparation order against respondent. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Sun World International, Inc., is a corporation whose address is P. O. Box 9110, Bakersfield, California. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $7,720.20. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $7,720.20, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies of this order shall be served upon the parties.

COX TOMATO COMPANY, INC. *v.* SIDNEY WOLFE d/b/a WILDEROM TOMATO HOUSE. PACA Docket No. 2-7319. Decided November 21, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed on May 5, 1986. Complainant seeks to recover $28,965.80, which amount is alleged to be the purchase price for tomatoes sold to and accepted by respondent between October 21 and December 8, 1985. Respondent filed an answer to the complaint on August 22, 1986. In this answer, respondent admitted owing complainant $23,290.00 of the $28,965.70 claimed by complainant.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the undisputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $23,290.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

HARRY SHAFFER, INC. *v.* VAN SOLKEMA FARMS, INC. PACA Docket No. 2-6881. Decided November 24, 1986.

Burden of proof—Reparation awarded.
Where shipper fails to prove it had a contractual agreement with respondent, it is not entitled to award of damages, but where buyer fails to prove disposition of produce accepted on price after sale basis, it is liable for agreed price for each carton in lot.

Edward M. Silverstein, presiding officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). Three timely complaints were filed in which complainant seeks an award of reparation against respondent in the total amount of $3,864.00, in connection with the shipment of three loads of produce in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. In addition, respondent was served with a copy of each of the three individual complaints filed by complainant, and filed an answer to each of them in each of which it denied any further liability to complainant.

As the total amount claimed in the three formal complaints did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements, but neither party did so. Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Harry Shaffer, Inc., is a corporation whose mailing address is P.O. Box 1272, Parkersburg, West Virginia 26102.

2. Respondent, Van Solkema Farms, Inc., is a corporation whose mailing address is P.O. Box 308, Byron Center, Michigan 49315. At all material times, respondent was licensed under the Act.

3. On or about July 31, 1984, respondent was contacted by Mr. John Mankin, an employee of complainant, and asked to handle 324 cartons of cantaloupes which had been rejected by complainant's original customer, Tony-Lin Produce, Inc., 2701 Russel Street, Detroit, Michigan 48207, on a price after sale basis. Respondent ar-

ranged for the cantaloupes to be handled by J. A. Besteman Co. of Grand Rapids, Michigan. On or about August 28, 1984, the parties agreed on a price of $7.00 per carton, or a total of $2,268. Respondent, claiming that 127 of the 324 cartons were unmerchantable, paid complainant for only 197 cartons at $7.00 per carton ($1,379.00). The disposition of the remaining 127 cartons of cantaloupes is unknown.

4. On or about August 2, 1984, repsondent was again contacted by complainant's employee, Mr. John Mankin. This time, respondent was asked to unload 175 cartons, which previously had been rejected by at least one of complainant's customers, from a truck and to "dispose of them even if they have to be dumped." After looking at the shipment, respondent concluded that the cantaloupes were not salable and, with complainant's permission, had it dumped. At no time did respondent accept this lot of cantaloupe.

5. On or about August 5, 1984, respondent purchased 500 cartons of eggplant from complainant at a total agreed f.o.b. price of $5,250.00, or $10.50 per carton. Complainant had paid $8.50 per carton for the eggplant, or $4,250.00. Respondent has remitted to complainant at a rate of $7.00 per carton, or $3,500.00.

6. Each of the three complaints involved herein was filed on April 11, 1985, which was within nine months after the causes of action therein accrued.

CONCLUSIONS

In reparation matters under the Act, complainants have the burden of proving, by a preponderance of the evidence, the terms of the contract, respondent's breach of such contract, and the resulting damages, if any, sustained by it. *New York* v. *Sandler*, 32 Agric. Dec. 702 (1973). In a case involving a shipper as a complainant, once the complainant has proven that a respondent has received and accepted a load of produce and has not paid for it, the complainant has satisfied his burden. Then, the burden of proof shifts to the respondent who has to prove, by a preponderance of the evidence, that it was damaged by a breach of contract committed by complainant and the amount of those damages. *Rocky Ford Dist. Co.* v. *Angel Produce*, 29 Agric. Dec. 93 (1970); *The Grower-Shopper Pot. Co.* v. *Southw. Pro. Co.*, 28 Agric. Dec. 511 (1969).

Each of the three subject shipments must be viewed independently. As to the July 31, 1984, shipment of 324 cartons of cantaloupes, the only dispute surrounds the disposition of 127 cartons of cantaloupes. Respondent, which admits receiving and accepting all 324 cartons, has failed to adduce any evidence regarding the disposition of the missing 127 cartons. It could have, but it did not, provide

documentation showing that its customer, J. A. Besteman Co., dumped or lost the 127 cartons. Respondent's self-serving assertion in its answer that this occurred is not sufficient for it to carry its burden of proof.[1] *Leo Young, Inc.* v. *J. Schlanger & Sons*, 16 Agric. Dec. 716 (1957). Accordingly, we must hold respondent liable to complainant for the full contract price for the 324 cartons of cantaloupes ($2,268.00). As it has paid complainant $1,379.00 for this lot, it remains obligated to complainant in the amount of $889.00 and its failure to pay complainant this amount is a violation of the Act for which reparation plus interest should be awarded. In so ruling, we are not unmindful of the fact that the cantaloupes had previously been rejected by the original purchaser. However, we are constrained by respondent's failure to submit proof as to the disposition of the 127 cartons for which it has failed to pay complainant to rule in complainant's favor.

As to the August 2, 1984, shipment of 175 cartons of cantaloupes, complainant has failed to prove that respondent had entered into any kind of contractual arrangement with it which would have obligated respondent to pay it for the cantaloupes. The record indicates that this lot of cantaloupes, which had earlier been rejected by complainant's customer, arrived at respondent's location in an unsalable condition, and that all respondent agreed to do was to unload the cantaloupes from the truck for the purpose of dumping them. Accordingly, the complaint as to this lot of cantaloupes must be dismissed.

The dispute as to the August 5, 1984, shipment of 500 cartons of eggplant solely focuses on the price agreed upon between the parties. Complainant asserts that the price was $10.50 per case. In support of its position, complainant has shown that its cost for the eggplant was $8.50 per carton. On the other hand, respondent asserts that the price agreed upon was $7.00 per carton, but has offered no evidence in support thereof. As respondent has failed to adduce any evidence in support of its position, and as it is illogical to assume that, barring any evidence that the condition of the eggplant had deteriorated, a shipper would sell produce for $1.50 per carton less than its cost, we must hold that the parties agreed upon a price of $10.50 per carton. The total price agreed upon by the parties was $5,250.00. Respondent has already paid complainant $3,500.00. It, therefore, remains obligated to complainant in the amount of $1,750.00, and its failure to pay complainant this

[1] Had respondent submitted a sworn affidavit from J. A. Besteman Co., we might have ruled otherwise. However, it is now too late to reopen the record for admission of such a document. *See* 7 CFR § 47.24(b).

amount is a violation of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, $2,639.00 ($889 + $1,750) plus interest at the rate of 13 percent per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

J.R. BROOKS & SONS, INC. *v.* ATLANTIC TROPICAL MARKETING CORPORATION. PACA Docket No. 2-6936. Decided November 24, 1986.

FOB Sale—Breach of contract—Reparation awarded.
Respondent failed to provide any evidence to support its contentions that it never contracted for produce shipped to it and that it duly rejected the produce upon arrival.

Jory Hochberg, presiding officer.
John Himmelberg, for complainant.
Jose Fuentes, Union City, New Jersey, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter, "the Act." A timely complaint was filed in which complainant now seeks an award of reparation against respondent in the total amount of $13,920.00, in connection with the sale of 2,320 flats of avocados in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an Answer on August 21, 1985.

Since the amount claimed as damages does not exceed $15,000, the shortened method of procedure set forth in the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of additional sworn statements. Complainant availed itself of this opportunity, but respondent failed to file its statement in a timely manner. No further statements were filed by the parties. Complainant filed a brief while respondent chose not to do so.

FINDINGS OF FACT

1. J. R. Brooks & Son, Inc. is a corporation whose business mailing address is P.O. Box Drawer 9, Homestead, Florida 33090.

2. Atlantic Tropical Marketing Corp. is a corporation whose business address is 729 Clinton Street, Hoboken, New Jersey 07030. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about July 16, 1984 by oral agreement, complainant sold to respondent 2,320 flats of avocados at the agreed price of $6.00 per flat for a total cost of $13,920.00, delivered.

4. Pursuant to this contract, on July 17, 1984, complainant shipped the 2,320 flats of avocados from its place of business to the respondent by truck. Immediately prior to this shipment the avocados were inspected and found to be in suitable shipping condition.

5. The shipment of avocados was delivered to the respondent and signed for by an employee of respondent on July 20, 1984. The truck carrying this shipment had a refrigeration unit which maintained the temperature at 42 degrees Fahrenheit during the entire trip. I116. Complainant billed respondent $13,920.00 for this shipment which respondent has failed to pay.

7. An informal complaint in this proceeding was filed on January 21, 1985, which was within the nine months after the cause of action accrued. The formal complaint was then filed on May 24, 1985.

CONCLUSIONS

The record in this proceeding clearly supports an order requiring respondent to pay complainant the full amount billed for the avocados which were delivered to respondent. The evidence demonstrates that during the period from at least July 17, 1984, through December 11, 1984, the parties entered into numerous oral contracts for the sale of both avocados and limes by complainant to respondent. With respect to the shipment in question, complainant's sworn statements and documentation support the conclusion that the avocados were shipped to respondent pursuant to an oral contract at an agreed invoice amount of $13,920.00. Complainant's evidence further supports the conclusion that the avocados were signed for and accepted by an employee of respondent and were delivered in suitable condition.

Respondent claims in its Answer that it never contracted for the produce in question and that it duly rejected the goods on arrival, such rejection having been accepted by complainant. However, since respondent has not provided any evidence to support the allegations in its answer, it is concluded that respondent contracted for

and accepted the avocados, as supported by complainant's evidence. *Gafford* v. *Bananas, Inc.*., 17 Agric. Dec. 360 (1958); See *Harland W. Chidsey Farms* v. *Geurin*, 27 Agric. Dec. 384 (1968).

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $13,920.00 with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

GRANADA MARKETING, INC. *v.* DURANTE AND TERMINI, INC. PACA Docket No. 2-6954. Decided November 24, 1986.

Contract requirements—Notice of rejection—Misrepresentation of federal inspection results—Reparation awarded.

Where complainant relies on respondent's misrepresentation of the federal inspection results, and on the basis of such misrepresentation, agrees to a price after sale novation, the novation agreement is void.

Sharlene W. Lassiter, presiding officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
LeRoy W. Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). The complainant timely filed an informal complaint in which the complainant sought an award of reparation against respondent in the amount of $14,241.60 in connection with two shipments of grapes in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability.

Because the amount claimed as damages was less than $15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties had the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and affidavits from its employees, Rick Eastes and William Karney. The respondent filed affidavits from Fred Durante, presi-

dent of respondent company, and Ralph Jarson, a broker for the respondent. Both parties filed a brief.

FINDINGS OF FACT

1. Complainant, Granada Marketing, Inc., hereinafter referred to as Granada, is a corporation whose mailing address is P.O. Box 3006, Visalia, California 93278.

2. Respondent, Durante and Termini, Inc., hereinafter referred to as Durante, is a corporation whose mailing address is 39–41 South Water Market, Chicago, Illinois 60608. At the time of the transactions involved herein, Durante was licensed under the Act.

3. On September 7, 1984, in the course of interstate commerce, Granada sold and shipped to Durante, from Visalia, California to Chicago, Illinois, 1680 lugs of Thompson Seedless Grapes pursuant to an oral contract negotiated by William Karney, a salesman employed by Granada and Ralph Jarson, a broker for Durante, at a f.o.b. price of $12,958.50, invoice #19774.

4. Durante received and accepted the September 7, 1984 shipment.

5. Granada acknowledged that there was full payment for the September 7, 1984 shipment after submission of the formal complaint, due to a price adjustment.

6. On October 9, 1984, in the course of interstate commerce, Granada sold and shipped to Durante, from Strathmore, California to Chicago, Illinois, 1380 lugs of U.S. No. 1 table grapes, 930 lugs Thompson Seedless @$12.00 per lug, 180 lugs Emperor @$9.00, and 270 lugs Ruby Seedless @$12.00, pursuant to an oral contract negotiated by William Karney for Granada and Ralph Jarson for Durante, total f.o.b. price of $17,008.50, invoice #19838.

7. Durante received the 1380 lugs of grapes on October 12, 1984.

8. Durante obtained a federal inspection of the grapes at 11:30 a.m. on October 12, 1984 which rated the condition of the grapes, in pertinent part, as follows:

> Each lot: Berries generally firm and firmly attached to capstems.
>
> Ruby Seedless lot: Stems mostly green, some turning brown and pliable. Average 3% shattered. Decay in most lugs none, in some 3 berries.
>
> Thompson Seedless lot: Stems generally turning brown and pliable. From 3 to 12% per lug, average 7% shattered. Average less than 1% decay.

Emperor lot: Stems generally green. Average 1% shattered. Decay in most lugs none, in many 3 berries.

9. The condition of the 1380 lugs of table grapes was within the range of tolerance of grade U.S. No. 1 Table as prescribed in 7 CFR 51.880 *et seq.*

10. Durante paid Granada $9,486.90 for the October 9, 1984 shipment of 1380 lugs of grapes.

11. Granada filed a formal complaint on June 24, 1985, and an informal complaint on March 29, 1985, which was within nine months after the cause of action herein acccrued.

CONCLUSIONS

This reparation proceeding involves only the October 9, 1984 transaction, i.e. the purchase of 1380 lugs of assorted grapes by Durante, since complainant acknowledged full payment with respect to the September 7, 1984 transaction. Granada alleges that Durante purchased the grapes on October 9, 1984, but has yet to remit the balance of the purchase price, $7,521.60. In this case, rejection and misrepresentation are the two issues which dictate the necessity of an order in favor of Granada.

As the moving party, the complainant has the burden to prove by a preponderance of the evidence the affirmative allegations of this complaint. *New York* v. *Sandler*, 32 Agric. Dec. 702, 705 (1973). Granada met its burden in this case. The invoice #19838, bill of lading, and confirmation of sale letter from Durante's broker, Mr. Jarson, proffered by Granada, show the existence of a contract for 1380 lugs of assorted U.S. No. 1 Table grapes between Granada and Durante and the agreed upon price terms. Durante claims that the parties agreed to change the price terms becuse of the poor condition of the grapes upon arrival in Chicago on October 12, 1984. Durante proffers verified statements from Mr. Durante and Mr. Jarson which state that on October 12, 1984, Mr. Durante and Mr. Jarson called Granada to complain about the quality of the grapes and to negotiate a change in the price per lug term to a price after sale agreement. During the telephone call, Mr. Jarson orally communicated his understanding of the federal inspection results to Mr. Karney. It seems that Mr. Durante intended his telephone complaint to serve as a notice of rejection and his oral report of the federal inspection results to be sufficient proof of the poor condition of the grapes to persuade Granada to alter the price per lug term of the original contract.

The October 12, 1984 telephone complaint was not sufficient to constitute rejection. Notice of rejection must be in clear and unmistakable terms, such that a mere complaint is not sufficient. *Mario*

Saikhon v. *Russel-Ward Co., Inc.*, 34 Agric. Dec. 1940 (1975); *Jarson & Zerilla Co., Inc.* v. *P. Tavilla Co., Inc.*, 30 Agric. Dec. 1360 (1971); *Schley* v. *Mercurio*, 23 Agric. Dec. 862 (1964). Therefore, Durante is deemed to have accepted the 1380 lugs of assorted grapes and is liable for the full purchase price as of October 12, 1984.

The second issue is misrepresentation. We find that Mr. Durante misrepresented the condition of the grapes to Granada. Mr. Durante's state of mind is shown by his statement that he knew the grapes were in poorer condition than the inspection report showed. However, by law, the federal inspection report is prima facie evidence of the facts set forth therein. *Commonwealth Fruit & Produce Co., Inc.* v. *Idaho Falls Bonded Produce & Supply Co.*, 32 Agric. Dec. 1734, 1738 (1978). Because Mr. Durante failed to inform Granada's representative Mr. Karney accurately of the true inspection results, Granada is permitted to rescind the price after sale novation. *Mendelson-Zeller Co.* v. *W.M. Turino Co.*, 32 Agric. Dec. 1972, 1981 (1973); *Tom Bengard Ranch Inc.* v. *Tomatoes, Inc.*, 41 Agric. Dec. 1637, 1639 (1982). On October 12, 1984, the federal inspector orally reported to Durante the condition of the grapes which eventually would appear on the written certificate. Mr. Durante states that he did not agree with the federal inspector's quality evaluation and communicated his personal evaluation, as well as the results of the federal inspection, to Mr. Jarson. On the same day, Mr. Jarson called Mr. Karney at Granada to complain about the quality of the grapes and read the results of the inspection, given to him by phone, to Mr. Karney. Mr. Karney recorded Mr. Jarson's communication on Granada's notice of complaint form and cited the condition of the grapes as follows:

> *Ruby Lot*—3% Shatter, Decay in Most, Some none, Avg. 3% decay. *Thompson Lot*—1% Shatter, 3-12 Avg. 7% Serious damage by wet crushed and split. 1% damage by Brown discoloration, 1% decay.

Grapes of this quality would not qualify for a grade U.S. No. 1 Table as prescribed in 7 CFR § 51.880 *et seq.*, and thus there would be a breach of the contract between the parties. As the result of Mr. Durante's and Mr. Jarson's inducement and the degree of damage reported by Mr. Jarson, Mr. Karney agreed to change the price per lug terms to a price after sale agreement, which Mr. Jarson confirmed on October 17, 1984. Durante then sold the 1380 lugs for $9,486.90 on or before November 15, 1984, and remitted the same to Granada. Shortly thereafter, Granada received the written federal inspection certificate. The certificate revealed that the condition of the grapes was within the range of tolerance for grade

U.S. No. 1 Table, and therefore, not a breach of the contract. Mr. Karney stated that he would not have agreed to the price after sale arrangement if he had known of the true results of the federal inspection. The totality of the evidence submitted is dispositive of the truth in Mr. Karney's statement. Durante misrepresented the true condition of the grapes received by Granada. Granada relied on this misrepresentation when it agreed to the price after sale novation. Accordingly, the novation must be declared as void and the original terms of the contract remain in force. Durante is liable for the full purchase price of $17,008.50 less the amount already remitted, $9,486.90. Granada must be awarded reparation in the amount of $7,521.60.

ORDER

Within 30 days from the date of this Order, respondent Durante and Termini, Inc., shall pay to Granada, as reparation, $7,521.60, with interest thereon at the rate of 13% per annum from November 1, 1984, until paid.

Copies of this Order shall be served upon the parties.

BONITA PACKING CO., INC. *v.* PETER G. PAPPAS and PHILLIP G. PAPPAS d/b/a PETE PAPPAS & SONS. PACA Docket No. 2-6955. Decided November 24, 1986.

Contract term—Reparation awarded.

Complainant sold and shipped to respondent a truckload of tomatoes "to be priced on next week's market." It was held that the term should be construed to refer to average prices for the following week as reflected by Market News Service Reports.

George S. Whitten, presiding officer.
Complainant, *pro se*.
George I. Charles, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,000.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was

served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and respondent filed an answering statement. Complainant also filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Bonita Packing Co., Inc., is a corporation whose address is P.O. Box 309, Bonita Springs, Florida.

2. Respondent, Pete Pappas & Sons, is a partnership composed of Peter G. Pappas and Philip G. Pappas whose address is P.O. Box 1292, Washington, D.C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about January 20, 1985, complainant sold to respondent one truckload of tomatoes containing 400 size 6×6, 800 size 6×7, and 400 size 7×7, f.o.b., "to be priced on next week's market."

4. Complainant shipped the tomatoes to respondent on January 20, 1985, and the tomatoes were received and accepted by respondent on arrival. Respondent has paid complainant $13,040.00 for the tomatoes.

5. The formal complaint was filed on May 10, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant states in its informal complaint that the tomatoes were sold "with the agreement, with the broker, that they would be billed out Tuesday, the 22nd, or Wednesday, the 23rd, when the market was established." Respondent states in its answer that the agreement was that the tomatoes "would be priced on 'next week's market' ". The record shows that the contract was negotiated through a broker, Frank DeTrani, who both parties admit was acting as an agent for respondent. This broker issued a broker's memorandum of sale which clearly stated on the face thereof "to be priced on next week's market".

Respondent takes the position that the term "next week's market" is not a specific contractual understanding and that the term must be interpreted to mean "market protection or open

basis". It is true that the term generically falls into the category of an "open price term" as those words are used in UCC § 2-305, i.e. "The parties if they so intend can conclude a contract for sale even though the price is not settled". However, the succeeding sentence providing for a reasonable price at time of delivery does not apply since none of the three prescribed conditions is applicable. See *A. Duda & Sons, Inc.* v. *Pete Pappas & Sons*, PACA Docket No. 2-6940, 45 Agric. Dec. ____ (1986). The term "to be priced on next week's market" should be given its plain and simple meaning, that is, the average prices for the following week. See *Id.*

Federal-State Market News reports issued out of the Jessup, Maryland office show shipping point tomato prices from South ahd Central Florida beginning with Wednesday, January 23, 1985. (The reports for Monday and Tuesday show that the market was unsettled with practically all sale prices to be established later). The Wednesday report shows that 85% or better U.S. No. 1 quality tomatoes were selling for $18.00 per carton for size 6×6, $16.00 per carton for size 6×7 and $12.00 per carton for size 7×7. The reports for Thursday and Friday of that week show the same prices.

Complainant voluntarily reduced the amounts claimed on this load to $13.00 for the size 6×6, $11.00 for the size 6×7, and $7.00 for the size 7×7, plus $.15 per carton for palletizing, or a total of $17,040.00. Under the circumstances of this case we consider this to be a reasonable price, and in conformity with the contract between the parties. Respondent has already paid complainant $13,040.00 of this amount leaving a balance still due and owing of $4,000.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $4,000.00, with interest thereon at the rate of 13 percent per annum from February 1, 1985, until paid.

Copies of this order shall be served upon the parties.

RICHARD S. BROWN, INC. *v.* Post & TABACK, INC. PACA Docket No. 2-7080. Decided November 24, 1986.

Acceptance—Measure of damages—Reparation awarded.
Where lot of lettuce was delivered in damaged condition resulting from breach of contract by seller, buyer who accepts load by unloading is entitled to deduct damages from contract price.

Edward M. Silverstein, presiding officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of $1,352.00 in connection with a transaction in interstate commerce involving lettuce, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint and filed an answer thereto in which it denied any further liability to complainant.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of verified statements. Complainant filed a certified opening statement, and respondent filed a verified answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Richard S. Brown, Inc., is a corporation whose mailing address is P.O. Box 4729, Salinas, California 93912.

2. Respondent, Post & Taback, Inc., is a corporation whose mailing address is 253-256 N.Y.C. Terminal Market, Bronx, New York 10474. At all material times, respondent was licensed under the Act.

3. On April 11, 1985, in the course of interstate commerce, complainant sold, by oral contract, 410 cartons of lettuce, a perishable agricultural commodity, to respondent at an agreed f.o.b. price of $3.50 per carton ($1,435.00) plus 65 cents per carton for cooling

($266.50) for a total agreed f.o.b. price of $1,701.50. The contract was negotiated through Tom Lange Co., Inc., Salinas, California, acting as the broker.

4. The lettuce was shipped by complainant on April 11, 1985, and arrived at respondent's location late on April 15, 1985. It was the subject of a federal inspection on April 16, 1985, at respondent's business location after it had been unloaded from the truck. The lettuce had been unloaded to enable respondent to reach a lot of asparagus, shipped by someone other than complainant, which was loaded in the nose of the truck. The inspector noted the condition of the lettuce as follows: "Generally fresh and crisp wrapper leaves no decay. Head leaves 2 to 6 heads per carton average 17% damage by Tipburn 1 to 4 heads per carton average 10% Bacterial Soft Rot in various stages affecting 1 to 2 leaves."

5. Respondent reported the condition of the lettuce to the Tom Lange Co., Inc., which, in turn, reported it to complainant. The broker, however, erroneously reported to complainant that the lettuce had not been unloaded from the truck. Complainant, based on the information that the lettuce had not been unloaded and its condition, agreed to have respondent handle the lettuce on consignment. Tom Lange Co., Inc., issued a broker's confirmation as to this agreement.

6. On or about April 15, 1985, respondent accounted to complainant for the lettuce as follows:

Units	Price	Total	
15	$6.00	90.00	
180	5.50	990.00	
195	5.00	975.00	
20	4.00	80.00	
410			$2,135.00
Less: Freight			$1400.00
Term. Chg.			6.15
Inspection			40.30
Unloading @15¢/carton			61.50
Commission (13%)			277.55
			$1,785.50
			$349.50

7. Respondent sent complainant a check in the amount of $349.00 which complainant refused to negotiate until respondent released it as an undisputed amount. The check has now been paid.

8. The complaint was filed on October 7, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

There is no dispute in this case as to whether the lettuce failed to make good delivery. Complainant concedes this point. *See* also 7 CFR § 46.44(a). Rather, the dispute focuses first on whether the complainant's agreement to have respondent handle the lettuce on consignment was obtained through misrepresentation and consequently is voidable, and secondly on the amount which the complainant should have realized from the sale of the damaged lettuce. The facts related to the first issue, whether complainant was made fully aware of all material matters prior to agreeing to allow the respondent to handle the lettuce on consignment must be decided in complainant's favor. The broker, in contacting complainant on respondent's behalf in order to notify the former as to the condition of the lettuce and to make an offer to allow respondent to handle the lettuce on consignment, was operating as an agent for respondent. *PACA Docket No. 5562*, 13 Agric. Dec. 89 (1954). Thus, when the broker incorrectly informed the complainant that the lettuce had not been unloaded off the truck, the broker was acting as an agent for respondent and the giving of this misinformation is attributable to it. Complainant states that, had it known the lettuce had been unloaded off the truck at the time it received the broker's phone call, it would have taken the position that respondent had accepted the lettuce and would not have given it permission to handle the lettuce on consignment. That complainant's permission was obtained through use of this misinformation is undisputed. Consequently, we must conclude that the agreement permitting respondent to handle the lot of lettuce on consignment is void, and that the rights and liabilities of the parties should be determined by the terms of the original f.o.b. sales contract. *Mendelson-Zeller* v. *Wm. Turino Co.*, 32 Agric. Dec. 1972 (1973).

It is clear that, under the Act, the respondent accepted the lettuce by unloading it from the truck. *Barkley Co. of Ariz.* v. *Phil Dattilo & Co.*, 28 Agric. Dec. 537 (1969). Accordingly, it became liable for the agreed contract price less provable damages resulting from any breach of contract committed by complainant. *Edward Hiller, Jr.* v. *Mickelian Sales*, 29 Agric. Dec. 82 (1970). As noted above, it is clear that complainant breached the parties' contract. *See Ritter-Robinson* v. *C. L. Fain Co., Inc.*, 29 Agric. Dec. 1416 (1970). Accordingly, respondent is entitled to deduct its damages from the parties' agreed contract price. It is noted that, although it claimed it was entitled to the full contract price when it filed its

formal complaint, in its opening statement and in its brief, complainant conceded that, at best, it is entitled to $1,232.00 which it computes as follows: the parties' contract price ($1,701.50) less respondent's damages of $120 (or the Market News price of the lettuce ($2,255.00 or $5.50 ×410) less the gross sales received by respondent ($2,135.00)) less the amount already paid by respondent ($349.00). Respondent claims that complainant has received all to which it is entitled. Neither position is correct.

Respondent's damages are computed by subtracting the actual value of the lettuce received from the value it would have had had it been as called for under the contract. The value of the lettuce had it met contract requirements is the f.o.b. price ($1,701.50) plus freight ($1,400.00), or $3,101.50. The value of the lettuce actually received by respondent is the total of the gross sales received by respondent from its prompt resale of it, or $2,135.00. Respondent's damages, therefore, are $966.50 ($3,101.50 −$2,135.00). Subtracting this amount from the agreed contract price ($1,701.50) leaves a balance due complainant of $735.00. Respondent should have paid complainant this amount. *Babijuice Corp. of Florida* v. *J. L. Lustig & Son*, 17 Agric. Dec. 32 (1958). However, it only paid complainant $349.50. Accordingly, respondent remains liable to complainant in the amount of $385.50. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, respondent shall pay complainant $385.50, as reparation, plus interest at the rate of 13% per annum from May 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC. *v.* JOS. NOTARIANNI & COMPANY, INC.
PACA Docket No. 2-7097. Decided November 24, 1986.

Novation—Employee—Complaint dismissed—Counterclaim dismissed.
Where complainant's employee agreed with broker to have shipment of damaged melons transshipped from buyer to third party so the latter could handle for complainant's account, complaint is dismissed.

Edward M. Silverstein, presiding officer.
Complainant, *pro se*.
Sal Cognetti, Jr., Scranton, Pennsylvania, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $3,603.30 in connection with one transaction, in interstate and foreign commerce, involving mixed melons, each being a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. Also respondent was served with a copy of the formal complaint and filed an answer thereto denying any further liability to complainant with respect to the subject shipment. In addition, respondent filed a counterclaim against complainant seeking reparation in the amount of $12,500.00 in connection with the same transaction as was made the subject of the complaint.

As neither the amount involved in the complaint nor in the counterclaim exceeds $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was applicable. Under this procedure, the Department's report of investigation, as well as the verified pleadings of the parties, are made part of the evidence of the case. In addition, the parties were given an opportunity to submit further evidence by way of verified statements, however, neither party did so. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Cal-Mex Distributors, Inc., is a corporation whose mailing address is P.O. Box 1717, Chula Vista, California 92012.

2. Respondent, Jos. Notarianni & Company, Inc., is a corporation whose mailing address is 301 Genet Street, Scranton, Pennsylvania 18505.

3. At all material times, both complainant and respondent were licensed under the Act.

4. On June 6, 1985, in the course of interstate and foreign commerce, complainant sold to respondent, by oral contract, through H&M Brokerage Co., P.O. Box 1781, Oxnard, California 93032, acting as a broker, a truck load of mixed Mexican melons consisting of 840 cartons of honeydews at $4.65 per carton ($3,906.00) and 500 cartons of cantaloupes at $4.80 per carton ($2,400.00) plus $22.50 for a Ryan recording thermometer for a total agreed f.o.b.

price of $6,328.50. The shipment was picked up on that same date, at 2:00 p.m., and the trucker was instructed to maintain the temperature at 36° F. en route.

5. The truck arrived at respondent's location on June 11, 1985, where it was unloaded and, at 8:45 a.m. of that day, was the subject of a federal inspection. The inspector noted that the temperature of the melons ranged from 41° F. to 44° F. He noted the condition of the melons as follows:

> *Cantaloupe lot:* Generally hard. Ground color mostly green, some turning. Decay ranges 1 to 3 melons in most cartons, none in some, averages 7% Fusarium Rot various stages mostly early. *Select Melon Honeydew lot:* Generally hard. Ground color greenish white to white. In most cartons no decay. 1 melon in some averages 4% Cladosporium Rot in various stages. *Melon Honeydew lot:* Mostly ripe and Firm, some firm. Ground color mostly cream color, some white. Decay ranges 2 to 4 melons in most cartons, none in some, averages 11% Cladosporium Rot in various stages.

6. Respondent notified the broker as to the results of the Federal inspection. The broker contacted Mr. George Ellis, an employee of complainant's, who agreed to have the melons transshipped to Shapiro and Cohen, Inc., 153-155 New York City Terminal Market, Hunts Point, New York 10474, for handling on consignment. Subsequently, on or about June 25, 1985, Shapiro and Cohen returned $2,725.20 to complainant.

7. A formal complaint was filed on July 29, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issue in this case is whether complainant's employee, Mr. George Ellis, agreed to the novation of the parties' original contract and to the broker's suggestion that the melons be handled for complainant's account by Shapiro and Cohen. While the Department's report of investigation contains a statement from the broker to that effect, the complainant has not submitted any statement from Mr. Ellis contradicting it. Complainant's president, Mr. Robert Villalobos, did state, in his verified reply to respondent's counterclaim, that Mr. Ellis did not enter into any such agreement. However, Mr. Villalobos did not explain how he had such knowledge and we cannot, therefore, attribute very much weight to it. In view of this, we hold that the preponderance of the evidence supports a conclusion that complainant, through its agent

Mr. Ellis, agreed that the truck load of melons could be transferred from respondent's location to that of Shapiro and Cohen in order for the latter to handle the melons for complainant's account. *Baldwin* v. *Harrisburg Daily Market,* 10 Agric. Dec. 589 (1951); *PACA Docket No. 5337,* 10 Agric. Dec. 1468 (1951). Accordingly, the complaint should be dismissed.[1]

We next must deal with respondent's counterclaim. As respondent has not adduced any proof of its claimed damages, such counterclaim must be dismissed. *Carol-Ann Produce* v. *C&J Farms,* 32 Agric. Dec. 1869 (1973). Moreover, respondent's claims for lost profits, and for punitive damages appear to be frivolous and would not have been granted in any event. *S. P. Lipoma* v. *C.H. Robinson,* 29 Agric. Dec. 499 (1970); *Corley Produce Co.* v. *Gar Produce Co.,* 19 Agric. Dec. 33 (1960).

ORDER

The complaint is dismissed.
The counterclaim is dismissed.
Copies of this order shall be served upon the parties.

PACIFIC GAMBLE ROBINSON CO. d/b/a PACIFIC FRUIT & PRODUCE CO. *v.* PRODUCE PRODUCTS, INC. PACA Docket No. 2-6946. Decided November 25, 1986.

Lack of personal knowledge—Burden of proof—Reasonable value—Reparation awarded.

Respondent failed to submit verified answers and there was no showing that person making answering statement had personal knowledge of facts. Consequently, it was found that sale was FOB as alleged by complainant. In addition, the accounting and federal inspection report submitted by respondent were not used. Nevertheless, admissions by complainant were held to show that the sale was of U.S. No. 1 product and that there was a prompt rejection by respondent. Complainant, as a consequence of the effective rejection, had the burden of proving that it complied with the contract and failed to meet such burden. Respondent disposed of the produce and was therefore liable to the complainant for their reasonable value, which in the absence of an accounting, was shown by market reports.

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[1] It is noted that complainant has received payment from Shapiro and Cohen. However, the record does not reflect whether complainant has negotiated that check. In view of our holding, if complainant has not already done so, it is suggested that it immediately deposit the Shapiro and Cohen check into its account.

George Whitten, presiding officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $3,308.00 in connection with the shipment in foreign commerce of a truckload of bell peppers.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, and respondent failed to file an answer thereto. On June 7, 1985, a Default Order was issued against respondent. On June 12, 1985, respondent petitioned for reopening after Default and on July 5, 1985, the Default Order was stayed. After service of respondent's petition upon complainant, and consideration of complainant's views, an order was issued on September 18, 1985, reopening after Default and giving respondent opportunity to file a verified answer. On October 3, 1985, respondent filed an answer denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered a part of the evidence in the case, as is the Department's report of investigation. Respondent's answer, since it was not properly verified, is not a part of the evidence in this proceeding. However, such answer does serve the purpose of framing the issues between the parties. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant filed a statement in reply which was not properly verified, and was therefore returned to complainant, and will not be considered in this proceeding. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Pacific Gamble Robinson Co., d/b/a Pacific Fruit & Produce Co., is a corporation whose address is P.O. Box 425, Kingsburg, California.

2. Respondent, Produce Products, Inc., is a corporation whose address is 231 E. Imperial Highway, Suite 230, Fullerton, California.

At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about April 30, 1984, complainant sold and shipped from loading point in California, to respondent's customer in Los Angeles, California, one truckload of sweet peppers received by complainant from Mexico. The load contained 288 cartons of extra large bell peppers at $8.50 per carton; 324 cartons of large bell peppers at $8.50 per carton; and 324 cartons of medium bell peppers at $6.50 per carton; or a total price for the truckload of $7,308.00. The peppers were sold to respondent as U.S. No. 1 on a f.o.b. basis.

4. Following arrival of the peppers at the place of business of respondent's customer, such customer rejected the peppers to respondent and respondent notified complainant of such rejection. The peppers were dealt with by respondent, or respondent's customer, on a consignment basis, and respondent remitted $4,143.00 to complainant.

5. An informal complaint was filed on July 16, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent's petition to reopen after Default included a detailed answer by Scott Triolo who claimed to be the salesman who entered into all negotiations regarding the load of bell peppers with complainant's Marvin Farris. This proposed answer, however, was not verified, and when the order was issued September 18, 1985, reopening after Default, respondent was granted ten days in which to submit a verified answer, and was specifically instructed that if a verified answer was not submitted the original unverified statement in respondent's petition to reopen after Default would be considered the answer in the case. Respondent again submitted the same answer as was submitted in connection with its petition to reopen after Default, and such answer was again not verified. Beside Mr. Triolo's signature on the second submission was a stamp which stated "signature guaranteed Lloyds Bank California" with the signature of the assistant cashier/manager. At the bottom of the page respondent had written in ink "our notary was out at the time". It is well settled that an administrative agency is bound to follow its own rules. Section 47.20 of the Rules of Practice (7 CFR § 47.20) specifically provides that under the shortened method of procedure the pleadings of the parties will be considered as evidence in the proceeding only if verified in accordance with paragraph h of the section. Paragraph h of section 47.20 states "verification shall be made under oath of any fact set forth in the pleadings or statement by the person who signs the pleading or state-

ment". There is then set forth a suggested form of verification. The guarantee of a signature by a bank cashier, of course, does not qualify as a verification. Consequently, neither respondent's answer, nor the exhibits attached thereto, can be considered as evidence in this proceeding.

The answering statement submitted by respondent was signed by George Haddad, Vice President and General Manager of respondent, and there is nothing in such answering statement to show that Mr. Haddad had personal knowledge of the matters related in the statement. Consequently this statement is of negligible value as evidence.

Briefly, respondent claims that the peppers were sold on a delivered basis, that upon arrival the peppers were rejected by its customer, and that respondent gave notice of such rejection to complainant who requested a federal inspection. Respondent states that he could not get a federal inspection that day, and that an inspection was secured on May 2, 1984. Respondent further alleges that when complainant was informed of the results of the inspection complainant agreed to the peppers being handled on consignment. Respondent claims to have paid complainant the net proceeds for the peppers.

Complainant's Marvin Farris claimed in the opening statement that the peppers "were not sold as U.S. No. 1". However, paragraph 4 of complainant's formal complaint describes the peppers as U.S. No. 1. Complainant's Marvin Farris also stated in the opening statement that "on information and belief, the shipment was rejected at the original delivery point, but complainant was not notified of the rejection." However, the same Marvin Farris stated in the informal complaint as follows:

> ON APRIL 30TH 1984, A LOAD OF BELL PEPPERS WERE SENT TO WEST COAST FRUIT OF LOS ANGELES, CA. WITH PRODUCE PRODUCTS OF FULLERTON ACCEPTING BILLING ON THE PRODUCT.
>
> WEST COAST REJECTED THE LOAD OF BELL PEPPERS. I WAS INFORMED OF THIS AND AT THAT TIME AN INSPECTION WAS REQUESTED. THE INSPECTION WAS NOT TAKEN UNTIL THE FOLLOWING DAY.

Complainant claimed in the formal complaint that the peppers were sold on a f.o.b. basis. However, the copy of the invoice attached to the complaint nowhere indicates the terms of sale. Had respondent's allegation that the sale was on a delivered basis been in evidence we would have so found. Since it is not in evidence we

have no alternative, on the basis of the evidence of record, but to find that the sale was f.o.b. We also find that the peppers were sold as U.S. No. 1 grade, and that respondent made a prompt rejection of the peppers.

The inspection report submitted by respondent shows delivery of a fairly good load of bell peppers which clearly did not deliver as U.S. No. 1, and would just barely fail to make good delivery for peppers sold as U.S. No. 1 on a f.o.b. basis. However, the only copy of the inspection submitted in this proceeding was submitted in connection with respondent's answer, and consequently the inspection report is not in evidence.

Where a load of produce is rejected and proper notice is given, the seller has the burden of proving that it complied with the contract. *Bud Antle, Inc.* v. *J. M. Fields, Inc. a/t/a Worldwide Produce,* 38 Agric. Dec. 844 (1979); *Heggeblade-Marguleas-Tenneco* v. *Fisher Foods,* 33 Agric. Dec. 1443 (1974); *Bud Antle, Inc.* v. *Bolrack,* 32 Agric. Dec. 1589 (1973). Since no inspection report is in evidence in this proceeding complainant has failed to meet this burden and we conclude, therefore, that respondent's rejection was rightful. Following this rightful rejection the peppers became the responsibility of complainant. *Yokoyama Bros.* v. *Cal-Veg. Sales,* 41 Agric. Dec. 535 (1982). However, it is apparent that respondent disposed of the peppers. Accordingly, respondent is liable to complainant for their reasonable value. See *Sunrise Fruit* v. *Great Bridge Foods,* 33 Agric. Dec. 1342 (1974). Unfortunately respondent's accounting is not in evidence. Under these circumstances reasonable value is deemed to be market value at destination as shown by applicable Market News Service quotations. *Id.* Since complainant failed to show a wrongful rejection we feel justified in using the lower of the fair quality and condition quotations where possible. The Los Angeles Wholesale Market Reports for May 2–4, 1984, show the lowest price for fair quality or condition extra large peppers from Mexico as being $10, and the lowest price for fair quality or condition large and medium peppers from Mexico as being $8. The 288 cartons of extra large peppers would, therefore, have had a value of $2,880, and the 648 cartons of large and medium peppers would have had a value of $5,184. The total value for the load would be $8,064. The record does not disclose who paid freight, nor the amount of freight incurred. However, we deem it appropriate to allow a 15% selling commission to respondent, or $1,209.60. This leaves respondent's net liability to complainant as $6,854.40. Respondent has already paid complainant $4,143.00, which leaves a balance still due of $2,711.40. Respondent's failure to pay complainant this amount is a

violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $2,711.40, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

R.M. ALLRED and RONALD D. ALLRED d/b/a ALLRED'S PRODUCE *v.* RICHARD C. SHELTON d/b/a/ MID-VALLEY BROKERAGE CO. PACA Docket No. 2-6967. Decided November 25, 1986.

Burden of proving breach of warranty—Damages—Resale not prompt and proper—Reparation awarded.

Where respondent proved a breach of suitable shipping conditions warranty but failed to prove damages because resale found not prompt and proper, respondent liable for the contract price of the accepted tomatoes.

Andrew Stanton, presiding officer.
Stephen P. McCarron, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,302.50 in connection with a quantity of tomatoes sold to respondent in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement and respondent submitted an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, R. M. Allred and Ronald D. Allred d/b/a Allred's Produce, is a partnership whose address is 4115 Michael Boulevard, McAllen, Texas.

2. Respondent, Richard C. Shelton d/b/a Mid-Valley Brokerage Co., is an individual whose address is P.O. Box 5546, McAllen, Texas. At the time of transaction involved herein, respondent was licensed under the Act.

3. On approximately January 24, 1985, complainant sold to respondent a quantity of tomatoes consisting of 201 cases of 5×6 tomatoes at $8.50 per case and 66 cases of 5×5 tomatoes at $9.00 per case, for a total contract price of $2,302.50, f.o.b. A contract destination was not agreed to at the time of the sale.

4. Respondent shipped the tomatoes to its customer, Kaleck Bros., in Philadelphia, Pennsylvania, where they arrived on January 28, 1985, and were federally inspected. The inspection found temperatures of 43 to 47°F. and an average of 3% decay and 41% soft. Respondent notified complainant of the inspection results.

5. Kaleck Bros. obtained gross proceeds of $537.50, from which it deducted $66.00 for inspections, $267.00 for freight, $13.35 for drayage, and $75.25 for commission, for net proceeds of $115.90. Respondent offered this sum to complainant as payment in full, but complainant refused to accept the payment under the conditions offered.

6. A formal complaint was filed on August 8, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent does not deny purchasing, receiving and accepting the tomatoes, and thus became liable for the agreed upon contract price, less damages resulting from any breach of warranty by complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Growers Exchange, Inc.* v. *Central Carolina Grocers, Inc.*, 42 Agric. Dec. 666 (1983).

Respondent claims there was a breach of warranty by complainant, as the tomatoes were severely deteriorated when they arrived at the place of business of respondent's customer, Kaleck Bros., Philadelphia, Pennsylvania, on January 28, 1985. Respondent has submitted into evidence a federal inspection which confirms his claim of severe deterioration. Complainant argues that the warranty is inapplicable as there was no contract destination agreed upon between the parties. In his sworn answer and answering statement, respondent insists that there was no contract destination agreed to by the parties when he purchased the tomatoes. Complainant, in

its complaint and opening statement, claims that it thought respondent had indicated that the tomatoes were going to be shipped to Baton Rouge, Louisiana, but in its brief admits that no contract destination was agreed upon. We can only conclude from the evidence in the record that at the time of sale, the parties had not agreed to any particular destination other than respondent's place of business in McAllen, Texas, which was also the shipping point. Accordingly, complainant's suitable shipping condition warranty would not be applicable to Philadelphia, Pennsylvania, the ultimate destination, where the tomatoes were found to be decayed on January 28, 1985. See *Joseph F. Byrnes Produce, Inc.* v. *Kaleck Distributing Co.*, 40 Agric. Dec. 997 (1981). However, the condition of the tomatoes on January 28, 1985, an average of 41% soft and 3% decay, was so poor that it can readily be assumed that the tomatoes would have been in breach of warranty at the agreed upon contract destination, which we presume to have been respondent's place of business in McAllen, Texas, when the load would have arrived there on January 24, 1985, the same day it was shipped. Further, the pulp temperatures found by the inspection, 43 to 47°F., clearly indicate normal transportation conditions. Accordingly, we conclude that respondent has sustained his burden of proving a breach of the suitable shipping condition warranty by complainant.

As damages from complainant's breach of warranty, respondent is entitled to the difference between the actual value of the tomatoes, as determined by a prompt and proper resale, and their value if they had been as warranted. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest* v. *Garden State Farms, Inc.*, 42 Agric. Dec. 922 (1983). Complainant questions whether the resale to Kaleck Bros. was prompt and proper. Kaleck Bros., which dumped 200 out of the 267 cases and remitted only $115.90, accepted the tomatoes on January 28, 1985, four days after they should have arrived at the contract destination, respondent's place of business in McAllen, Texas. Further, the location of Kaleck Bros., Philadelphia, Pennsylvania, is over 1500 miles from respondent. Under these circumstances, we cannot hold that the resale to Kaleck Bros., was prompt and proper and thus an adequate reflection of the actual value of the tomatoes. In the absence of a prompt and proper resale, no damages can be awarded respondent.

Respondent is therefore liable for the contract price of $2,302.50, and his failure to pay such sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the day of this order, respondent shall pay to complainant, as reparation, $2,302.50, with interest thereon at the rate of 13 percent per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MERRILL FARMS *v.* TOM LANGE COMPANY, INC. PACA Docket No. 2-6894. Decided December 5, 1986.

Protection agreement—Consignment agreement—Accounts of sale—Reparation awarded.

The parties agreed after arrival of two truckloads of lettuce, to modifications of the original contracts of sale whereby respondent would be granted full protection as to one load, and allowed to handle the other load on a consignment basis. Respondent, however, did not render an accounting as to either load and it was held that both the protection and consignment agreements were voided and respondent was liable to complainant on the basis of the original contracts.

George S. Whitten, presiding officer.
Matthew M. McInerney, Newport Beach, California, for complainant.
LeRoy Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $8,788.50 in connection with the shipment in interstate commerce of two truckloads of lettuce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant and asserting a setoff. Complainant filed a reply to respondent's answer and setoff.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed

an answering statement and complainant filed a statement in reply. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, Merrill Farms, is a corporation whose address is P.O. Box 659, Salinas, California.

2. Respondent, Tom Lange Company, Inc., is a corporation whose address is P.O. Box 4701, Springfield, Illinois. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 20, 1983, complainant sold to respondent and shipped from loading point in the State of California to respondent in Atlanta, Georgia one truckload containing 870 cartons of size 24 lettuce at $10.00 per carton, plus 65 cents per carton for vacuum cooling, f.o.b. Complainant informed respondent at the time of sale that the lettuce would weigh approximately 50 pounds per carton.

4. The lettuce arrived at the place of business of respondent's customer in Columbus, Georgia on the morning of May 25, 1983. At that time respondent's manager, Eric R. Hoffman, called respondent's salesman, Bill Gheen, and informed him that the lettuce was light in weight. The parties agreed that 500 cartons of the lettuce should be unloaded at the place of business of respondent's customer in Columbus, Georgia and the remaining 370 cartons should be transported to Atlanta for federal inspection.

5. The 370 remaining cartons of lettuce were federally inspected for weight only at 7:35 a.m. on May 25, 1983, at the place of business of Burnett Produce Co. in Forest Park, Georgia. The inspection revealed a net weight per carton range from 37 to 45½ pounds with an average weight of 41.84 pounds. This information was conveyed by Mr. Hoffman to Mr. Gheen, and it was agreed that respondent would be granted a price reduction of $2.00 per carton for market decline, and full protection on the lettuce due to the light weight.

6. The firm in Columbus, Georgia which received the 500 cartons of lettuce paid respondent $8.90 delivered net for the 500 cartons, and Burnett Produce Company paid respondent $6.95 delivered net for the 370 cartons received by such company. Respondent deducted $2.25 per carton for freight, and remitted the balance of $5,064.00 to complainant by check on June 21, 1983. The check was not cashed by complainant until release was obtained through this Department in October of 1983 for the check to be negotiated as an undisputed amount.

7. On May 23, 1983, complainant sold to respondent, and shipped from loading point in the state of California to respondent in At-

lanta, Georgia, one truckload containing 900 cartons of size 24 lettuce at $6.00 per carton, plus 65 cents per carton for vacuum cooling, or a total of $5,985.00, f.o.b.

8. On May 27, 1983, at 9:15 a.m., the lettuce was federally inspected at the place of business of Packaging Unlimited in Forest Park, Georgia on application of respondent. The lettuce was inspected while still on board the truck, and temperatures were stated to be "Top 39°F; Bottom 46°F.". Condition of the lettuce was stated to be as follows:

> Heads or portions of heads not affected by condition factors are fresh and crisp. Wrapper leaves: Serious damage by small tan to brown spotted discolored areas averages 5%. Decay averages 3%. Head leaves: Decay ranges 1 to 3 heads in ½ of cartons, remainder none, average 4%, Bacterial Soft Rot in mostly early, and some advanced stages.

Respondent's Mr. Hoffman reported the results of this inspection to complainant's Ken Wolf on May 27, 1983, and was granted permission to handle the lettuce on a consignment basis through F. C. Davis Inc. in Atlanta, Georgia.

9. Respondent was paid for the lettuce on the basis of $4.25 per carton delivered. This amount was accepted by respondent, and respondent deducted $42.00 for a U.S.D.A. inspection, $2,250.00 for freight, and $135.00 brokerage, and remitted the sum of $1,398.00 to complainant on June 17, 1983. Complainant did not cash the check from respondent until October of 1983 after securing its release as an undisputed amount through this Department.

10. An informal complaint was filed on August 5, 1983, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant seeks to recover the full purchase price of the two truckloads of lettuce less the amounts already paid by respondent. When the formal complaint was filed complainant requested the original full price on the first load of lettuce, but later reduced the amount claimed by $2.00 per carton on the basis of the allowance for market decline. Complainant denied in its reply to respondent's setoff and answer that it agreed to granting full protection on the first load of lettuce or that the second load of lettuce could be handled on consignment. We have carefully reviewed all of the evidence of record and have concluded that respondent has met its burden of proving by a preponderance of the evidence that full protection was granted on the first load, and that the parties did agree to the second load being handled on a consignment basis.

Respondent additionally alleges that as to the first load of lettuce its Eric Hoffman called Bill Gheen on June 17, 1983, and secured his agreement to the prices at which the cartons of lettuce were sold by respondent's customers. In view of complainant's failure to accept the check sent by respondent on June 17, we find it difficult to credit this allegation, and find on the basis of all of the evidence of record that complainant did not enter into this alleged agreement.

We have held many times that a protection agreement is voided by failure to keep proper records which substantiate the prices received on resale of produce. See *Demarco Produce Co., Inc.* v. *J. R. Cortes & Co.*, 39 Agric. Dec. 1256 (1980); *Dave Walsh Co., Inc.* v. *Liberty Fruit Co., Inc.*, 38 Agric. Dec. 533 (1979); *Genbroker Corp.* v. *Super Food Services*, 38 Agric. Dec. 83 (1979); *Northwest Arkansas Produce* v. *Creasey Co.*, 27 Agric. Dec. 760 (1968); and *Vener Co.* v. *McCaffrey Bros. Co.*, 15 Agric. Dec. 405 (1956). Since respondent did not furnish complainant with any accounting of the resale of the lettuce contained on the first load the protection agreement is voided, and respondent is liable to complainant for the full original contract price of the lettuce.

The agreement between the parties that the second load of lettuce should be handled on a consignment basis also entails a duty on respondent's part to render an accounting to complainant. Respondent's customer failed to render an accounting to respondent, and respondent has failed to render any accounting to complainant. The reasoning in the cases cited above relative to protection agreements requires that a failure to account in a case such as this must also result in the voiding of a consignment agreement. Respondent is therefore liable to complainant for the full original contract price relative to the second shipment of lettuce.

Respondent is liable to complainant for the full contract price on the first load of lettuce, less the $2.00 per carton allowance for market decline, or $7,525.50. Respondent is also liable to complainant for the full original purchase price on the second load, or $5,985.00. Respondent has already paid complainant a total of $6,462.00, which leaves a balance due on both loads of $7,048.50. Respondent's failure to pay complainant such amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $7,048.50, with interest thereon at the rate of 13% per annum from June 1, 1983, until paid.

Copies of this order shall be served upon the parties.

DEBRUYN PRODUCE CO. *v.* BATTAGLIA PRODUCE SALES, INC. PACA Docket No. 2-6991. Decided December 5, 1986.

Misrepresentation—Contracts—Accounting—Reparation awarded.
The parties entered into a protection agreement on the basis of respondent's unintentional misrepresentation. It was held that the protection agreement was voided. Although an arrival inspection showed considerable damage in one lot of the peaches, such damage was not deemed scorable against peaches sold without a U.S. Grade designation. However, the parties' view that such damage showed a breach was given effect as the true intent of their contract. Respondent, however, did not submit an accounting covering the resale of the peaches and therefore did not prove damages.

George S. Whitten, presiding officer.
Complainant, *pro se*.
Ralph V. Hadley, III, Winter Garden, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $6,204.20 in connection with the shipment in interstate commerce of a truckload of peaches.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, DeBruyn Produce Co., is a corporation whose address is P.O. Box 76, Zeeland, Michigan.

2. Respondent, Battaglia Produce Sales, Inc., is a corporation whose address is 1705 Weeksville Road, Elizabeth City, North Carolina. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about September 11, 1984, complainant sold to respondent 260 one bushel containers of peaches, size 2⅛ inch minimum at $13.35, and 740 one bushel containers of peaches, size 2¼ inch minimum at $14.35, or a total of $14,090.00 f.o.b. destination.

4. On or about September 11, 1984, complainant shipped the peaches from loading point in the State of Michigan to respondent's customer P. Tavilla Co. in Miami, Florida.

5. On September 13, 1984, at 8:45 a.m., the peaches were federally inspected during the process of unloading at the place of business of P. Tavilla Co., in Miami, Florida, with the following results in relevant part:

Condition:	Each Lot: Mostly ripe, many firmripe, some firm. Mostly yellow, some turning yellow, some light green color. *2⅛ inch Lot:* Average 2% damage by bruising affecting ripe fruit. Average 2% damage by tan to brown discolored areas. No decay. *2¼ inch Lot: A. L. Schmaltz Lot:* Ranges 20 to 25%, average 24% damage by tan to brown discolored areas. Average 1% decay. *Remainder Lots:* Average 1% damage by tan to brown discolored areas. Average 7% damage by bruising scattered throughout pack affecting ripe fruit. No decay.
Remarks:	Inspection made during process of unloading.

6. On September 18, 1984, at 10:35 a.m., the peaches were again federally inspected at the place of business of P. Tavilla Co., in Miami, Florida with the following results in relevant part:

Condition: *Greg Orchard, Higbees Farm & Gerold C. Hiler lots*-Mostly ripe. Ground color is yellow. *Greg Orchard lot* Average 4% damage by bruises. Ranges 4 to 18% average 9% soft. Average 4% decay (Rhizophus Rot). *Higbees Farm lot*—Ranges 2 to 12% average 7% soft. No decay. *A. L. Schmaltz lot*—Firm to firm ripe. Ground Color is light green to turning yellow. Ranges 2 to 32% average 19% damage by brown surface discoloration. No decay. *Gerold L. Hiler lot*—Ranges 12 to 22% average 17% soft. No decay.

7. On September 13, 1984, when the peaches arrived in Miami, respondent reported to complainant that the Schmaltz Lot of peaches arrived in poor condition, but that the number of cartons in the lot could not be determined because the Schmaltz brand was scattered throughout the load. Complainant granted respondent protection as to the Schmaltz brand, and requested a federal inspection. On or about September 18 or 19 respondent reported to complainant the results of the second federal inspection quoted in Finding of Fact 6 above, but by mistake represented such inspection as having been made shortly after arrival. On the basis of such inspection complainant agreed that the entire load could be handled on a consignment basis.

8. An informal complaint was filed on March 26, 1986, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent attached as an Exhibit to its answer a copy of the complaint which it has filed against P. Tavilla Co., Inc., and such complaint discloses that respondent is in basic agreement with complainant concerning the facts in this case as outlined above in the Finding of Fact. It is clear, therefore, that the full protection granted by complainant to respondent was based on respondent's uninternational misrepresentation of the condition of the produce. Consequently this modification of the contract is to be considered voided. See *Tom Bengard Ranch* v. *Tomatoes, Inc.*, 41 Agric. Dec. 1637 (1982). The rights and liabilities of the parties must be determined on the basis of the original contract. *Pappas & Co.* v. *A. & J. Produce Corp.*, 41 Agric. Dec. 1820 (1982).

Although these peaches were not sold with any grade designation we consider the damage indicated in the federal inpsection as showing a breach of contract on the part of complainant. In addition a contract is to be interpreted in the light of how it is viewed by the parties thereto. In this case complainant, throughout this proceeding, has clearly indicated that it considers the contract to have been breached in regard to the A. L. Schmaltz lot of peaches. Such lot comprised 106 containers of the 2¼ inch size peaches. Had respondent submitted an accounting showing a breakdown of the sales of the peaches we could have awarded respondent damages in regard to the A. L. Schmaltz lot. However respondent did not submit any such accounting, and consequently we have no means of assessing damages in respondent's favor. See *Genbroker Corp.* v. *Super Food Services,* 38 Agric. Dec. 83 (1979). We find that respondent is liable to complainant for the full contract price of the peaches, less the $7,885.80 which it has already paid to complainant, or a balance of $6,204.20. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $6,204.20, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BARTELL MARKETING, INC. *v.* CHANDLER-TOPIC CO., INC. PACA Docket No. 2-7020. Decided December 5, 1986.

Change in contract terms—Duty to properly handle produce on consignment. Respondent sustained its burden of proving that the original FOB terms were changed to a consignment. However, respondent mishandled a portion of the load, and is liable to complainant for what the mishandled produce should have brought if it had been properly handled.

Andrew Stanton, presiding officer.
Complainant, *pro se.*
Stephen P. McCarron, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $17,935.20 in connection with a truckload of tomatoes shipped to respondent, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Although the amount claimed as damages exceeds $15,000.00, the parties waived oral hearing. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified or signed by an employee of respondent, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and file briefs. Respondent submitted an answering statement and complainant a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Bartell Marketing, Inc., is a corporation whose address is 7100 North Financial Drive, Suite 103, Fresno, California.

2. Respondent, Chandler-Topic Co., Inc., is a corporation whose address is 7367 Kirkwood Court, Maple Grove, Minnesota. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately January 25, 1985, complainant sold to respondent one truckload of 85% U.S. number one or better green tomatoes, consisting of 550 cartons of extra large at $14.00 per carton, 640 cartons of large at $13.00 per carton, and 330 cartons of medium at $12.00 per carton, plus $.80 per carton precooling and gassing, for a total contract price of $21,218.50, f.o.b.

4. The truckload of tomatoes was shipped to respondent, who had a portion delivered to Northwest Produce Co., Inc., Minneapolis, Minnesota (hereinafter, "Northwest") and another portion to S.C. Shannon, Appleton, Wisconsin. The tomatoes were received on January 28, 1985. When both receivers reported problems, respondent's employee, Tim Grace, called complainant's employee, Don Davis, and they agreed that Northwest would handle its part of the load on consignment, and the other part would be sent to J&J Distributing Co., St. Paul, Minnesota (hereinafter "J&J"), for consignment handling. On January 29, 1985, respondent sent a telegram to com-

plainant confirming their agreement, which reads as follows, in relevant part:

> In reference to Bartell file #2508 loaded on an MTS truck Chandler Topic #5251 as per discussion with Don Davis the rejected load of tomatoes originally slated for S C Shannon and Northwest Produce have been inspected per request of shipper. With the understanding of full protection on working product out Northwest Produce will handle for the shippers account 200 extra large 640 large and 190 medium. The remaining 350 extra large 140 medium will be placed and inspected with J and J Distributing on the same open basis presented Northwest Produce. If these terms are not as discussed or acceptable to Bartell Marketing and or represented shipper immediate notification is requested.

Complainant never notified respondent that the terms expressed in its telegram were unacceptable.

5. On January 29, 1985, Northwest had its portion of the tomatoes federally inspected, which resulted, in pertinent part, as follows:

WHERE INSPECTED	Applicant's whse.
Products Inspected:	TOMATOES in cartons printed "5½ Brand, Jorge Luis Rodarte & Assoc., Culiacan, Sinaloa, Mexico, Net wt. 25 lbs.," and stamped "Super Select," and to denote size (Lg-EXLG 56A, Med Lg 66A, Med Sm 67A noted.) Applicant states 640 cartons 6×6 lot, 190 6×6's and 200 cartons 5×6 lot.
Condition of Load:	*Each lot*: stacked on pallets in warehouse.
Condition of Pack:	*Each lot*: well filled.
Temperature of Product:	In various cartons 52° to 56°F.
Size:	*Each lot*: meets size as marked.

Quality:	*Each lot*: Mature; well developed; clean; mostly well, some fairly well formed and smooth. *5*×6 lot: Grade defects average 6%. *6*×6 lot: Grade defects average 5%. *6*×7 lot: Grade defects average 5%. *Each lot*: Grade defects are mostly scars and misshapen.
Condition:	*5*×6 lot: Average approximately 35% green and breakers, 40% turning and pink, 25% light red and red. Average 3% decay. From 2 to 20%, average 9% soft. Average 5% damage by sunken, discolored areas occurring over shoulders. *6*×6 lot: Average approximately 45% green and breakers, 35% turning and pink, 10% light red and red. Average 2% damage by sunken, discolored areas occurring over shoulders. From 4 to 18%, average 10% soft. Average less than 1% decay. *6*×7 lot: Average approximately 50% green and breakers, 20% turning and pink, 20% light red and red. From 8 to 12%, average 11% soft. No decay. Average 2% damage by sunken, discolored areas occurring over shoulders.
GRADE:	*Each lot*: Meets quality requirements but fails to grade U.S. No. 1, account condition.

6. Northwest sent an account of sales to respondent dated March 10 1986, showing that, after regrading, it sold 164 of the 200 cartons of extra large tomatoes for $1,592.00, 524 of the 640 cartons of large tomatoes for $4,687.90, and 159 of the 190 cartons of medium tomatoes for $1,417.50. The unsold tomatoes were apparently dumped. Northwest deducted $1.50 per carton for handling and profit, or $1,270.50, from its proceeds of $7,697.40, leaving $6,426.90. Northwest deducted an additional $1.25 for each of the original 1,030 cartons, or $1,287.50, for labor to regrade, and $42.00 for the cost of inspection, resulting in net proceeds of $5,097.40. However, Northwest paid respondent $5,128.50 for the consigned tomatoes.

7. J&J never had a federal inspection for its portion of the load consisting of 350 cartons of extra large tomatoes and 140 cartons of medium tomatoes. J&J sent respondent an account of sales dated May 6, 1985, showing that it had sold the 350 cartons of extra large

tomatoes at $2.50 per carton, or $875.00, 100 cartons of the medium tomatoes at $2.00 per carton, or $200.00, and 40 cartons of the medium tomatoes at $2.50 per carton or $100.00, for a total of $1,175.00. From this figure, J&J had deducted $290.00 for trucking and $.25 per carton, or $122.50, for storage at Jerry's Produce, St. Paul, Minnesota, leaving $762.50.

8. Respondent deducted from the proceeds of its sales $2,100.00 for freight, $380.00 for handling, and an additional $127.00 for transportation from the original receiver, S.C. Shannon Co., to J&J. Respondent remitted to complainant $3,283.20. Respondent has failed to pay complainant any of the $17,935.20 which complainant claims is past due and owing.

9. A formal complaint was filed on August 29, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent claims that complainant authorized a change in the contract terms to a consignment. Complainant has not specifically denied this contention. Furthermore, the report of investigation contains a January 29, 1985, telegram from respondent to complainant proposing that respondent handle the tomatoes on consignment for complainant's account, and requesting immediate notification from complainant if such proposal is unacceptable (Finding of Fact 4). The record does not indicate, nor does complainant assert that it ever informed respondent that consignment handling would not be permitted. Therefore, it is clear that respondent has sustained its burden of proving a change in the contract terms. *Joe Phillips, Inc.* v. *G & T Terminal Packaging Co., Inc.*, 42 Agric. Dec. 1199 (1983).

The next issue is whether respondent fulfilled its duty as a consignee to properly handle the truckload of tomatoes consigned by complainant. See *John Livacich Produce, Inc. a/t/a Vista Sales* v. *The Auster Company, Inc.*, 42 Agric. Dec. 657 (1983). With respect to the sales by Northwest, although respondent has not provided dump certificates establishing that the 143 cartons allegedly dumped out of the 1030 carton load had no commercial value, the number of cartons dumped is consistent with the poor condition of the tomatoes reflected in the January 29, 1985, inspection report (Finding of Fact 5). The account of sales of Northwest (Finding of Fact 6) shows that, after regrading, it sold 164 cartons of extra large tomatoes for a net of $1,592.00, 524 cartons of large tomatoes for a net of $4,687.90, and 159 cartons of medium tomatoes for a net of $1,417.50, totalling $7,697.40. These sales appear entirely proper. However, the handling fee deducted by Northwest is not

entitled to be claimed by respondent as a deduction, as respondent has claimed a fee for its commission, as discussed below, and complainant never gave respondent authorization to reconsign the tomatoes. Northwest also deducted $1.25 per carton, or $1,287.50, for labor to regrade, which is reasonable, and $42.00 for inspection fees, which is not a permissible deduction. Therefore, the net proceeds of Northwest which respondent may claim are $6,409.90.

J&J claims to have sold its portion of the load for only $1,175.00 (Finding of Fact 7), consisting of 350 cartons of extra large tomatoes for $875.00, 100 cartons of medium tomatoes for $200.00, and 40 cartons of medium tomatoes for $100.00. From this figure, J&J deducted $290.00 for trucking, which is reasonable, and $122.50 for storage, which is not. The net figure, $885.00 is an extremely small return for the consigned tomatoes. Respondent argues that the condition of the tomatoes was poor and the market was not good. However, this argument is not adequate to explain why J&J could not have received prices similar to those of Northwest. Northwest realized from the 200 cartons of extra large tomatoes an average of $7.96 per carton, less $1.25 for regrading, or $6.71. Therefore, J&J should have obtained $2,348.00 if the 350 cartons of extra large tomatoes had been properly handled. Northwest Produce realized from the 190 cartons of medium tomatoes $7.46 per carton, less $1.25 for regrading, or $6.21. Therefore, J&J should have obtained $869.40 for the 140 cartons of medium tomatoes, or $3,217.90 for the entire load.

Respondent should thus have been able to obtain proceeds for the consigned tomatoes of $6,409.90 and $3,217.90, amounting to $9,627.80. Respondent may deduct from this figure its freight of $2,227.00 and 15% commission, or $1,444.17, leaving $5,956.63 to be remitted to complainant. Since respondent has paid only $3,283.00, it is liable for an additional $2,673.43, and its failure to pay such sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation $2,673.43, with interest thereon at the rate of 13% per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NAT FEINN SALES CORPORATION *v.* SUNLIGHT TOMATO CO., INC.
PACA Docket No. 2-7055. Decided December 5, 1986.

Burden of proof—Evidence of contract—Sale of produce to cover freight—Complaint dismissed.

Complainant failed to sustain its burden of proving any contractual arrangement with respondent, as respondent submitted strong evidence that it refused to purchase the produce from the complainant, but handled it on consignment for the account of the truck broker. Therefore the complaint was dismissed.

Andrew Stanton, presiding officer.
James H. Vallis, Kingsburg, California, for complainant.
Frank V. Charles, Chelsea, Massachusetts, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $12,426.84 in connection with a truckload of cherry tomatoes allegedly sold and shipped to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the Department's report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements, but declined to do so. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Nat Feinn Sales Corporation, is a corporation whose address is P.O. Box 848, 920 South Topeka, Fresno, California.

2. Respondent, Sunlight Tomato Co., Inc., is a corporation whose address is 145 Market Street, Chelsea, Massachusetts. At the time of the transactions alleged herein, respondent was licensed under the Act.

3. On approximately July 11, 1985, complainant attempted to sell respondent a truckload of cherry tomatoes, but respondent did not agree to the purchase.

4. On July 11, 1985, complainant's employee, Paul Lichter, called Patterson Truck Brokers, Inc., Pharr, Texas (hereinafter, "Patterson"), and spoke to an employee, David Thompson, about securing a truck on behalf of respondent. Thompson called respondent's president, Anthony Sarno, who made clear that he did not want the load that complainant desired to ship. Another employee of Patterson later conveyed this information to Lichter, while a third employee, Joe Lowery, was listening in on the conversation. Lichter said to send the truck anyway and he, Lichter, would take care of Sarno.

5. Complainant shipped the truckload of tomatoes to respondent, who refused to accept them.

6. On approximately July 15, 1985, someone from Patterson informed complainant that the tomatoes had been turned back to the trucker, and asked if complainant would have the truck unloaded at its place of business. Complainant refused, and the Patterson representative stated that the tomatoes would be sold for freight charges. Joe Lowery of Patterson confirmed this discussion in a July 18, 1985, telegram to complainant.

7. Patterson consigned the tomatoes to respondent, who sold them for Patterson's account.

8. A formal complaint was filed on October 28, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Respondent contends that there never was a contract with complainant for the purchase of the load of cherry tomatoes at issue. Complainant insists that the tomatoes were sold to respondent for $12,426.84, f.o.b., and claims that respondent is liable to it for this sum. Complainant is the moving party herein, and thus has the burden of proving the existence of a contractual relationship between it and respondent. *Cook Sales Company* v. *Romney Produce Co.*, 42 Agric. Dec. 641 (1983).

The only evidence presented by complainant which purports to show the existence of a contract consists of the allegations to this effect in the sworn complaint, and complainant's invoice, reflecting an f.o.b. sale to respondent. However, there is no evidence that the invoice was sent to respondent. Further, respondent, in its sworn answer, has asserted that it refused complainant's offer to sell the cherry tomatoes. Respondent has offered into evidence the affidavits of two employees of Patterson Truck Brokers, Inc., David Thompson and Joe E. Lowery, who state that on July 11, 1985, they engaged in a telephone conversation with complainant's employee,

Paul Lichter. They state that Lichter requested a truck for respondent, but when they called respondent, its president, Tony Sarno, said he did not want the load. They contend they told this to Lichter, who said to send the truck anyway as he, Lichter, would take care of Sarno (Finding of Fact 4). This strongly supports respondent's claim that it never purchased the cherry tomatoes. Thompson also asserts in his affidavit that respondent thereafter refused to accept the load, and when complainant would not take it back, Patterson consigned the cherry tomatoes to respondent to handle for Patterson's account. The record contains a July 18, 1985, telegram from Lowery to complainant which confirms complainant's authorization to Patterson to sell the cherry tomatoes for freight charges (Finding of Fact 6).

Complainant has not offered any evidence beyond that contained in its complaint to rebut the strong evidence presented by respondent, which shows clearly that respondent never purchased the cherry tomatoes from complainant, but handled them on consignment for the account of the truck broker. We therefore conclude that complainant has failed to sustain its burden of proving the existence of a contractual relationship with respondent. We also conclude that respondent was under no legal obligation to remit the proceeds of its sales to complainant, as complainant was not a party to Patterson's consignment arrangement with respondent. Accordingly, there is no merit to the complaint, and it must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TOM LANGE CO., INC. *v.* WEINSTEIN PRODUCE SALES, INC. PACA Docket No. 2-7103. Decided December 5, 1986.

Buyer's liability after acceptance—Burden of proof—Damages—Settlement—Accord and satisfaction.

Where buyer accepts produce, he is liable for contract price less damages caused by seller's breach of contract.

Edward M. Silverstein, presiding officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of $3,770.14, in connection with one transaction in interstate commerce involving mixed produce, all being perishable agricultural commodities.

Both parties were served with copies of the Department's report of investigation. Respondent was also served with a copy of the formal complaint and filed an answer thereto denying any liability to complainant.

As the amount in dispute was less than $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the Department's report of investigation and the verified pleadings of the parties are considered as part of the evidence in the case. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Respondent filed a verified answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Tom Lange Co., Inc., is a corporation whose mailing address is P.O. Box 80010, Salinas, California 93902.

2. Respondent, Weinstein Produce Sales, Inc., is a corporation whose mailing address is P.O. Box 7364, Boise, Idaho 83707. At all material times, respondent was licensed under the Act.

3. On December 11, 1984, in the course of interstate commerce, complainant, by oral contract, sold a lot of mixed produce, all being perishable agricultural commodities, on a good delivery basis to respondent. The produce was to be picked up by respondent at complainant's loading dock. Over the next 2½ days, respondent had the produce picked up in accordance with this agreement. The items contained in this shipment, *inter alia*, included 120 cartons of mature green tomatoes sold at $8.70 per carton ($1,044.00), 120 cartons of green tomatoes sold at $9.70 per carton ($1,164.00), and 3 cartons of red peppers sold at $22.00 per case ($66.00). Respondent accepted all of the produce. The total agreed contract price for the lot of mixed produce was $10,508.00.

4. Upon receiving the various items in Boise, Idaho, respondent, on December 14, and December 17, 1984, had some of them inspected. Among the items inspected were the green tomatoes. The inspection certificate issued following the December 14, 1984, inspection (E 193864) of the tomatoes reflected their condition as follows: "Average approximately 95% light red and red. Average 2% damage by numerous sunken discolored areas generally occurring over shoulders. Average 3% Decay ALTERNARIA ROT. Tomatoes show light colored surface mold in stem scar." Also, the three cartons of red peppers were among the items inspected. The inspection certificate (E 193867) relating to the red peppers reflected the condition of the peppers as follows: "Decay ranges 38 to 48%, average 43% affecting pods average 7% affecting stems, Bacterial Soft Rot in various stages. Remainder fresh, firm, and characteristic color. Average 7% shrivelled areas, affecting 5 to 10% of surface."

5. After respondent reported the condition of the produce to complainant, the latter offered to reduce the agreed contract price by $977.00. Respondent did not accept this offer.

6. On or about January 7, 1985, respondent accounted to complainant for the tomatoes and red peppers as follows:

		Tomatoes		
Sales:				
		18 @$7.50	$135.00	
		22 @6.75	148.50	
		42 @5.25	220.50	
		31 @4.00	124.00	
		47 @3.00	141.00	
		Total Sales		$769.00
Expenses:				
	Rerun	240 @75¢	$180.00	
	Dumped	70 @25¢	17.50	
	Freight	240 @80¢	192.00	
	Warehouse and Selling @15%		115.35	
		Total Cost		$504.85
				$264.15
		Red Peppers		
Sales:				
	0			
Expenses:				
	Freight	3 @80¢	$2.40	
	Dumping	3 @25¢	.75	
		Total Cost		$3.15

Respondent, also, accounted to complainant for two cartons of eggplants. However, no eggplants were included on the subject shipment.

7. At some time thereafter, respondent paid complainant $5,706.86 with respect to this shipment.

8. An informal complaint was filed on January 24, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

There is no dispute regarding the fact that respondent received and accepted the truckload of mixed produce. Accordingly, respondent is obligated to complainant for the full purchase price for the lot of mixed produce less any damages resulting from a breach of contract committed by complainant. *Rocky Ford Dist. Co.* v. *Angel Produce*, 29 Agric. Dec. 93 (1970). The respondent has the burden of proof on such matters. *The Growers-Shipper Pot. Co.* v. *Southw. Prod. Co.*, 28 Agric. Dec. 571 (1969).

For the most part, respondent has failed to sustain its burden of proof regarding the damages it allegedly sustained as a result of the alleged breach of contract committed by complainant. However, it has proven that complainant shipped red tomatoes rather than green tomatoes and that the red peppers it received were unmerchantable. With regard to these items it has proven that it sustained damages of $1,897.65, i.e., the contract price plus freight of the damaged merchandise ($2,468.40) less the result of the resale ($769.00) plus incidental costs such as dumping and rerunning the merchandise ($198.25). *See Bosgraaf Sales* v. *Alexander Marketing*, 26 Agric. Dec. 1201 (1967). When this amount is deducted from the parties' agreed contract price of $10,508.00, the balance remaining is $8,610.35. This is the amount which respondent should have paid complainant. However it only paid the latter $5,760.86. Thus, it remains obligated to complainant in the amount of $2,849.49.

The next issue we must discuss is whether the parties negotiated a settlement with regard to this shipment. Since complainant made this allegation, it has the burden of proving it by a preponderance of the evidence. *J. E. Nelson & Sons* v. *Quality Produce Co.*, 16 Agric. Dec. 708 (1957). The only evidence it offered in support of its allegation is the "corrected" invoice it issued. However, such a self-serving document is insufficient to sustain its burden of proof. *See El Solo Packing Co.* v. *Ligon Produce Co.*, 17 Agric. Dec. 1002 (1958). Accordingly, we hold that the parties did not agree to compromise this matter.

The last issue we must consider is whether the complainant, by accepting the respondent's payment of $5,760.86, entered into an

accord and satisfaction. Respondent, as the proponent of this allegation, had the burden of proving it. But it has failed to show that its check was offered and accepted in full satisfaction of the amount in dispute. Accordingly, we must hold that it has failed to sustain its burden of proof. *See Mendelson-Zeller* v. *Season Produce*, 31 Agric. Dec. 1288 (1972).

On the basis of the whole record, we find that respondent is obligated to complainant in the amount of $2,849.49 with respect to the subject shipment and that its failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant $2,849.49, as reparation, plus interest at the rate of 13% per annum from January 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ANTLE BROTHERS and TANIMURA BROTHERS d/b/a TANIMURA AND ANTLE *v.* ALBERTSON'S, INC. PACA Docket No. 2-6989. Decided December 8, 1986.

Broker's authority to invoice and collect—Failure to prove modification of understandings—Complaint dismissal.

Pursuant to the long-established custom of the parties and an invoice received from the broker who negotiated the sale, respondent buyer paid the broker for a trucklot of lettuce. The broker failed to remit the proceeds to complainant seller. Since complainant failed to prove the parties had agreed to change their customary practice authorizing the broker to invoice and collect, payment was made pursuant to the contract of the parties, and the complaint was dismissed.

Thomas Heinz, presiding officer.
Complainant, *pro se*.
Chip Cole, Boise, Idaho, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter "the Act". A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of $2,293.20 in connection with the sale and shipment of a truckload of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given opportunities to submit additional evidence in the form of verified statements and to file briefs. Both complainant and respondent submitted verified statements but neither submitted briefs.

FINDINGS OF FACT

1. Complainant, Antle Brothers and Tanimura Brothers, is a partnership doing business as Tanimura and Antle with a mailing address at P.O. Box 4070, Salinas, California 93912.

2. Respondent, Albertson's, is a corporation with its principal place of business at P. O. Box 20, Boise, Idaho 83786. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about June 25, 1984, respondent by oral contract purchased one trucklot of lettuce at an agreed price of $2,293.20 from complainant.

4. The contract was negotiated by Stoops & Wilson, a broker in Shawnee Mission, Kansas, which is no longer in business.

5. Respondent accepted the lettuce upon arrival at Aurora, Colorado. Thereafter, Stoops and Wilson billed and collected for the lettuce from respondent but has failed to remit any part of the sale proceeds to complainant.

6. The complaint was filed within nine months after the cause of action accrued.

SUBSIDIARY FINDINGS OF FACT AND CONCLUSIONS

Both parties agree that before late spring or early summer of 1984 they had an established course of dealing authorizing Stoops and Wilson, a broker, to bill and collect for produce sold by complainant to respondent. Complainant contends, however, that because Stoops and Wilson's payment practices became very slow, this course of dealing was modified by an oral contract negotiated by unspecified individuals on an unspecified date during the late spring or early summer of 1984. By the terms of such oral contract, complainant asserts the parties all agreed that thereafter complainant would bill and collect directly from respondent and remit the collected brokerage commission to Stoops and Wilson. To sup-

port this contention, complainant submitted copies of documents showing complainant's sale of lettuce to respondent on June 23, 1984, (two days earlier than the disputed transaction) for which respondent paid complainant directly, even though the sale was negotiated by Stoops and Wilson.

Respondent, on the other hand, denies entering into any contract which modified the custom of the parties and argues, in effect, that the June 23, 1984 transaction was an anomaly which cannot be taken to prove an agreed-upon modification to the customary practice of the parties.

As the moving party, complainant has the burden of proving by a preponderance of evidence the terms of the contract, respondent's breach of such contract, and the resulting damages, if any, sustained by complainant. *Justice* v. *Milford Packing Co.*, 34 Agric. Dec. 533, and cases cited at 535 (1975). Complainant has not met that burden.

The record reveals respondent paid Stoops and Wilson for the disputed lettuce pursuant to an invoice received from Stoops and Wilson which directed payment to Stoops and Wilson for the disputed lettuce as well as for other produce provided by a different supplier. Respondent claims it never received any invoice from complainant for the disputed lettuce, and complainant does not allege having sent one. Complainant relies entirely on respondent's direct payment to complainant for a different purchase through Stoops and Wilson on June 23 where complainant was the sole supplier. This constitutes the only evidence to support complainant's claim that the parties had agreed to change their long-standing practice permitting Stoops and Wilson to bill and collect. Absent corroborating evidence from disinterested sources or other documentary evidence, the mere fact that respondent paid complainant directly on one occasion does not persuade us that the parties had agreed to depart from past practice authorizing Stoops and Wilson to bill and collect from respondent for sales of complainant's produce to respondent. Since we find that respondent paid Stoops and Wilson for the disputed lettuce pursuant to a Stoops and Wilson invoice reflecting the contract of the parties, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.
Copies shall be served upon the parties.

HENRY AVOCADO PACKING CORP. *v.* RUSHTON & CO., INC. PACA Docket No. 2-6998. Decided December 8, 1986.

Burden of proof—Damages—Breach of contract—Overseas shipments—Inspections—Reparation awarded—Counterclaim dismissed.

Where buyer fails to prove that precise quality standards were a part of the parties' contract and also failed to prove it was damaged, it has failed to sustain its burden of proving that it was damaged as a result of a breach of contract committed by seller.

Edward M. Silverstein, presiding officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Deborah Reid Kelley, Long Beach, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of $13,094.92 in connection with two transactions, in foreign commerce, involving avocados, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. In addition, respondent filed a counterclaim against complainant also in the amount of $13,094.42 in connection with the same transactions as are made the subjects of the complaint.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement, respondent filed a verified answering statement, and complainant also filed a verified statement in reply. In addition, complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Henry Avocado Packing Corp., is a corporation whose mailing address is P.O. Box 27867, Escondido, California 92027.

2. Respondent, Rushton & Co., Inc., is a corporation whose mailing address is 11 Embarcadero West, Suite 230, Oakland, California 94607.

3. At all material times, complainant and respondent were licensed under the Act.

4. On June 11, and 12, 1984, in contemplation of foreign commerce, complainant, by oral contract, sold to respondent two container loads of Haas avocados, a perishable agricultural commodity, at f.o.b. prices, the contract destination being Packinghouse Escondido, California, as follows:

a. Container # SEAU 122289 contained 864 flats of size 24 at $4.70 per flat ($4,060.80), 864 flats of size 30 at $4.50 per flat ($3,888.00), and 864 flats of size 35 at $4.10 per flat ($3,542.40). Additional charges for this load were $10.50 for a phytosanitary certificate, $50.00 for an inspection, and $35 each for two Ryan temperature recording devices ($70.00). The total f.o.b. price for this container load was $11,621.70.

b. Container # SEAU 122732 contained 1,296 flats of size 24 at $4.70 per flat ($6,091.20), and 1,296 flats of size 30 at $4.50 per flat ($5,832.00). Additional charges for this load were $50.00 for an inspection, $10.50 for a phytosanitary certificate, and $35 each for two Ryan temperature recording devices ($70.00). The total f.o.b. price for this container load was $12,053.70.

5. Each of the container loads was the subject of a shipping point inspection which was restricted to condition only, and no condition defects were noted. As the inspection was restricted to condition only, the inspector did not note whether there were any quality defects apparent on the avocados.

6. Respondent received and accepted the avocados, which were then shipped to its customer in France. The shipments arrived in France on July 3, 1984. On July 4, 1984, the avocados in container # SEAU 122732 were inspected by Captain (Retired) J. J. Huni, Marine and General Goods Surveyor, 2 Rue J. J. Rousseau, F 92600 Asnieres. In his report, M. Huni noted as follows:

> These fruits showed discolourations [sic], stains, and some slight genetics [sic] abnormalities. The buyer on the Rungis market is looking for monocoloured [sic] fruits, because the consumers in France willingly buy these, but only reluctantly the brownish, and stained ones.
>
> It is the opinion of the undersigned Surveyor that the fruits are internally in a satisfactory condition, see in this respect our photographs on sheet 'D' hereafter, but the sales go by the external aspect and one must depend on a

slight depreciation, of about 5% of the Sound [sic] arrived Market [sic] Value [sic].

M. Hunis further concluded in his report that the damage to the avocados was not caused by intransit conditions, but rather stemmed from an "inherent vice." In an addendum to his survey report, M. Huni presented an accounting for the shipment based on respondent's customer's records summarized as follows:

Cost Price:		
	Supplier's Invoice	$20,282.40
	Expenses	3,369.45
	Total	$23,651.85
Sales Proceeds	$16,556.93	
Loss	$7,094.92	

7. Also on July 4, 1984, the avocados in container # SEAU 122289 were viewed by M. Gary Bull who is the European representative of the Transfresh Corporation which provided the artificial atmosphere used in the container. It was also viewed by M. Joel Jean-Etienne who issued a survey report, in pertinent part, as follows:

* * * * * * *

Quality of Fruits [sic]:

I checked many samples of flats taken at random over pallet situated on the back, middle and head container. These fruits [sic] appear with a color: green to deep green or green with 20% at [sic] 30% of the skin showing brown traces: pink-purple or yellow, like sun-blotch over the two unstorage [sic] pallet in back container, I noticed fruits with many flats crushed.

The sizing was fairly irregular to [sic] one ctn. to another ctn, I noticed pale fruit, badly waxed.

In general, the brown spot observed over firm fruit was variable from one size to another size eg:.
Color: brown over deep green : 16% in size 24
" : brown to green purple : 50% in size 30
" : brown to green brown : 23% in size 35

The fruits [sic] were in general firm to very firm, with rough skin and presented stem-end very adherent but with old cut.

The stem-end showed a dry cut brown and woody. The cutting of the fruit showed a pulp with white color firm with adherent stone this fruit was difficult to cut and their pulp were health.

* * * * * * *

Conclusion:

In my opinion, after my checking and after the examination of the documents concerning this voyage, I estimate that the damages are due to:

. . . The quality of the fruit at departure, the pigmentation and brown spot noticed over the surface of the fruit during my checking, are characteristic of fruit with an advanced degree of cut, eg. stem-end woody and brown . . [sic] This fruit has been stored in gold [sic] store [sic] before their loading [sic] in container.

* * * * * * *

. . . The skin defects, green fruit with brown spots or burns at the stem end and apical surface involved a depreciation, that belongs to the quality of the fruit and their degree of cut.

. . . All these defects of quality have any relation with the condition of transport in SEA-LAND container [sic], which in fact can't receive any responsibility in these damages fixed [sic].

* * * * * * *

8. Respondent has paid complainant $10,580.48 with respect to the two subject loads of avocados.

9. An informal complaint was filed on February 21, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

There is no dispute that respondent accepted the two container loads of avocados. Therefore, respondent is obligated to complainant for the full purchase price less any damages resulting from a

breach of contract committed by the complainant. *Rocky Ford Dist. Co.* v. *Angel Produce,* 29 Agric. Dec. 93 (1970). The respondent has the burden of proving such matters by a preponderance of the evidence. *The Growers-Shipper Pot. Co.* v. *Southw. Pro. Co.,* 28 Agric. Dec. 511 (1969).

Respondent has taken the position that neither of the container loads of avocados met "the kind, quality or size called for by the contract of sales." However, there is no evidence in the record as to the specific terms of sale relied upon by respondent to make this assertion. From the record, it would appear that respondent purchased two container loads of avocados suitable for export. It further appears that respondent got precisely that—two containers loads of avocados which were in a condition permitting their export. There is nothing in either of the French survey reports which would serve to dispute this conclusion. That the avocados were not of the precise quality desired by respondent is irrelevant as it does not appear that their quality was made a condition of their purchase and sale.[1]

In view of this, we must conclude that respondent has failed to prove that complainant breached their contract by shipping avocados which were not of "the kind, quality or size called for by the contract of sale."

In any event, respondent has failed to prove it was damaged by the alleged breach. While it has asserted being damaged in the amount of $6,000 with regard to the avocados in container #SEAU 122289 and in the amount of $7,094.42 with regard to the avocados in container #SEAU 122732, it has offered no probative evidence whatsoever on this point. The only evidence on damage is the accounting done by M. Huni on the avocados in container #SEAU 122732 which shows that respondent's customer may have lost $7,094.92 on this shipment. However, respondent has not shown how this relates to its alleged loss. Moreover, even if we assume that the customer deducted this loss from the respondent's sales price ($20,282.40), respondent should still have received $13,187.48 from the customer. This amount would still be $1,133.78 more than the amount ($12,053.70) it agreed to pay complainant for the avocados in this container. Under these circumstances, respondent could not, therefore, be said to have suffered a loss on this shipment.[2]

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[1] It is noted that the shipping point inspection was limited to condition defects and therefore no quality defects which may have been present were noted.

[2] Special damages for loss of profit are not awardable when a buyer, as here, fails to show that the seller entered into their agreement with knowledge of the terms of the resale. *A. G. Shore Co.* v. *Conner Bros.,* 18 Agric. Dec. 1269 (1959).

Moreover, there is absolutely no evidence that either respondent or its French customer suffered a loss on the avocados in the second container #SEAU 122289.

In view of the above, we hold that respondent is liable to complainant for the full contract price for the two container loads of avocados, or $23,675.40. As it has already paid complainant $10,580.48, it remains obligated to complainant in the amount of $13,094.92. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded. In view of the above, the respondent's counterclaim is dismissed.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $13,094.92 plus interest at the rate of 13 percent per annum from July 1, 1984, until paid.

Respondent's counterclaim is dismissed.

Copies of this order shall be served upon the parties.

NORDEN FRUIT CO. a/t/a CAL FRUIT *v.* SIGMA PRODUCE CO., INC.
PACA Docket No. 2-7012. Decided December 8, 1986.

Burden of proof—Acceptance after inspection waives warrantees.
Buyer, who alleges that parties renegotiated price, has burden of proving such by a preponderance of evidence. Acceptance of produce after inspection waives warrantees as to fitness.

Edward M. Silverstein, presiding officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Leigh Larson, Nugales, Arizona, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of $5,776.00 in connection with one transaction, in interstate commerce, involving cucumbers, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

As the amount of damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) has been followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement and respondent filed a verified answering statement. Each party also filed a brief.

FINDINGS OF FACT

1. Complainant, Norden Fruit Co., is a corporation also trading as Cal Fruit whose mailing address is P.O. Box 21394, Market Station, Los Angeles, California 90021.

2. Respondent, Sigma Produce Co., Inc., is a corporation whose mailing address is P.O. Box 1683, Nogales, Arizona 85621. At all material times, respondent was licensed under the Act.

3. On or about March 14, 1985, through Jose Gomez, Chula Vista, California, acting as a broker, complainant purchased a shipment of 360 crates of Alfa Brand cucumbers from respondent at an agreed f.o.b. price of $12.00 per crate ($4,320.00) plus 65 cents per crate for palletization and pre-cooling ($234.00) for a total f.o.b. contract price of $4,554.00. The cucumbers were shipped that same day.

4. Upon arrival of the cucumbers in California on March 15, 1985, complainant accepted them. At 10:25 a.m. of that day, the cucumbers were inspected. The inspector reported the condition of the cucumbers as follows: "Generally fresh and firm. Average 1% damage by sunken areas. From 18 to 36% average 28% damage by yellowing. Average 2% decay." The inspector further noted, as to grade, that the cucumbers met "quality requirements but [failed] to grade U.S. No. 1 only account condition."

5. Subsequent to the inspection, respondent contacted the broker who negotiated a settlement of the matter with the parties agreeing to a price of $10.25 per carton for a total agreed f.o.b. price of $3,924.00, or $1.75 per carton less than the $12.00 upon which the parties originally agreed. Respondent, on March 16, 1985, invoiced complainant pursuant to this modified agreement.

6. On March 21, 1985, the Agricultural Commissioner for Los Angeles County (California) issued a notice of noncompliance as to 261 cartons of cucumbers noting that the cucumbers exceeded the "legal tolerances for Mold & Decay 80-90%." These cartons were dumped.

7. On or about April 9, 1985, respondent received payment of its March 16, 1985, invoice. However, as complainant had not paid a related $400 freight charge, respondent invoiced it for the $400. Complainant also paid this invoice.

8. On April 19, 1985, complainant notified respondent and the broker, Jose Gomez as follows:

> RE: SIGMA INVOICE #1814 OF 360 ALFA BRAND CUCUMBERS WE RECEIVED FROM SIGMA PRODUCE ON APRIL [SIC] 15, 1985. TO CONFIRM OUR TELEPHONE CONVERSATION WITH JOSE AT OTAY ON APRIL 19TH, OF [SIC] A PAYMENT OF $3655.00 SHALL BE DEDUCTED FROM SIGMA. IN EVENT SIGMA DOES NOT SATISFY OBLIGATION, OTAY SHALL BE HELD LIABLE FOR FULL AMOUNT.

9. On or about May 16, 1985, complainant completed an account of sales for the subject shipment of cucumbers. According to the accounting, sales were not completed until that date. Complainant reported its accounting as follows:

29	@	$12.00	$348.00	
14	@	10.50	147.00	
2	@	10.00	20.00	
36	@	4.00	144.00	
15	@	3.00	45.00	
264	DUMPED			
360				$704.00
Less 15% Com'n			$105.60	
Freight			400.00	
Inspection			35.00	
				$540.60
			Total Due	$163.40

10. The complaint was filed on August 28, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a shipment of cucumbers which complainant claims did not arrive in suitable condition. The parties agree that, after arrival, they renegotiated their contract. Respondent claims that it granted complainant a $1.75 per carton allowance; com-

plainant claims that the parties agreed to a $1.75 per carton price. It would have been helpful if one of the parties had included a statement from the broker through which all of their negotiation and renegotiation had taken place, or if such a statement had been included in the Department's report of investigation. However, we are forced to form our conclusions without that aid.

The complainant had the burden of proving, by a preponderance of the evidence, the allegations contained in the formal complaint. *Villareal* v. *Kellerman,* 25 Agric. Dec. 1399 (1966). It has failed to do so.

Complainant presented several different versions of the facts during the course of its presentation. In its formal complaint, it alleges the parties agreed to an f.o.b. price of $10.25 per carton for the cucumbers. Then, after respondent alleged that the original price had been $12.00 per carton and that this price was reduced to $10.25 after arrival and acceptance of the cucumbers, complainant claimed that the parties had agreed, not to a $1.75 per carton allowance, but to a price of $1.75 per carton. In addition, some two months after acceptance of the cucumbers, complainant prepared an account of sales treating the shipment as a consignment sale. In point of fact, complainant has failed to show any consistency of position. Rather, it shows an attempt to formulate a theory to conveniently fit whatever facts respondent proved.

The preponderance of the evidence supports respondent's assertion that the parties renegotiated their contract and agreed to reduce the original $12.00 price to $10.25. This evidence consists of respondent's invoices, complainant's receipt thereof without protest, and complainant's payment thereof. As the parties renegotiated the contract after arrival of the cucumbers, the complainant, as the buyer, was liable to the respondent seller for the full agreed contract price. *Henson & Padgett Produce* v. *Ferrante,* 18 Agric. Dec. 1044 (1959). It has paid respondent this amount and it is not entitled to any damages. *See Max Feldbaum & Sons* v. *Alderiso,* 27 Agric. Dec. 763 (1968): acceptance of produce after inspection waives warrantees as to fitness of produce.

In view of the above, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served on the parties.

MENDELSON-ZELLER CO., INC. *v.* VITA-WELLBROCK-KEARNEY, INC.
PACA Docket No. 2-7046. Decided December 8, 1986.

Burden of proving contractual relationship—Third-party relationships—Complaint dismissed.

Complainant failed to sustain its burden of proving that it had a contractual relationship with respondent, as the evidence clearly showed that the respondent received the peaches on consignment from another firm, which itself had purchased the peaches from complainant.

Andrew Stanton, presiding officer.
Complainant, *pro se*.
Frederick C. Stern, New York, New York, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $8,025.90 in connection with a truckload of peaches allegedly sold and shipped to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure set forth in section 47.20 of the Department's Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not a sworn statement by an employee of respondent, is not considered part of the evidence. The parties were given the opportunity to submit additional documents in the form of verified statements and to file briefs. Respondent submitted an answering statement and complainant a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Mendelson-Zeller Co., Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California.

2. Respondent, Vita-Wellbrock-Kearney, Inc., is a corporation whose address is 223-225 New York City Terminal Market, New York, New York. At the time of the transactions alleged herein, respondent was licensed under the Act.

3. On approximately August 11, 1984, John Cribb, an employee of Troy H. Cribb & Sons, Inc., Spartanburg, South Carolina (herein-

after "Cribb"), ordered from complainant a truckload of peaches for $15,525.90, for Cribb's account, with shipment to be made to respondent. Cribb was not brokering a sale for complainant to respondent but was purchasing the peaches on its own behalf. Cribb never prepared a memorandum of sale for this transaction. Cribb consigned the peaches to respondent and sent respondent an invoice reflecting the consignment. Respondent received and accepted the peaches, and sold them for Cribb's account.

4. On August 15, 1984, complainant prepared an invoice showing the sale of the peaches to respondent, and sent the invoice to respondent. Upon receipt of the invoice, respondent contacted John Cribb, who acknowledged that it was Cribb's responsibility, and asked that respondent send the invoice to Cribb.

5. Respondent sold the peaches and credited Cribb's account with the net proceeds. Cribb prepared a check to complainant on September 25, 1984, for the full purchase price of the peaches, $15,525.90, and sent it to complainant, but the check was returned unpaid due to insufficient funds. Cribb has since paid complainant $7,500.00.

6. A formal complaint was filed on February 4, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

The issue which must be resolved is whether the truckload of peaches was purchased from complainant by respondent, as complainant alleges, or by Troy H. Cribb & Sons, Inc., Spartanburg, South Carolina, with shipment to respondent, which is claimed by respondent. Complainant has the burden of proving the existence of this alleged contractual relationship with respondent. *Cook Sales Company* v. *Romney Produce Co.*, 42 Agric. Dec. 641 (1983).

The only evidence offered by complainant in support of its position, other than the allegations in its sworn complaint, is an August 15, 1984, invoice to respondent, which complainant asserts was received without objection. Respondent's position is strongly supported by a sworn statement by John Cribb, who personally negotiated the transaction. Mr. Cribb states that he ordered the produce on behalf of Troy H. Cribb & Sons, Inc. with delivery to respondent, to whom Cribb had consigned the peaches. He denies complainant's allegation in its complaint that Cribb acted as the broker in the transaction. The veracity of this statement is support by Cribb's invoice to respondent showing the consignment (Finding of Fact 3). It is also quite significant that Cribb never performed one of the primary duties of a broker, the preparation of a memo-

randum of sale (Finding of Fact 3). Further, all payments to complainant for the peaches were from Cribb, not respondent (Finding of Fact 5). In view of all these factors, it is apparent that respondent did not purchase the peaches from complainant, but merely received them on consignment from Cribb, the actual purchaser. Therefore, we conclude that complainant has failed to sustain its burden of proving any contractual relationship with respondent. Accordingly, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GARDEN STATE FARMS, INC. *v.* INTERNATIONAL A. G., INC. PACA Docket No. 2-7285. Decided December 15, 1986.

Dennis Becker, presiding officer.

Complainant, *pro se.*

C. Peter Buhler, Miami, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $19,600.00 in connection with shipments of pineapples in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint. Said answer disputed, however, the amount in contention claiming that the amount owed to complainant was $10,290.00. Complainant was given an opportunity to dispute the fact that the outstanding balance owed to it was $10,290.00. Complainant did not dispute this fact. Accordingly, the issurance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Garden State Farms, Inc., is a corporation whose address is 3655 S. Lawrence Street, Philadelphia, Pennsylvania 19148. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida 33142. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $10,290.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $10,290.00, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

Copies of this order shall be served upon the parties.

SOUTHLAND PRODUCE COMPANY a/t/a WESTERN FRUIT SALES CO. *v.* INTERNATIONAL A. G., INC. PACA Docket No. 2-7315. Decided December 15, 1986.

Dennis Becker, presiding officer.
Complainant, *pro se*.
C. Peter Buhler, Miami, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $9,138.75 in connection with shipments of oranges in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto. Such answer did not deny liability and respondent was given an opportunity to so deny. Respondent has not denied liability. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Southland Produce Company, a/t/a Western Fruit Sales Co., is a corporation whose address is P. O. Box 21037, Los Angeles, California. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $9,138.75. Accordingly, within 30 days from the date of this

order, respondent shall pay to complainant, as reparation, $9,138.75, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served upon the parties.

EDWIN PELLETIER & SONS, INC. *v.* JOHN A. PIRRELLO CO., INC. PACA Docket No. 2-7336. Decided December 15, 1986.

Dennis Becker, presiding officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $72,081.22 in connection with shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Edwin Pelletier & Sons, Inc., is a corporation whose address is P. O. Box 133, Frenchville, Maine 04745. Respondent, John A. Pirrello Co., Inc., is a corporation whose address is P. O. Box 70067 Brightwood Station, Springfield, Massachusetts 01107. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $72,081.22. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $72,081.22, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served upon the parties.

RAWLAND F. TAPLETT d/b/a R.F. TAPLETT FRUIT & COLD STORAGE *v.* PREMIUM PACKING & STORAGE, INC. PACA Docket No. 2-6871. Decided December 17, 1986.

Contract—Jurisdiction—Interstate commerce—Complaint dismissed.
Complainant agreed to contract whereby respondent would pack complainant's cherries and complainant would be responsible for marketing the cherries. It was held that this type of contract did not constitute a transaction within the meaning of section 2 of the Act and that the Secretary therefore lacked jurisdiction over such contract. The parties later agreed that culls and briner cherries were sold by respondent for complainant's account, but it was found that complainant had failed to show by a preponderance of evidence that such cherries were sold in interstate commerce. Complainant additionally alleged that a substantial poundage of cherries were received but not accounted for by respondent and that such cherries must have been sold in interstate commerce because most cherry sales are interstate. It was found that complainant failed to meet its burden of proving by a preponderance of evidence that the allegedly unaccounted for cherries were sold in interstate commerce. The complaint was dismissed for want of jurisdiction.

George S. Whitten, presiding officer.
Complainant, *pro se*.
Patrick Andreotle, Yakima, Washington, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $133,519.34 in connection with the delivery of numerous loads of cherries to respondent for packing.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent filed an answering statement, and complainant filed a statement in reply. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Rawland F. Taplett, is an individual doing business as R. F. Taplett Fruit & Cold Storage, whose address is P.O. Box 2188, Wenatchee, Washington.

2. Respondent, Premium Packing & Storage Incorporated, is a corporation whose address is 301 North Track Road, Wapato, Washington. At the time when respondent received the subject cherries for packing, respondent was not licensed under the Act, but respondent subsequently submitted an application for license along with accrued fees covering the period when it received the cherries. On the basis of this application a license was issued June 20, 1984.

3. On May 26, 1984, complainant and respondent entered into a contract under which respondent agreed to receive, cool, sort, pack, store and load for complainant those sweet cherries brought to it by complainant, and grown in an orchard described in the contract, for specific packing fees according to box sizes and services specified in the contract. It was agreed that complainant would be "the sole and exclusive marketing agent" for the fruit it grew in the specified orchard and would "make all necessary arrangements for the disposition of culls, briner cherries, freezer cherries, and processors."

4. Between approximately June 11, 1984, and approximately July 9, 1984, complainant delivered cherries to respondent for packing in approximately the following amounts: Bing cherries 950,000 or more pounds; Chinook cherries 356,000 or more pounds; Burlatt cherries 10,000 or more pounds; Van cherries 58,000 or more pounds; Lambert cherries 62,858 pounds; and Rainier cherries 25,788 pounds.

5. Approximately 300,000 to 400,000 pounds of cherries were assigned to culls and approximately 50,000 to 90,000 pounds were assigned to briners, and sold by respondent within the state of Washington for complainant's account.

6. An informal complaint was filed on October 10, 1984, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

The contract between complainant and respondent makes it clear that respondent was only to perform packing type services for complainant in regard to the subject cherries. It was long ago determined that the Secretary of Agriculture does not jurisdiction over this type of contract, even though such contract involves perishables. This type of contract does not fall within the meaning of the

best copy available

term "transaction" as it is used in section 2 of the Act (7 U.S.C. § 499b). *See Anonymous*, 4 Agric. Dec. 332 (1945).

It is also clear that respondent did sell culls and briners belonging to complainant for complainant's account, and that at least part of these sales were orally authorized by complainant, without, however, any reference in such oral authorizations to sale of the produce outside the state. Respondent asserts in its sworn answer that these culls and briners were sold to Mojonnier & Sons, Inc. in Sunny Side, Washington, and did not move in interstate commerce. Complainant has presented us with no evidence which would show that the culls and briners were sold in interstate commerce, or that such was contemplated within the meaning of the Act and we must conclude that we have no jurisdiction to adjudicate any matters relative to such cherries. *See Mendelson-Zeller Co.* v. *Bleir*, 34 Agric. Dec. 683 (1975).

Complainant also asserts that the records furnished by respondent to complainant, when compared with delivery receipts, demonstrate that out of all the cherries received by respondent, 107,774 pounds of Bing cherries, 12,351 pounds of Chinook cherries, 2,141 pounds of Burlatt cherries, 29,004 pounds of Lambert cherries, and 3,580 pounds of Van cherries were missing or unaccounted for by respondent. Complainant asserts that respondent must have sold these cherries, and has simply refused to disclose such sales to complainant. Complainant also asserts that most cherry sales are in interstate commerce, and that consequently such cherries must have been sold in interstate commerce. It is well established that the burden is upon a claimant in a reparation proceeding to prove interstate commerce or contemplation thereof. See *Wright Supply Corporation* v. *Carpenter Marketing, Inc.*, 38 Agric. Dec. 1641 (1979) and *S. Walter Market Credit* v. *Treasure Island Foods and/or Ben Klein*, 28 Agric. Dec. 1186 (1969). Complainant's speculation that the cherries, if diverted by respondent, were sold in interstate commerce, is not sufficient proof of interstate commerce. In an effort to show that "the ultimate destination of packed and processed cherries normally involves interstate shipment" complainant submitted a number of invoices covering its own cherries which were shipped interstate. However, among another group of invoices covering complainant's cherries were at lease six covering shipments of cherries intrastate. We conclude that complainant has failed to establish the required interstate commerce in connection with these cherries which it alleges respondent in some way disposed of without authorization. The complaint should be dismissed.

ORDER

The complaint is dismissed.
Copies of this order shall be served upon the parties.

BIANCHI & SONS PACKING CO. *v.* TOM LANGE CO., INC. and/or MARTIN MONTES d/b/a M&M PRODUCE BROKERAGE. PACA Docket No. 2-6943. Decided December 17, 1986.

Contracts—Payment.
Respondent Montes represented himself to complainant as a broker in negotiating a contract of sale from complainant to respondent Lange. Respondent Lange was led to believe by Montes that the sale was made by Montes. Upon receipt of an invoice from complainant, Lange called and received permission from complainant's office manager to pay the invoice of Montes. It was held that no contract was formed between complainant and Lange, that complainant was bound by the permission given by its office manager in spite of Lange's notice of complainant's possible interest, and that Montes should pay complainant reparation.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
LeRoy W. Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,561.20 in connection with the shipment in interstate commerce of a truck lot of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondents, and respondent Tom Lange Co., Inc., filed an answer thereto denying liability to complainant. Respondent Martin Montes d/b/a M&M Produce Brokerage did not file an answer and was deemed to be in default.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent Tom Lange,

Co., Inc., filed an answering statement, and complainant filed a statement in reply. Complainant also, filed a brief.

FINDINGS OF FACT

1. Complainant, Bianchi & Sons Packing Co., is a corporation whose address P.O. Box 190, Merced, California.

2. Respondent, Tom Lange Co., Inc., (hereinafter Lange) is a corporation whose address is P.O. Box 4701, Springfield, Illinois. At the time of the transaction involved herein this respondent was licensed under the Act.

3. Respondent Martin Montes (hereinafter Montes) is an individual doing business as M & M Produce Brokerage whose address is 43 Dolores Street, Watsonville, California. At the time of the transaction involved herein this respondent was licensed under the Act.

4. On October 19, 1984, complainant was contacted by respondent Montes, who represented himself to be acting as a broker, and who secured complainant's agreement to sell to respondent Lange 288 25 pound cartons of extra large "Jana Pink" tomatoes at $8.00 per carton, and 360 25 pound cartons of large "Jana Pink" tomatoes at $6.00 per carton, plus $.15 per carton for palletizing, or a total of $4,561.20, f.o.b.

5. On October 19, 1984, the tomatoes were shipped from loading point in California by truck.

6. On October 19, 1984, respondent Lange contacted respondent Montes to purchase a truckload of tomatoes from such respondent. Respondent Montes agreed to sell to respondent Lange a truckload of tomatoes to contain 432 cartons of extra large U.S. No. 1 grade tomatoes, No. 2 to No. 3 color, at $8.35 cents per carton, and 360 cartons of large tomatoes at $6.35 per carton, f.o.b., joint account above the specified prices.

7. On October 19, 1984, respondent Montes added 144 cartons of extra large tomatoes to the truck destined to respondent Lange and issued a "standard confirmation of sale" under its own letter head covering the total of 792 cartons of tomatoes. The confirmation of sale showed that the tomatoes were "sold for account of M & M Produce Brokerage" and also stated "joint account sale." The confirmation also included the additional instructions that the purchase price plus profits were to be remitted to M & M Produce Brokerage. Respondent Lange received this confirmation of sale on October 25, 1984. Respondent Lange accepted the tomatoes on arrival and determined that the 144 cartons of extra large tomatoes added by respondent Montes contained excessive condition defects. Respondent Lange contacted respondent Montes and negotiated a

$3.00 per carton allowance as to the 144 cartons of extra large tomatoes.

8. On November 5, 1984, respondent Lange received complainant's invoice. Respondent Lange's branch manager in Dallas, Texas, Greg Gust, who had conducted all of the negotiations on behalf of respondent Lange, placed a telephone call to complainant's office in California at 4:30 p.m. on November 5, 1984, and asked to talk to Mr. Bianchi. Mr. Gust was advised by Carol Krumm, office manager of Bianchi & Sons Packing Company, in Merced, California that Mr. Bianchi was not in the office, and asked if she could be of assistance. Mr. Gust identified himself and his company and told Ms. Krumm that he had received invoices both from Bianchi and from M & M Produce Brokerage. After a discussion of the situation Ms. Krumm agreed that Lange should make payment to respondent Montes.

9. Respondent Lange has paid respondent Montes for the 648 cartons of tomatoes covered by the formal complaint in an amount which exceeds the amount claimed in the formal complaint. Respondent Montes has not paid complainant any amount for the tomatoes.

10. An informal complaint was filed on February 5, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

It is clear from the record in this case that complainant had no contact with respondent Lange prior to such respondent receiving complainant's invoice on November 5, 1984. While complainant believed, on the basis of the misrepresentation of respondent Montes, that it was entering into a contract with respondent Lange, we do not believe that the evidence of record shows that a contractual relationship ever existed between complainant and respondent Lange. There was no mutuality between the parties concerning the terms of sale, and respondent Lange did not believe that it was contracting with complainant. See *Anonymous*, 8 Agric. Dec. 374 (1949).

Respondent Lange had notice of complainant's possible interest in the tomatoes prior to its making payment to respondent Montes. Respondent Lange contends that upon receipt of such notice in the form of the invoice of complainant its Greg Gust immediately telephoned complainant and secured the permission of complainant's Carol Krumm to pay the invoice of respondent Montes. This was asserted during the informal stages of this proceeding by respondent Lange and was again asserted in respondent Lange's answer. In the opening statement complainant's vice president, G. John Bian-

chi, Jr. referred to respondent Lange's allegation concerning the conversation with Carol Krumm and stated as follows:

> This conversation would have taken place without my knowledge and certainly would not constitute any agreement by Bianchi & Sons Packing Co. as Ms. Krumm would not be in the position of authority to authorize remittance to M & M Produce Brokerage. Why Mr. Gust would not communicate with me (a person in authority) is beyond my knowledge but I must reemphasize that certainly no one in Bianchi & Sons Packing Co. ever authorized payment to be directed to M & M Produce Brokerage.

Respondent Lange in its answering statement submitted the affidavit of Greg Gust in which it was again affirmed that the conversation with Carol Krumm had taken place. In addition, Mr. Gust submitted as an exhibit to the answering statement a copy of Bianchi's invoice which contains the handwritten and dated note reflecting Mr. Gust's agreement with Carol Krumm. Complainant's statement in reply consists of a lengthy affidavit by Carol Krumm admitting to the conversation of November 5, 1984, but denying that she ever gave consent for respondent Lange to pay the invoice of Martin Montes. Carol Krumm stated in part as follows:

> . . . Mr. Gust states that he spoke with me on November 5, 1984, at approximately 4:30 in the afternoon. Mr. Gust is correct in this statement. Apparently, Mr. Gust was telephoning for Mr. Bianchi to discuss the transaction covered by these proceedings. As Mr. Bianchi was not available, I told Mr. Gust that I would be more than happy to take a message for Mr. Bianchi. Mr. Gust asked if Bianchi & Sons Packing Co. could bill M & M Produce Brokerage for the load of tomatoes in question. I advised Mr. Gust that I would give this message to Mr. Bianchi, however, at no time did I ever agree that M & M Produce Brokerage should bill Tom Lange Co. direct and that Bianchi & Sons Packing Co. should bill M & M Produce direct for this shipment. I advised Mr. Gust that Mr. Bianchi would have to make the decision in regard to this matter and that I had no authority to make any type of commitment one way or the other . . .

Although Mr. Bianchi had earlier wondered "why Mr. Gust would not communicate with me . . ." no explanation was given to complainant as to why, if Carol Krumm's version of the conversation is correct, Mr. Bianchi never returned the call of Mr. Gust. On

the whole, we find that Mr. Gust's account of the conversation with Carol Krumm is the more plausible and we have found as a matter of fact that Mr. Gust's version of the conversation is what occurred. Mr. Bianchi's protest that the office manager of Bianchi & Sons did not possess adequate authority to enter into the agreement that respondent Lange should pay the invoice of Montes cannot be accepted. Carol Krumm was complainant's employee, answered complainant's telephone, and undertook to make the agreement with Mr. Gust whereby respondent Lange was allowed to pay the invoice of Montes. We find that Carol Krumm had apparent authority to authorize payment to Montes. The complaint as to respondent Lange should be dismissed.

Respondent Montes clearly received funds which should have been forwarded to complainant. This respondent has not forwarded such funds to complainant, and its failure to do so is a violation of the Act for which reparation should be awarded to complainant with interest.

ORDER

The complaint as against respondent Tom Lange Co., Inc., is dismissed.

Within thirty days from the date of this order, respondent Martin Montes doing business as M & M Produce Brokers, shall pay to complainant, as reparation, $4,561.20 with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC. *v.* FOUR C'S PACKING COMPANY. PACA Docket No. 2-7002. Decided December 17, 1986.

Evidence—Unverified pleadings under shortened procedure.

Due to respondent's failure to submit a verified answer there was no evidence in the record to support its contention that cucumbers were sold at a lower price than that billed by complainant.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $2,597.50 in connection with the shipment in foreign or interstate commerce of truck lot and a truckload of cucumbers. A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability to complainant in the amount of $2,001.50 and denying liability to complainant for the remaining $596.00. On January 17, 1986, an order was issued requiring respondent to pay complainant $2,001.50 as an undisputed amount.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered a part of the evidence in the case, as is the Department's report of investigation. Respondent's answer was not verified and is therefore not considered a part of the evidence in this proceeding. *See* 7 CFR § 47.20(a). In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California.

2. Respondent, Four C's Packing Co., is a partnership composed of Charles L. Cacho, Hellen O. Cacho, Louis J. Cacho, and Richard A. Cacho, whose address is P.O. Box 3278, Chula Vista, California. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about March 6, 1985, complainant sold to respondent one lot consisting of 72 wire bound crates of select cucumbers which had been received by complainant on March 4, 1985, from Mexico. The price of the cucumbers was $6.00 per crate, plus $.65 for palletizing and cooling, or a total of $478.80. Respondent picked

up the cucumbers in its own truck at complainant's place of business on March 6, 1985.

4. On or about April 8, 1985, complainant sold to respondent 596 crates of super select cucumbers at $12.50 per crate, and 224 crates of select cucumbers at $7.50 per crate, plus $22.50 for a Ryan temperature recorder, or a total of $9,152.50. The cucumbers were shipped on or about April 8, 1985, from Florida to respondent's place of business in Chula Vista, California in a truck hired by respondent.

5. On May 18, 1985, respondent sent complainant a check in the amount of $7,033.80 for the two cucumber transactions. This check was later released by respondent as an undisputed amount.

6. The formal complaint was filed on May 24, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent in its unsworn answer admitted liability for $2,001.50 of the remaining $2,597.50 alleged due by complainant. Respondent's defense in regard to the remaining $596.00 consisted of the allegation that the 596 crates of super select cucumbers sold on April 8, 1985, were sold at $11.50 rather than the $12.50 figure alleged by complainant. Since respondent's answer was not verified there is no evidence in the records supporting respondent's contention. *Perrell, Inc.* v. *Anthony Abbate Fruit Distributors*, 32 Agric. Dec. 1900 (1973). On the other hand, complainant's sworn complaint alleges that the sale price of the 596 crates of cucumbers was $12.50, and complainant attached a copy of the invoice to its sworn complaint showing that the 596 cartons of cucumbers were billed at $12.50 to respondent. We conclude the sale price was $12.50, and that there remains due and owing from respondent to complainant the sum of $596.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $596.00, with interest thereon at the rate of 13 percent per annum from May 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CARLSBAD PRODUCE, INC. *v.* CALIFORNIA PRODUCE DISTRIBUTORS, INC.
PACA Docket No. 2-7021. Decided December 17, 1986.

Warranty of suitable shipping condition—Breach of contract—Rejection with reasonable cause—Complaint dismissed.

Complainant has the burden to prove by a preponderance of evidence the allegations of its complaint and failed to meet its burden in this case. It alleges that the respondent is liable for the balance of the purchase price in part due to a breach of the warranty of suitable shipping condition and because the tomatoes provided were in conformity with the contract terms. Where the normality of the transportation service and conditions are challenged, the burden of proof rests upon the party seeking the benefit and the complainant failed to submit such evidence. Accordingly, the complaint is dismissed.

Sharlene W. Lassiter, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). The complainant timely filed a formal complaint in which the complainant sought an award of reparation against respondent in the amount of $5,487.30 in connection with a shipment of tomatoes in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability.

Because the amount claimed as damages was less than $15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties had the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and a brief. Respondent filed a response to complainant's opening statement but did not file a brief.

FINDINGS OF FACT

1. Complainant, Carlsbad Produce, Inc., hereinafter referred to as Carlsbad, is a corporation whose mailing address is 6150 Yarrow Drive, Suite D, Carlsbad, California 92008. At the time of the transaction involved herein, Carlsbad was licensed under the Act.

2. Respondent, California Produce Distributors, Inc., hereinafter referred to as California Produce, is a corporation whose mailing address is 751 Merchant Street, Los Angeles, California 90021. At the time of the transaction involved herein, California Produce was licensed under the Act.

3. On or about January 23, 1985, Carlsbad sold to California Produce, 594 flats of 4×5 Tomatoes and 990 flats of 5×5 Tomatoes $7.65 per flat, plus $22.50 for a Ryan Recorder tape, total f.o.b. price of $12,140.10, 2 Breaker to 3 Turning color in transit, based on the color classifications set forth in 7 CFR § 51.1860, pursuant to an oral contract negotiated by Waynne Nakaji for Carlsbad and Gene Wyche for California Produce.

4. On January 24, 1985, Carlsbad shipped the truckload of tomatoes from Nogales, Arizona to American Tomatoes Distributing Inc., Miami, Florida, hereinafter referred to as American Tomatoes.

5. American Tomatoes received the truckload of tomatoes on January 29, 1985.

6. Without unloading the tomatoes, American Tomatoes obtained a federal inspection of the tomatoes on January 29, 1985, at 7:45 a.m., which rated the temperature and condition of the tomatoes, in pertinent part, as follows:

Temperature Range:	45°F
Condition:	Average approximately 30% Turning to Pink. 70% Light Red to Red. 1% Decay.

7. American Tomatoes and California Produce rejected the truckload of tomatoes on January 29, 1985.

8. California Produce gave timely notice of rejection to Carlsbad on January 29, 1985.

9. At the instruction of the Los Angeles office of the Perishable Agricultural Commodities Act Division, United States Department of Agriculture, American Tomatoes unloaded the tomatoes and obtained a second, post-rejection, federal inspection of the tomatoes on January 30, 1985, at 10:45 a.m., which rated the temperature and condition of the tomatoes, in pertinent part, as follows:

Temperature Range:	44°, 47°, 52°, 54°F
Condition:	Average approximately 5% Breakers 30% Turning to Pink 60% Light Red to Red 4% Decay

Average 5% damage by sunken discolored area, generally occurring over shoulders.

10. The condition of the tomatoes after each inspection was within the range of tolerance for grade U.S. No. 1 as prescribed in 7 CFR § 51.1861(a)(2).

11. American Tomatoes sold the tomatoes for the account of Carlsbad.

12. California Produce remitted $6,652.80 to Carlsbad for the truckload of tomatoes.

13. Carlsbad filed a formal complaint on September 16, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This proceeding involves the purchase of 1584 flats of tomatoes by California Produce from Carlsbad and shipped to American Tomatoes, f.o.b. Miami, Florida. We resolve this case in favor of California Produce on the basis of the warranty of suitable shipping condition, breach of contract and rejection with reasonable cause. There is no dispute that there was an oral contract to purchase 1584 flats of tomatoes between the parties. Also, the statements submitted by both parties dispositively show that California Produce requested tomatoes of 2 Breaker to 3 Turning color, based on the color classifications set forth in 7 CFR § 51.1860.

As the moving party, Carlsbad has the burden to prove by a preponderance of the evidence the affirmative allegations of its complaint. *New York* v. *Sandler*, 32 Agric. Dec. 702, 705 (1973). Carlsbad did not meet its burden in this case. Essentially, Carlsbad alleges that California Produce is liable for the balance of the purchase price in part due to a breach of the warranty of suitable shipping condition and because the tomatoes provided by Carlsbad were in conformity with with the contract terms. In an f.o.b sale such as this one, California Produce assumes all risk of loss due to transportation service and conditions (e.g., abnormal temperatures), while Carlsbad is liable for any abnormal deterioration at the contract destination point if the commodity is handled under normal transportation service and conditions. This is the warranty of suitable shipping conditions which Carlsbad seeks to apply to California Produce. *Wolf* v. *Mendelson-Zeller Co.*, 34 Agric. Dec. 690, 693 (1975).

The transportation services and temperature conditions provided here were normal. Carlsbad questions the pulp temperatures noted on the federal inspection certificates as indicative of abnormal temperature conditions in transit, and therefore the reason for the advanced color of the tomatoes on arrival. Where the normality of the transportation service and conditions are challenged, the burden of proof rests upon the party seeking the benefit of this part of the warranty, Carlsbad here. *Valley Packing Co.* v. *Nicholas J. Zerillo, Inc.*, 28 Agric. Dec. 1352, 1356 (1969). Nevertheless, Carlsbad submitted no evidence to prove abnormal temperatures in transit.

The Department's publication Protecting Perishable Foods During Transport by Motor Truck, Agriculture Handbook No. 105, states relative to the tomatoes here that desired transit temperatures should be between 45° and 50°F. The Handbook also states that the shipping temperature maintained in transit depends on the number of days required for transportation and the percentage of ripening desired by the receiver. The rate of ripening of the tomatoes in transit is further retarded by lower temperatures not less than 41°F. *D'Arrigo Bros. Co. of California* v. *Colonial Stores*, 42 Agric. Dec. 173, 176 (1983). The federal inspection on the date of arrival shows a pulp temperature of 45° with 1% decay. Without any evidence to the contrary, we find no abnormal temperatures in transit. The pulp temperature indicates an in transit temperature low enough to retard advancing color changes beyond a 2 to 3 color during the journey. Accordingly, Carlsbad did not prove that transportation was not normal due to the temperature conditions in transit associated with the warranty of suitable shipping condition.

Finally, Carlsbad did not prove that the tomatoes provided were in conformity with the contract term requesting tomatoes of 2 to 3 color. Carlsbad did not submit any evidence to show that it loaded tomatoes of 2 to 3 color in Nogales, Arizona, in accordance with the contract requirement. Also, while it is true that the federal inspection report taken on arrival shows that the tomatoes were within the range of tolerance for U.S. No. 1 grade fresh tomatoes, the percentage of advanced ripening color far exceeded the color specified in the contract, which constitutes a breach of contract. *Pacific Farm Co.* v. *Bisese and Console, Inc.*, 33 Agric. Dec. 1839, 1841. Therefore, California Produce properly rejected the tomatoes shipped by Carlsbad. California Produce is not responsible to Carlsbad for any of the purchase price. American Tomatoes disposed of the tomatoes for the account of Carlsbad and submitted an account of sale to California Produce. California Produce remitted $6,652.80 to Carlsbad for the tomatoes. Carlsbad submitted its invoice on

which $6,652.80 appears with the words "claim settlement—released on undisputed amount" and with the original invoice price deleted. Accordingly, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.
Copies of this order shall be served upon the parties.

FRANK S. ECKEL, III and WILLIAM R. SHERER d/b/a SKIP'S CONSOLIDATION *v.* WEINSTEIN PRODUCE SALES, INC. PACA Docket No. 2-7026. Decided December 17, 1986.

Accord and Satisfaction.
Where a good faith dispute existed between the parties in regard to the amount due, and respondent paid a lesser amount than that invoiced by means of a check with an accompanying stub which referenced the relevant invoices and stated "paid in full per att letter & inspection", complainant's negotiation of the check resulted in an accord and satisfaction.

George S. Whitten, presiding officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $9,811.85 in connection with the shipment in interstate commerce of two truckloads of mixed produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Frank S. Eckel III and William R. Sherer, doing business as Skip's Consolidation, whose address is P.O. Box 3947, Salinas, California.

2. Respondent, Weinstein Produce Sales, Inc., is a corporation whose address is P.O. Box 7364, Boise, Idaho. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about January 16, 1985, complainant sold to respondent under its invoice No. 5744, and shipped from loading point in California to respondent in Boise, Idaho, one truckload of mixed perishable produce which contained, in addition to numerous other items, 330 cartons of lettuce which were sold at a price of $2,515.50. The total price for the truckload of mixed produce was $7,308.10, f.o.b.

4. On or about January 31, 1985, complainant sold to respondent under its invoice No. 5808, and shipped from loading point in California to respondent in Boise, Idaho one partial truckload of mixed produce having a total invoice price of $2,503.75, f.o.b. This produce was accepted by respondent without complaint, and complainant has been paid in full for such produce.

5. The mixed truckload of produce shipped on January 16, 1985, arrived in Boise, Idaho on Saturday, January 19, 1985. Respondent called complainant at that time and informed complainant that the 330 cartons of lettuce arrived showing damage due to field freeze. Respondent also informed complainant that an inspection would be called for but was not yet available since the lettuce arrived on the weekend. On Monday, January 21, 1985, respondent attempted to secure federal inspection and was informed that inspection would not be available until Tuesday. Respondent so informed complainant on Monday. On Tuesday, January 22, 1985, at 9 a.m., the lettuce was federally inspected while stacked on pallets at respondent's place of business. The temperature was shown to be 36° to 38°F. Condition was stated to be as follows:

> Wrapper leaves: Average 8% damage by Light brown to brown discoloration affecting 2 to 5 leaves. No decay.
>
> Head Leaves: 22 Heads per carton average 88% damage by feathering and peeling affecting 4 to 7 outer head leaves. No decay.

On January 23, 1985, respondent sent complainant the following telegram:

> AS TO OUR FIRST PHONE CONVERSATION ON LATE SATURDAY EVENING 1-19-85 ARRIVAL TRUCK PER

YOUR INSTRUCTIONS WE UNLOADED LETTUCE WHICH HAD SIGNIFICANT VISUAL DAMAGE. WE INFORMED YOU THEN THE EARLIEST INSPECTION WOULD BE MONDAY 1/21/85 AS WE COULD NOT CONTACT INSPECTION SERVICE SATURDAY OR SUNDAY. INSPECTION SERVICE NOTIFIED US ON MONDAY THE EARLIEST WOULD BE TUESDAY WE NOTIFIED YOU MONDAY INSPECTION WOULD BE TUESDAY ALSO STATED SATURDAY THAT WE WANTED A REPLACEMENT OF DAMAGED LETTUCE. WE AGREE TO TAKE DAMAGED LOAD OF LETTUCE ON CONSIGNMENT ONLY, AND OUR ORIGINAL LOAD OF LETTUCE TO BE REPLACED. AS PER OUR CONVERSATION OF TUESDAY LATE AFTERNOON, AFTER WE CONFIRMED SIGNIFICANT DAMAGE YOU WERE AGAIN INFORMED OF OUR ORIGINAL DEMAND OF REPLACEMENT OF US #1 QUALITY LETTUCE. AT THIS TIME WE ARE HEREBY MAKING A DEMAND OF THE REPLACEMENT IN A REASONABLE PERIOD OF TIME WITHIN 7 DAYS. IF OUR DEMAND IS NOT MET WE WILL HAVE NO ALTERNATIVE BUT TO BUY AGAINST YOUR ACCOUNT

On the following day, January 24, 1985, complainant replied to the above telegram as follows:

TO WEINSTEIN PRODUCE SALES, INC. IN REPLY TO YOUR WESTERN UNION MESSAGE OF 1-23-85

DEAR SIR

BE ADVISED THAT OUR PURCHASE OF LETTUCE CARTONS NUMBER 330 OF SNAPPY BRAND LETTUCE BOUGHT ON YOUR BEHALF ON 1-18-85 THIS LETTUCE WAS BOUGHT ON GOOD DELIVERY STANDARDS THAT WE DID NOT QUOTE IMPLY OR GUARANTEE US #1 LETTUCE ON ARRIVAL CONFIRMING YOUR ADVISING US OF INSPECTION ON PROBLEMS AT 5:50 P.M. JANUARY 19 1985 WE WERE FIRST MADE AWARE OF THE PROBLEM AT AN EARLIER TIME FROM JACK T BALLIE COMPANY THROUGH THE LETTUCE BROKER SINCE WE LEARNED SECOND HAND OF A LIKELY PROBLEM THROUGH THE LETTUCE BROKER FROM THE SHIPPER WHO YOU HAD TALKED TO EARLIER SATURDAY 1-19-85 YOU ADVISED US THAT YOU WERE

GOING TO TAKE INSPECTION AND UNLOAD THE TRUCK AND WAIT FOR GOVERNMENT INSPECTION ON MONDAY 1-21-85 MONDAY A.M. YOU INFORMED SKIPS CONSOLIDATION THAT AN INSPECTOR WOULD NOT BE AVAILABLE TILL TUESDAY A.M. WE IN TURN NOTIFIED THE LETTUCE BROKER AT NO TIME ON SATURDAY 1-19-85 WAS THERE CONVERSATION WITH WEINSTEIN PRODUCE TO SKIPS CONSOLIDATION ABOUT REPLACEMENT OF LETTUCE NO MENTION OF CONSIGNMENT WAS DIRECTED OR IMPLIED FROM WEINSTEIN PRODUCE TO SKIPS CONSOLIDATION ABOUT THE LETTUCE LOAD THAT ARRIVED 1-19-85 AT THIS TIME WE CANNOT ACCEPT YOUR DEMAND FOR REPLACEMENT OF LETTUCE INSPECTION WAS REPORTED TO SHIPPER ON TUESDAY 1-22-85 WEINSTEIN PRODUCE REPORTED TO SKIPS CONSOLIDATION THAT HE WOULD GET BACK TO SKIPS CONSOLIDATION ON 1-25-85 AND REPORT DAMAGES AT NO TIME DID SKIPS CONSOLIDATION EVER AUTHORIZE YOU TO BUY AGAINST SKIPS CONSOLIDATION CONTRACT SKIPS CONSOLIDATION EXPECTING DETAILED ACCOUNT AND NET PROCEEDS ALONG WITH USDA INSPECTION

6. On or about August 22, 1985, respondent sent complainant a check in the amount of $7,579.25. Attached to the check was the following statement:

INVOICE #5808 2,503.75

#5744 5,075.50

paid in full per att letter & inspection

Attached to the check was an accounting under the letterhead of respondent covering the 330 cartons of lettuce. Such accounting showed gross proceeds in the amount of $1,497.90, freight at $495.00, and warehousing and selling fees at $2.25 per carton, or $742.50, leaving net proceeds of $260.40.

7. The formal complaint was filed on July 15, 1985, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Respondent in its answer asserts that its payment to complainant dated August 22, 1985, was tendered as payment in full, and

that it does not owe complainant any balance since the check was cashed by complainant as payment in full. Complainant did not address this crucial allegation in either its opening statement or its brief. The exchange of telegrams between complainant and respondent following respondent's acceptance of the produce and the subsequent filing of an informal and formal complaint by complainant make it abundantly clear that there was a bona-fide dispute between the parties prior to complainant's negotiation of the check tendered by respondent. The accounting, in the form of a letter attached to the check and statement, made clear the basis on which respondent was tendering a lesser amount than the amount invoiced as payment in full. We have held many times that where there is a bona-fide dispute between the buyer and seller as to the amount due for produce sold, and the buyer sends the seller a check for less than the contract price marked "payment in full" or other words clearly indicating that the check is tendered in full settlement, the acceptance of such check constitutes an accord and satisfaction. See *Kelman Farms* v. *Bushman Brokerage*, 34 Agric. Dec. 1146 (1975). The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

THE PRODUCE PLACE *v.* THE GUY C. PANNO COMPANY, INC. a/t/a PRODUCE PLUS. PACA Docket No. 2-7203. Decided November 6, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER (CONTINUANCE)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $1,485.00 against respondent in connection with a transaction in interstate commerce involving a shipment of tomatoes. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, The Produce Place, is a corporation whose mailing address is P.O. Box 21494, Los Angeles, California 90021. Respondent, The Guy C. Panno Company, Inc., a/t/a Produce Plus, is a cor-

poration whose address is 758 Market Court, Los Angeles, California. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a default order in this proceeding, the Department was advised that respondent had filed a petition pursuant to the Bankruptcy Code (11 U.S.C. § 1101–*et seq.*), in the United States Bankruptcy Court for the Central District California.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the proceeding now pending in the United States Bankruptcy Court has been closed or dismissed, or that the debts have been discharged.

Copies hereof shall be served upon the parties.

S. STAMOULES, INC. *v.* AL NAGELBERG & CO., INC. PACA Docket No. 2-7260. Decided November 6, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $12,230.70 in connection with a transaction involving the shipment of cantaloupes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 9, 1986, complainant notified the Department that it no longer wished to pursue its claim. Complainant, in its letter of September 9, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

DIAMOND FRUIT GROWERS, INC. *v.* INTERNATIONAL A. G., INC. PACA Docket No. 2-7284. Decided November 10, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $29,280.00 in connection with a transaction involving the shipment of mixed fruit in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 15, 1986, complainant notified the Department that settlement had been reached and that it no longer wished to pursue its claim. Complainant, in its letter of September 15, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

RITCLO PRODUCE, INC. *v.* MICHIGAN REPACKING AND PRODUCE CO. PACA Docket No. 2-6774. Decided November 14, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER UPON RECONSIDERATION AND DENYING PETITION TO REHEAR AND REARGUE

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued on July 9, 1986, awarding reparation to complainant against respondent. On July 23, 1986, respondent filed a petition to rehear, reargue and reconsider this matter. On August 18, 1986, the order of July 9, 1986, was stayed and complainant was granted 15 days from receipt thereof to file an answer to respondent's petition. On September 12, 1986, complainant filed an answer.

We have thoroughly considered the matters raised in respondent's petition and find them without merit. Upon reconsideration of our order of July 9, 1986, we find that such order is fully supported by the evidence and the law applicable thereto. Accordingly respondent's petition should be and hereby is dismissed. The stay order of August 18, 1986, is vacated and the order of July 9, 1986, is hereby reinstated, except that the reparation awarded to complain-

ant in that order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

PURE GOLD, INC. *v.* HARVEY C. HANSEN d/b/a Harvey's. PACA Docket No. 2-7280. Decided November 14, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,580.00 in connection with a transaction involving the shipment of lemons in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 26, 1986, complainant notified the Department that complainant no longer wished to pursue its claim. Complainant, in its letter of September 26, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

ANTHONY PODESTA, INC. *v.* FOPPIANO PACKING CO., INC. a/t/a JMB PACKING CO. PACA Docket No. 2-6916. Decided November 21, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION AND DENIAL OF PETITION TO REOPEN

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued July 9, 1986, awarding reparation to complainant against respondent. A copy of this order was served upon respondent and on August 1, 1986, respondent moved that this matter be reopened and reconsidered. On August 18, 1986, the order of July 9, 1986, was stayed and complainant was given fifteen days from date of receipt of the stay order to file an answer to the petition to reopen and reconsider. Such answer was filed on September 3, 1986.

This case was decided after careful consideration of the evidence furnished by the parties. The record has been reviewed in the light of the points raised by respondent in its petition and, in our opinion, the order of July 9, 1986, is amply supported by the evidence and the law applicable thereto. Respondent has stated no reasons which would justify reopening this proceeding. Accordingly, respondent's petition to reopen is denied and the petition for reconsideration is dismissed. The stay order of August 18, 1986, is vacated. The order of July 9, 1986, is reinstated, except that the reparation awarded in that order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

GRASSO FOODS, INC. *v.* THE QUAKER OATS COMPANY. PACA Docket No. 2-6869. Decided December 1, 1986.

Edward Silverstein, presiding officer.
Complainant, *pro se.*
Richard L. Frank, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on October 3, 1986, awarding reparation to the complainant in the amount of $13,200.00. This order was corrected by an order issued October 23, 1986. By petition dated November 5, 1986, respondent has moved that this matter be reconsidered and that the record be reopened for the taking of further evidence.

Accordingly, the order of October 3, 1986, as corrected by the order of October 23, 1986, is hereby stayed. Complainant has ten days from its receipt of this order in which to file a response to respondent's petition.

Copies of this order shall be served upon the parties. A copy of respondant's petition shall be served upon complainant.

CENTRAL VALLEY PRODUCE, INC. *v.* KEN GRIMES PRODUCE CO. PACA Docket No. 2-7278. Decided December 1, 1986.

Andrew Stanton, presiding officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Stuart Todd, Seattle, Washington, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $4,650.00 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of October 29, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PETER SOLOMON & JOSEPH R. SOLOMON d/b/a CATTLE VALLEY FARMS *v.* FRANCIS L. OLSON d/b/a COEXPORT WEST and/or COEXPORT INTERNATIONAL, INC. PACA Docket No. 2-6651. Decided December 2, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), complainant has advised the Department that its claim against respondent Coexport International, Inc., has been satisfied in accordance with the settlement agreement previously agreed to between complainant and such respondent. Accordingly the complaint against respondent Coexport International and the counterclaim of such respondent against complainant are dismissed.

Copies of this order shall be served upon the parties.

M&C P FARMS *v.* LLOYD MYERS CO., INC. PACA Docket No. 2-6873. Decided December 2, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on September 29, 1986, awarding reparation to the complainant in the amounts of $52,386.96 plus interest from December 1, 1984, until paid, and $5,716.78 plus interest from the date of the order until paid. On October 24, 1986, the respondent moved for reconsideration of that decision.[1]

As its primary ground for reconsideration, respondent argues that complainant failed to prove that respondent received payment from La Maison De Fruits Et. Le Gumes Supra, Inc., ("La Maison") in the amount of $52,739.70 as alleged by the former and as found by us in the September 29, 1986, Decision and Order. However, we are satisfied that the preponderance of the evidence in the record, which consists of checks made out to respondent by La Maison and La Maison's claim in its answer to complainant's Canadian lawsuit that it paid respondent the $52,739.70, establishes that respondent did, in fact, receive such payments. Moreover, that we correctly concluded that respondent did receive such payments is made clear by the fact that respondent's president, Lloyd Myers, was present at the hearing where the critical documents were made part of the record and, although present and aware that those documents were being received into evidence, he refused to take the stand to testify that it did not actually receive the payments represented by those checks. Under the circumstances presented here, after those documents were made a part of the record at the hearing, respondent had the burden of going forward to dispute the evidence showing that it did receive the payments from La Maison totalling $52,739.70. *See Walker & Hagan* v. *Amato,* 27 Agric. Dec. 1543 (1968); and *A. Levy & J. Zentner Co.* v. *Wuhl-Shafman-Lieberman,* 28 Agric. Dec. 1571 (1969). Since it failed to do so, we had no choice

[1] Respondent also moved for reopening of the hearing on the ground that it was entitled to cross-examine respondent regarding the complaint which was filed on complainant's behalf in the Canadian courts which complaint, although made a part of the record herein by the presiding officer at the hearing, was not physically received until after the close of the hearing. *See* fn. 1 of the September 29, 1986, Decision and Order. As there is nothing substantive in the Canandian complaint which would have any affect upon our decision in this case, respondent's motion is denied.

but to conclude that it did receive the payments as indicated by the checks issued to it by La Maison.

Respondent cites three other grounds for reconsideration.[2] None of them has any merit and none of them is worthy of comment. The record is clear. Complainant satisfied its burden of proving its allegations by a preponderance of the evidence. Respondent chose not to put any documentary evidence into the record to dispute the documentary evidence which was adduced by complainant, and also chose not to put on any evidence through witnesses. Apparently, respondent was planning on relying upon an argument that complainant failed to sustain its burden of proof as the keypoint to its defense. If, because of this, it lost its opportunity to adduce evidence in support of its contention that it had no liability towards complainant, respondent has no one but those who control its destiny to blame for its failure.

Based on the record as a whole, we are satisfied that respondent's claims in its motion for reconsideration are without merit and that the September 29, 1986, Decision and Order is amply supported by the evidence and by the law applicable thereto. Accordingly, the respondent's motion for reconsideration is dismissed without prior service on complainant.

The Decision and Order of September 29, 1986, is reinstated except that respondent shall have thirty days from the date of this order to pay complainant the reparation awarded therein.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY, INC. *v.* IRVING BUDNOFF d/b/a BUD'S SALAD.
PACA Docket No. 2-7134. Decided December 2, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $8,613.25 in connection with

[2] The first of these is that complainant did not prove it "was a valid entity that owned the olives" in question; the second is that it was erroneously concluded that respondent exceeded its authority by negotiating a sales price which was lower than authorized by complainant and that complainant was, therefore, not entitled to the $540.00 reparation awarded it on this basis; and the third is that it was erroneously concluded that respondent's counterclaim for $5,000.00 should be dismissed.

transactions involving the shipment of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 22, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 22, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

VAL-MEX FRUIT COMPANY, INC. *v.* LA PREFERIDA OF TEXAS, INC. PACA Docket No. 2-7266. Decided December 2, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $4,533.84 in connection with a transaction involving the shipment of jalepenos in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 3, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 3, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

SARAS, INC. *v.* RICHARD DURAN d/b/a CALIFORNIA PICKLE. PACA Docket No. 2-7072. Decided December 3, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $11,626.40 in connection with

a transaction involving the shipments of cucumbers in interstate commerce.

A copy of the formal complaint was served on respondent. By an undated letter, complainant notified the Department that it wished to dismiss its complaint against respondent contingent upon respondent paying to a third party the outstanding balance. By letter dated October 17, 1986, said third party notified the Department that respondent had paid in full the outstanding balance. Said third party, in its letter of October 17, 1986, authorized dismissal of the complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

D'ARRIGO BROS. CO. OF CALIFORNIA *v.* M. OFFUTT CO., INC. PACA Docket No. 2-7271. Decided December 3, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $15,138.20 in connection with two trucklots of lettuce and broccoli in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 7, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 7, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MOUNTAIN VALLEY, INC. *v.* INTERNATIONAL A. G., INC. PACA Docket No. 2-7320. Decided December 3, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation

against respondent in the amount of $5,895.00 in connection with two trucklots of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 1, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 1, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

YAKIMA FRUIT & COLD STORAGE CO. *v.* B & B WHOLESALERS, INC. a/t/a PATT WHOLESALE PRODUCE. PACA Docket No. RD-86-502. Decided November 3, 1986.

Respondent was ordered to pay complainant, as reparation, $7,406.00, with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid.

PERO BROTHERS FARMS, INC. *v.* DELEGAL CORPORATION. PACA Docket No. RD-86-503. Decided November 3, 1986.

Respondent was ordered to pay complainant, as reparation, $135,309.50, with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid.

MERIT PACKING COMPANY *v.* TOC PRODUCE DISTRIBUTORS CORPORATION. PACA Docket No. RD-86-504. Decided November 3, 1986.

Respondent was ordered to pay complainant, as reparation, $565.00, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

C.A. ABATTI d/b/a ALEX ABATTI BROKERAGE a/t/a A & M PRODUCE CO. *v.* NORTHEAST PRODUCE DEALERS, INC. PACA Docket No. RD-86-505. Decided November 3, 1986.

Respondent was ordered to pay complainant, as reparation, $1,260.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

BERENDA FRUIT COMPANY *v.* JOE PINTO & SON, INC. PACA Docket No. RD-86-506. Decided November 3, 1986.

Respondent was ordered to pay complainant, as reparation, $3,701.56, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

W.B. STEINBRECHER & SONS *v.* SANTA FE PRODUCTS, INC. PACA Docket No. RD-86-507. Decided November 4, 1986.

Respondent was ordered to pay complainant, as reparation, $4,000.00, with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

GRIFFIN & BRAND OF MCALLEN, INC. a/t/a INTERNATIONAL FROZEN FOODS *v.* A-ONE SALES. PACA Docket No. RD-86-508. Decided November 4, 1986.

Respondent was ordered to pay complainant, as reparation, $23,570.58, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

11-R SALES CORP. *v.* CHINOOK MARKETING CO., INC. PACA Docket No. RD-86-509. Decided November 4, 1986.

Respondent was ordered to pay complainant, as reparation $2,200.00, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

FRUDDEN PRODUCE, INC. *v.* TOC PRODUCE DIST. CORP. PACA Docket No. RD-86-510. Decided November 4, 1986.

Respondent was ordered to pay complainant, as reparation, $1,236.00, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

FAR SOUTH, INC. a/t/a QUALITY PRODUCE CO. *v.* HE BO FARMS and/or JACK BOWEN. PACA Docket No. RD-86-422. Decided November 13, 1986.

Respondent was ordered to pay complainant, as reparation, $41,000.00, with interest thereon at the rate of 13 percent per annum from September 1, 1984, until paid.

VEG-A-MIX *v.* JOSEPH PINTO d/b/a JOE PINTO & SON and/or RALPH M. JARSON d/b/a RALPH JARSON. PACA Docket No. RD-86-497. Decided November 17, 1986.

Respondent was ordered to pay complainant, as reparation, $13,428.24, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

WOODY'S TOMATO CORP. *v.* TERRIFIC TOMATO COMPANY. PACA Docket No. RD-87-2. Decided November 17, 1986.

Respondent was ordered to pay complainant, as reparation, $13,440.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

SILVER CREEK PACKING CO., INC. *v.* JOE PINTO & SON. PACA Docket No. RD-87-3. Decided November 17, 1986.

Respondent was ordered to pay complainant, as reparation, $9,518.24, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE *v.* LEGEIS PRODUCE CORP. PACA Docket No. RD-87-4. Decided November 17, 1986.

Respondent was ordered to pay complainant, as reparation, $6,006.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

SEAL PRODUCE, INC. *v.* ROBERT M. GISSER d/b/a ROBERT GISSER PRODUCE BROKERAGE & DISTRIBUTION. PACA Docket No. RD-87-5. Decided November 18, 1986.

Respondent was ordered to pay complainant, as reparation, $7,999.46, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

RED BALL POTATO COMPANY, INC. *v.* P & M PRODUCE, INC. PACA Docket No. RD-87-6. Decided November 18, 1986.

Respondent was ordered to pay complainant, as reparation, $6,652.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

PER-CLIN ORCHARDS, INC. *v.* B.G. MARKETING COMPANY. PACA Docket No. RD-87-7. Decided November 18, 1986.

Respondent was ordered to pay complainant, as reparation, $10,460.00, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE *v.* GARCIA PRODUCE. PACA Docket No. RD-87-8. Decided November 18, 1986.

Respondent was ordered to pay complainant, as reparation, $940.00, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

COOK DISTRIBUTING CO. *v.* RALPH M. JARSON d/b/a RALPH JARSON and/or JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-87-1. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, $14,163.81, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

THOMAS HEIMBUCH d/b/a HEIMBUCH FARMS *v.* DANA R. JOHNSON d/b/a U.S. FOOD MARKETING. PACA Docket No. RD-87-10. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, $1,100.00, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

CULIACAN PRODUCE CO., INC. *v.* JOE PINTO & SON, INC. PACA Docket No. RD-87-11. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, $30,109.86, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

GREINER BROS. *v.* EDUARDO FLORES d/b/a EDUARDO FLORES AND SONS. PACA Docket No. RD-87-12. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, $19,249.50, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

MONTEREY MUSHROOMS, INC. *v.* FRESHROOMS OF OHIO, INC. PACA Docket No. RD-87-13. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, $87,071.50, with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid.

WILLIAM H. CLAPP d/b/a TOP BILLING *v.* JOSEPH PINTO d/b/a JOE PINTO & SON and/or RALPH M. JARSON d/b/a RALPH JARSON. PACA Docket No. RD-87-14. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, $6,511.50, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

HAROLD TATEYAMA & SON, INC. *v.* ROBERT W. CASTO d/b/a PRIMA CITRUS AND FRUIT EXCHANGE. PACA Docket No. RD-87-15. Decided November 19, 1986.

Respondent was ordered to pay complainant, as reparation, $3,175.00, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

FANCEE FARMS, INC. *v.* WINSTON C. BAILEY d/b/a CLAUDE BAILEY PRODUCE CO. PACA Docket No. RD-87-16. Decided November 20, 1986.

Respondent was ordered to pay complainant, as reparation, $9,509.00, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

DAVE WALSH CO., INC. *v.* JOE PINTO & SON, INC. PACA Docket No. RD-87-18. Decided November 20, 1986.

Respondent was ordered to pay complainant, as reparation, $13,987.20, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

ADAMS FARMS *v.* HOUSTON PRODUCE DISTRIBUTING, INC. a/t/a HOUSTON FRUIT & VEGETABLE COMPANY. PACA Docket No. RD-87-19. Decided November 20, 1986.

Respondent was ordered to pay complainant, as reparation, $17,961.75, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

FRANK S. ECKEL, III and WILLIAM R. SHERER d/b/a SKIP'S CONSOLIDATION *v.* VIC MAHNS, INC. PACA Docket No. RD-87-21. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, $462.25, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

PURE GOLD, INC. *v.* ROBERT W. CASTO d/b/a PRIMA CITRUS & FRUIT EXCHANGE a/t/a PRIMA TRADING CO. PACA Docket No. RD-87-22. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, $21,697.00, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

SUNLAND PRODUCE CO. *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. RD-87-24. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, $1,211.50, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

M. OFFUTT CO., INC. *v.* GORE & FRANK, INC. PACA Docket No. RD-87-25. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, $657.62, with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

W.E. BITTINGER COMPANY, INC. *v.* EDWARD BOKER, INC. PACA Docket No. RD-87-26. Decided December 29, 1986.

Respondent was ordered to pay complainant, as reparation, $2,887.50, with interest thereon at the rate of 13 percent per annum from June 1, 1986, until paid.

BUSHMAN'S INC. *v.* VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-87-27. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, $3,323.75, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

ALAMO PACKING CO. *v.* JOE PINTO & SON, INC. PACA Docket No. RD-87-28. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, $29,324.30, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

PEMBERTON PRODUCE, INC. *v.* JOE PINTO & SON, INC. PACA Docket No. RD-87-29. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, $3,240.00, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

DEW-GRO, INC. a/t/a CENTRAL WEST PRODUCE *v.* JOE PINTO & SON, INC. PACA Docket No. RD-87-30. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, $3,647.66, with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid.

S. STAMOULES, INC. a/t/a STAMOULES PRODUCE CO. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON and/or RALPH M. JARSON d/b/a RALPH JARSON. PACA Docket No. RD-87-31. Decided December 30, 1986.

Respondent was ordered to pay complainant, as reparation, $12,195.00, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS

GOLD COAST PACKING, INC. *v.* MELON PRODUCE, INC. PACA Docket No. RD-86-395. Decided November 5, 1986.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on September 10, 1986, awarding reparation to

the complainant in the amount of $52,082.50. By motion received October 9, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of September 10, 1986, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this Order.

S & S PRODUCE *v.* VAN DE WALLE FARMS, INC. PACA Docket No. RD-86-480. Decided November 5, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent will have 10 days from the receipt of this order to file an answer, in triplicate.

Copies of this order shall be served upon the parties.

THOMAS KALLICHES, INC. *v.* JOSEPH GALIOTO & SONS, INC. PACA Docket No. RD-86-372. Decided November 12, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $320,398.38 in connection with

a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 15, 1986, complainant notified the Department that it requested dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TROPICAL PRODUCE COMPANY *v.* SAMONA BENEVIDEZ and VISTA MCALLEN, INC. d/b/a WORLDWIDE IMP-EX. PACA Docket No. RD-86-432. Decided November 12, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties. A copy of respondent's answer shall be served upon complainant along with this order.

QUAKER CITY PRODUCE COMPANY *v.* CHEMUNG FOOD, INC. PACA Docket No. RD-86-481. Decided November 12, 1986.

Decision by Donald A. Campbell, Judicial Officer

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation

against respondent in the amount of $1,174.00 in connection with a transaction involving the shipment of a perishable agricultural commodity in interstate commerce.

A copy of the formal complaint was served on respondent. Respondent did not file an answer to the complaint and was considered to be in default. However, before a default was issued in this proceeding, by letter dated September 17, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of September 17, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

HORACE T. HOLMES & SONS *v.* IMPERIAL BRANDS, INC. PACA Docket No. RD-86-364. Decided December 1, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $280,000.00 in connection with a transaction involving the shipment of peaches in interstate commerce.

A copy of the formal complaint was served on respondent which failed to file an answer thereto. However, before a decision could be issued, the Department was notified that respondent had filed a petition in bankruptcy. Accordingly, on August 14, 1986, this matter was stayed pending completion of respondent's bankruptcy. In a letter received by the Department on October 30, 1986, complainant requested dismissal of its complaint.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

BIANCHI & SONS PACKING CO. *v.* VIC MAHNS, INC. PACA Docket No. RD-87-17. Decided December 3, 1986.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendleson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties. A copy of respondent's answer shall be served upon complainant along with this order.

In re: LUZ G. PIESZKO. PQ Docket No. 82. Decided November 12, 1986.

Civil Penalty.

The Judicial Officer affirmed the default decision issued by Judge Palmer assessing a civil penalty of $250 because respondent violated the regulations governing the importing of meat products into the United States by importing cooked meat pies with pork from the Philippines, that were not accompanied by a certificate containing prescribed information. Respondent failed to file a timely answer, and, therefore, a default decision was properly issued. Although the ALJ did not refer to respondent's objections filed with respect to complainant's proposed decision and order, there is no requirement in the regulations that the ALJ answer such objections. Mitigating circumstances raised for the first time in respondent's appeal come too late to be considered, but, in any event, they would not reduce the sanction here. *In re Lopez*, 44 Agric. Dec. ___ (Oct. 7, 1985).

Jaru Ruley, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, 122), for a violation of the regulations governing the importing of meat products into the United States from foreign countries and localities (9 CFR § 94.1 *et seq*). An initial Decision and Order was issued on July 1, 1986, by Administrative Law Judge Victor W. Palmer (ALJ) assessing a civil penalty of $250.

On August 12, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on September 22, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with trivial changes. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of meat products from foreign countries and localities (9 CFR § 94.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR § 1.130 *et seq.* and 9 CFR § 93.10 *et seq.*

This proceeding was instituted by a Complaint filed on April 4, 1985, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about December 13, 1984, the respondent imported cooked meat pies with pork into the United States in violation of sections 94.9(b)(3) and 94.12(b)(3) of the regulations (9 CFR §§ 94.9(b)(3) and 94.12(b)(3)), because the cooked meat pies with pork were not accompanied by a certificate containing prescribed information.

On April 9, 1985, the complaint was sent to Ms. Pieszko by certified mail. The complaint was returned to the Hearing Clerk's office on or about April 30, 1985, marked unclaimed. Pursuant to section 1.147(b) of the Rules of Practice (7 CFR § 1.147(b)), the complaint was then posted by regular mail by the Hearing Clerk's office. The respondent has not filed an Answer to the Complaint. This failure to file an Answer is deemed, for purposes of this proceeding, to be an admission of the allegations contained in the Complaint and, consequently, a waiver of hearing. (See 7 CFR §§ 1.136(c) and 1.139).

Accordingly, the material facts alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Luz G. Pieszko, is an individual whose address is 95 Summit Avenue, Jersey City, New Jersey 07304.

2. On or about December 13, 1984, the respondent imported cooked meat pies with pork into the United States at Seattle, Washington, from the Philippines, in violation of sections 94.9(b)(3) and 94.12(b)(3) of the regulations (9 CFR §§ 94.9(b)(3) and 94.12(b)(3)), because the cooked meat pies with pork were not accompanied by a certificate containing prescribed information.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 94.9(b)(3) and 94.12(b)(3) of the regulations (9 CFR §§ 94.9(b)(3) and 94.12(b)(3)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer [2] or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)–(c), .139, .141(a)):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or
>
> (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless

[2] Respondent filed an untitled document, referred to by respondent as an "objection," which was dated "May 11, 1985." If this date were accurate, respondent would have technically met the deadline for filing an answer as required by 7 CFR § 1.136(a). However, it is clear from the record that that date was an oversight by respondent. It was probably sent May 11, *1986*, because it was received by the Hearing Clerk on May 19, 1986, and purported to state objections to Complainant's Proposed Decision and Order of April 23, 1986. Moreover, respondent's August 4, 1986, letter requesting review by the Judicial Officer refers specifically to the letter in question as being "forwarded [by respondent] on May 11, 1986. . . ." In any event, even if it were to be construed as a timely "answer," it still would not change the result as it does not deny the allegations in the complaint, as required.

the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra,* and advised respondent that complainant was seeking a $250 civil penalty. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, and that failure to file a timely answer or deny or otherwise respond to any allegation shall constitute an admission of such allegation, as follows (Complaint at 1-2):

WHEREFORE, it is hereby ordered that for the purpose of determining whether or not the respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The

> respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the applicable Rules of Practice (7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer or plead specifically to any allegation of the complaint. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent failed to answer the complaint. Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did

not object,[3] respondent has shown no basis for setting aside the default decision here.[4]

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[3] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[4] *See In re Henson*, 45 Agric. Dec. ___ (Nov. 4, 1986) (default order proper where answer admits or does not deny material allegations); *In re Guffy*, 45 Agric. Dec. ___ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. ___ (Sept. 9, 1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. ___ (Sept. 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ___ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ___ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec. ___ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ___ (Sept. 23, 1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ___ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' con-

Continued

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [5] If respondent were permitted to contest some of the allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

The Department's rules govern respondent's contention in his August 4, 1986, letter, that his late-filed May 11, 1986, "objections" letter constituted an "answer." The analysis, *supra,* demonstrates that it is not an "answer" within the rules.

There remains the procedural point raised by respondent that the ALJ did not acknowledge his May 11, 1986, letter in the July 1, 1986, Decision and Order. Although the record shows that the Hearing Clerk telephoned respondent to assure respondent that the ALJ had considered the May 11, 1986, letter, no such acknowledgement, verbal or written, is required by the rules. "If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing" (7 CFR § 1.139).

The remainder of the August 4, 1986, appeal to the Judicial Officer raises four objections: that respondent could not pay the original fine because she had no money; that respondent speaks imperfect English and did not understand the charges; that the pork pie actually had had the pork removed; and that the violation was not intentional. These are alleged mitigating circumstances, which are not appropriate to present at this level of review in a default proceeding. See *In re Midas Navigation, Ltd.,* 45 Agric. Dec. ____ (July 9, 1986). However, even if it were appropriate to consider them,

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tentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[5] *Cella* v. *United States,* 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied,* 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States,* 308 F.2d 849, 851-52 (7th Cir. 1962).

they would not alter the outcome here, because this case is governed by the principles set forth in *In re Lopez,* 44 Agric. Dec. ____ (Oct. 7, 1985), a copy of which is attached as an appendix.

There are some differences between the facts here and the facts in *Lopez;* however, the differences are not material. As explained in *Lopez,* in order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws. If that policy were not followed, loopholes would be created that could prove disastrous to American agriculture.

For the foregoing reasons, the following order should be issued.

ORDER

The respondent, Luz G. Pieszko, is hereby assessed a civil penalty of $250 which shall be paid within 30 days after service of this order. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, U.S. Department of Agriculture, Room 2422, South Building, Washington, D.C. 20250-1400.

APPENDIX

In re Lopez, 44 Agric. Dec. ____ (Oct. 7, 1985).
[Omitted.—Ed.]

In re: KATHY FAUSNAUGHT. P.Q. Docket No. 149. Decided October 3, 1986.

Importation of mangoes without a limited permit or certificate—Civil penalty—Default.

Joseph P. Pembroke, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*) and the Federal Plant Pest Act (7 U.S.C.

150aa *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 150 and 159 of the Act (7 U.S.C. § 150 and § 159) and section 318.13-4 of the regulations promulgated thereunder (7 CFR §§ 318.13-4)

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on June 4, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since Respondent was served with the amended complaint. Respondent has not filed an answer to the amended complaint. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice to this proceeding (7 CFR §§ 1.136 and 1.139).

FINDINGS OF FACT

1. Kathy Fausnaught, is an individual whose mailing address is 2704 13th Avenue, Oakland, California 94606.

2. On or about June 19, 1985, Kathy Fausnaught imported (15) fifteen mangoes from Hawaii to Oakland California, in violation of section 318.13-4 of the regulations (7 CFR 318.13-4), because the mangoes were not imported under a limited permit or certificate, as required.

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

CONCLUSION

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent is hereby assessed a civil penalty of two hundred and fifty dollars which shall be payable to the "Treasurer of the United States", by certified check or money order, and shall be forwarded

to Joseph P. Pembroke, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final November 20, 1986.—Ed.]

In re: AMERICAN AIRLINES, INC. PQ Docket No. 234. Decided December 1, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision in which they were assessed a civil penalty of $450.

Kevin Thiemann, for complainant.
Andrew Cuomo, Ft. Worth, Texas, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that American Airlines, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR §§ 319.74 *et seq* and 330.100 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material

issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. American Airlines, Inc., respondent, is a corporation doing business at P.O. Box 619616, Dallas/Fort Worth Airport, Texas 75261-9616.

2. On or about December 10, 1985, the respondent released a shipment of cut flowers that had been imported into the United States from Mexico at the Dallas/Fort Worth Airport, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred fifty dollars ($450.00) which shall be payable to the "Treasurer of the United States", by certified check or money order and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403" within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 234.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: AMERICAN AIRLINES, INC. PQ Docket No. 232. Decided December 3, 1986.

Civil Penalty—Consent.

Respondent consented to the issuance of this decision in which they were assessed a civil penalty of $1,875.

Jaru Ruley, for complainant.
Andrew Cuomo, Ft. Worth, Texas, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). The parties have agreed that:

(1) this Consent Decision does not constitute an admission of liability by respondent;

(2) respondent seeks to enter into this Consent Decision to avoid the expense and uncertainty of further litigation, and

(3) this proceeding should be terminated by entry of the Consent Decision set forth below.

The parties have agreed to the following stipulations:

1. Counts II and III of the complaint are dismissed;

2. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b)Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

3. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. American Airlines, Inc., herein referred to as the respondent, is a corporation whose business mailing address is P.O. Box 619616, MD4C27, Dallas/Fort Worth Airport, Texas 75261-9616.

2. On or about the dates of April 6 and 9, 1985, and August 9, 1985, at Honolulu International Airport, the respondent checked a

number of bags to the continental United States on respondent's flights numbers 2 and 8.

3. On or about January 8, 1986, at Kahului Airport, Kahului, Maui, Hawaii, respondent checked a bag to the continental United States on respondent's flight number 64.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent shall pay one thousand eight hundred seventy-five dollars ($1,875.00) in full settlement of all outstanding claims in the above-referenced proceeding. The respondent shall send a certified check or money order for $1,875.00, payable to the "Treasurer of the United States," to the U.S. Department of Agriculture, APHIS, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: MARIE FERRIER. P.Q. Docket No. 177. Decided August 8, 1986.

Importation of mangoes without the required permit—Civil penalty—Default.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 CFR §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on February 6, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about June 22, 1985, the respondent

imported mangoes into the United States at Jamaica, New York, from Haiti, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the mangoes were not imported under permit as required by section 319.56–2(e) of the regulations (7 CFR § 319.56–2(e)).

On February 20, 1986, the respondent signed a return receipt indicating that she had received the Complaint. Although the respondent's Answer was required to be filed in the Office of the Hearing Clerk by March 12, 1986, as of March 31, 1986, no such Answer has been filed. This failure to file an Answer is deemed, for purposes of this proceeding, to be an admission of the allegations contained in the Complaint and, consequently, a waiver of hearing. (See 7 CFR §§ 1.136(c) and 1.139).

Accordingly, the material facts alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACTS

1. Respondent, Marie Ferrier, is an individual whose address is 26 Seabring Street, Spring Valley, New York 10977.

2. On or about June 22, 1985, the respondent imported mangoes into the United States at Jamaica, New York, from Haiti, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the mangoes were not imported under permit, as required by section 319.56–2(e) of the regulations (7 CFR § 319.56–2(e)).

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 319.56(c) of the regulations (7 CFR § 319.56(c)).

Therefore, the following Order is issued.

ORDER

The respondent, Marie Ferrier, is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to

the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 CFR § 1.145).

[This decision and order became final December 12, 1986.—Ed.]

In re: MOR BODANSKY. P.Q. Docket No. 230. Decided October 23, 1986.

Importation of an apple without the required permit—Civil penalty—Default.

Clement J. McGovern, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

DECISON AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act, as amended, (7 U.S.C. § 151 *et seq.*) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 151 of the Act (7 U.S.C. § 151) and section 319.56-2(e) of the regulations promulgated thereunder (7 CFR § 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on April 28, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, the respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and constitute a waiver of hearing. More than twenty (20) days have elapsed since the respondent was served with the complaint in question. The respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Mor Bodansky is an individual whose address is 172 Heyward Street, Brooklyn, New York 11206.

2. On or about December 9, 1985, at John F. Kennedy International Airport, the respondent imported one apple from Israel into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit.

CONCLUSION

By reason of the facts in the findings of fact set forth above, the respondent violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

The respondent is hereby assessed a civil penalty of two hundred fifty dollars.[1] The civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final December 12, 1986.—Ed.]

In re: ROBERTO CABILI. PQ Docket No. 280. Decided December 23, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of $250.

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[1] This civil penalty is in conformance with the guides for civil penalties set forth in *In re Lopez*, 44 A.D. ___ (October 7, 1985); see also *In re Andrea Leo*, 45 A.D. ___ (January 27, 1986). Counsel for complainant had requested a civil penalty in the amount of $750.00.

Clement McGovern, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111), the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Acts and regulations promulgated thereunder (9 CFR § 93.1 *et seq.*, 7 CFR § 380.1 *et seq.*, and 7 CFR § 1.130 *et seq.*).

The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Robert Cabili, herein referred to as the respondent, is an individual whose address is Roberto Cabili, c/o Aerolineas Airlines, Miami International Airport, P.O. Box 59-2477—AMF, Miami, Florida 33159-2477.

2. On or about May 16, 1986, the respondent was in possession of certain foreign origin garbage that was removed from Argintineas Airlines flight AR-332, that arrived from Brazil at Miami International Airport.

CONCLUSION

Respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is hereby assessed a civil penalty of two hundred and fifty dollars ($250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403.

This Decision and Order shall become effective on the day upon which service of this order is made upon respondent.

In re: DELTA AIRLINES. PQ Docket No. 279. Decided December 24, 1986.

Civil Penalty—Consent.
Respondent consented to the issuance of this decision and order in which they were assessed a civil penalty of $750.

Clement McGovern, for complainant.
Jason R. Archambeau, Atlanta, Georgia, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151 *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.1 *et seq.*).

The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Delta Airlines, herein referred to as the respondent, is a corporation doing business at Honolulu International Airport, Honolulu, Hawaii, with a mailing address of Delta Airlines, Office of the General Counsel, Honolulu International Airport, Honolulu, Hawaii 96819.

2. On or about May 28, 1986, the respondent was in possession of three pieces of luggage, with bag tag numbers 38–59–04, 38–59–06, 38–59–07, which were destined for Mobile, Alabama via Delta flight 24 and flight 1009, at Honolulu International Airport, Honolulu, Hawaii.

CONCLUSIONS

Respondent having admitted the jurisidictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

Respondent is assessed a civil penalty of seven hundred fifty dollars ($750.00) which shall be made payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403. The payment shall be due within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: KAREN HOM. P.Q. Docket No. 48. Decided November 13, 1986.

Failure to present luggage for inspection at an airport—Civil penalty. Respondent failed to present luggage which was in her possession at Honolulu International Airport, for inspection as required by regulations. Respondent was assessed a civil penalty of $150.

Jaru Ruley, for complainant.
Kendall Wong, Honolulu, Hawaii, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding pursuant to the Plant Quarantine Act, as amended (7 U.S.C. § 151 *et seq.*), and the regulations promulgated thereunder. The complaint, filed on January 28, 1985, alleged that the respondent failed to present luggage for inspection by APHIS officials as required by controlling regulation (7 CFR § 318.13-12). An answer was filed by Ms. Hom on February 27, 1985, in which she advised that she would be represented by Mr. Kendall Wong, Esq., Honolulu, Hawaii. Complainant thereafter moved that this matter be set down for hearing in Honolulu, Hawaii, together with other cases pursuant to the Plant Quarantine Act.

I conducted an oral hearing in this matter on November 3, 1986, at which complainant was represented by Jaru Ruley, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250-1400. Respondent was represented by Kendall Wong, Esq., 1023 Kawaihao Street, Honolulu, Hawaii 96814.

Upon consideration of the evidence of record and the arguments by the parties, an Order is being entered this day assessing respondent a civil penalty of $150.00 for her failure to comply with the Act and the regulations thereunder.

FINDINGS

1. Karen Hom, herein referred to as the respondent, is an individual whose address is 4026 Pakahi Place, Honolulu, Hawaii 96816.

2. On or about October 4, 1984, the respondent violated sections 318.13-12(a) and 318.13-10 of the regulations (7 CFR §§ 318.13-12(a) and 318.13-10)) in that respondent failed to present three pieces of baggage which were in her possession at Honolulu International Airport and which were subject to inspection, for said inspection.

CONCLUSION

By reason of the facts set forth in Finding No. 2, *supra*, the respondent has violated the Act and the regulations pursuant thereunder. Accordingly, the following order is being entered.

ORDER

The respondent is hereby assessed a civil penalty of one hundred fifty dollars ($150.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order in that amount, to Jaru Ruley, Esq., Office of the General Counsel, Room 2416A South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this Order.

The Order shall become effective on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final December 26, 1986.—Ed.]

In re: CULVER DUCK CORPORATION. PPIA Docket No. 16. Decided December 2, 1986.

Product Labeling.
Respondent consented to the issuance of this decision and order in which they were ordered to modify their labels as indicated in the exhibits.

Andrea Bateman, for complainant.
J.A. Whitmer, Elkhart, Indiana, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This is a proceeding under the Poultry Products Inspection Act, as amended (21 U.S.C. § 451 *et seq.*), hereinafter referred to as the PPIA, and the Applicable Rules of Practice (9 CFR § 381.233 *et seq.*) to withdraw a label or modify a label with the phrase "5 Generations of Long Island Breeding and Growing Experience" on the basis that the label was misleading. This proceeding was commenced by a notification of the Administrator's determination, answer and request for a hearing, by respondent, which constituted the complaint. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision as set forth below and, have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision, respondent admits all of the jurisdictional allegations of the complaint, admits the Findings of Fact, and waives:

a. Any further procedural steps;

b. Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or basis thereof; and

c. All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. This stipulation and Consent Decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by respondent in connection with this proceeding.

FINDINGS OF FACT

1. Culver Corporation is an official poultry processing establishment, which processes poultry products including the product in

this subject case, which are subject to label approval under section 8 of the Poultry Products Inspection Act (21 U.S.C. § 457).

2. Approval of the poultry product label of Culver Corporation with the phrase "5 Generations of Long Island Breeding and Growing Experience" was withdrawn and denied.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Order and Consent Decision in disposition of this proceeding, such decision will be issued.

ORDER

1. The label, a copy of which is attached as Exhibit A, will be modified as follows:

a. The phrase "5 Generations of Long Island Breeding and Growing Experience" will be removed. The phrase "Five Generations of Breeding and Growing Experience" will be placed at the top of the label.

b. The island will be removed from the pictorial.

c. The phrase "One of the original developers of the duck breeding and growing practices used on Long Island" will be placed below the pictorial.

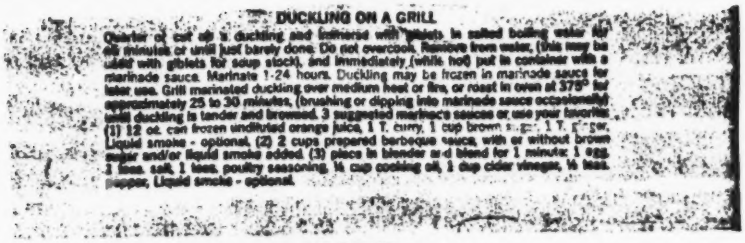
A copy of the label with the modifications indicated in draft is attached as Exhibit B.

2. The Department, through the Administrator, will agree to allow the exact language set forth above and on Exhibit B or similar language by the respondent.

3. If in the future respondent wants to use a label with any address other than the Long Island address, respondent may use the phrase "5 Generations of Long Island Breeding and Growing Experience."

4. The above agreement will be applicable to future labels submitted for approval by any member of the Herbert R. Culver family or related business entities.

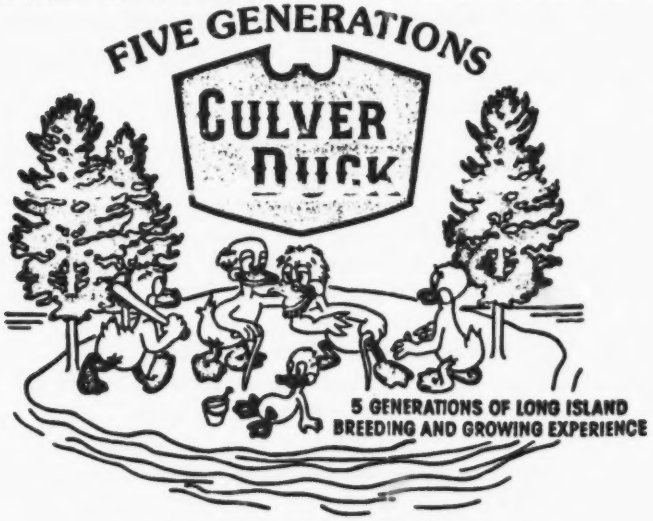
5. This order shall become effective on the day upon which service of this Order is made upon the respondent.



DUCKLING ON A GRILL

Quarter or cut up a duckling and immerse with giblets in salted boiling water for 45 minutes or until just barely done. Do not overcook. Remove from water, (this may be used with giblets for soup stock), and immediately (while hot) put in container with a marinade sauce. Marinate 1-24 hours. Duckling may be frozen in marinade sauce for later use. Grill marinated duckling over medium heat or fire, or roast in oven at 375° for approximately 25 to 30 minutes, (brushing or dipping into marinade sauce occasionally) until duckling is tender and browned. 3 suggested marinade sauces or use your favorite.
(1) 12 oz. can frozen undiluted orange juice, 1 T. curry, 1 cup brown sugar, 1 T. soy, Liquid smoke - optional. (2) 2 cups prepared barbeque sauce, with or without brown sugar and/or liquid smoke added. (3) place in blender and blend for 1 minute: 1 egg, 1 tbsp. salt, 1 tbsp. poultry seasoning, ¼ cup cooking oil, 1 cup cider vinegar, ½ tsp. pepper, Liquid smoke - optional.

Exhibit A



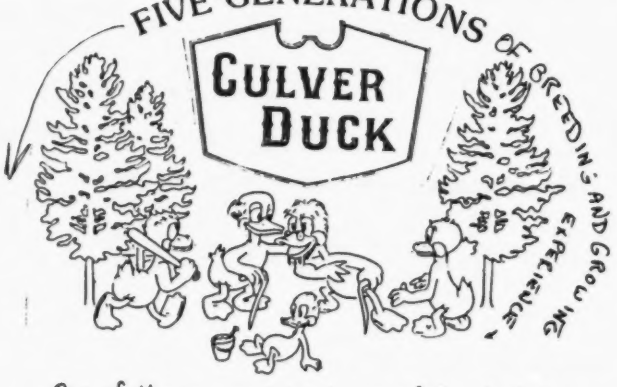
GRILLED DUCKLING

Thaw duckling in hot water, then quarter with sharp knife or poultry scissors. Place duckling in large kettle of water seasoned with: ginger, curry and salt. Simmer duckling in boiling water until just barely tender. Remove all fat by rinsing under running water. Marinate several hours or overnight in 12 oz. undiluted orange concentrate and 1 tbs. of ginger, while refrigerated. Place duckling on grill over medium low heat for 15 minutes, each side, basting frequently with remaining marinate.

PREPARATION OF COVERED BARBECUE EQUIPMENT

Arrange approximately 60 charcoal briquets in a circular pile; ignite throughly. Use an aluminum pan 12" x 18" x 2" deep and place in cooker. Surround aluminum pan with briquets. Place the duckling breast side up on top of the grill and directly above the aluminum pan so the drippings will fall into the pan. Cover and cook with all drafts open for 2 hours, basting with heated marmalade after each hour. Allow duckling to crispen for 30 minutes. Makes enough for 2 to 4 servings.

Exhibit B



One of the original developers of the duck breeding and growing practices used on Long Island

young duckling

NET WEIGHT
LBS OZS
KEEP FROZEN

INSPECTED U.S. DEPARTMENT OF AGRICULTURE PLANT NO. ON BAG CLIP

DISTRIBUTED BY CULVER CORPORATION, WESTHAMPTON BEACH, LONG ISLAND, N.Y. 11978

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